



The
University
Of
Sheffield.

**Challenges in implementing the 1958 New York Convention: A case study
of the Arab Gulf States**

By Reyadh Mohamed Seyadi

**A thesis submitted in partial fulfilment of the requirements of the
University of Sheffield for the degree of Doctor of Philosophy**

University of Sheffield

School of Law

December 2015

I. Abstract

This thesis concerns the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (henceforth, NYC).¹ It addresses some contemporary problems associated with the implementation of the NYC and considers the Arab Gulf states (henceforth, GCC states)² as a case study to illustrate these problems. The thesis first examines how different judicial interpretations of the NYC provisions may weaken the efficiency of the well-established legal framework that regulates the recognition and enforcement of foreign arbitral awards as established by the NYC, and developed by the practice of many jurisdictions during the last fifty years. Following this, it examines whether the laws and court decisions on the NYC in the GCC states are compatible with the best standards of international practice in this field.

A further aim of the thesis is to identify the major difficulties hindering the successful implementation of the NYC in GCC states. Achieving this ambitious aim required the use of methodical analytical and comparative approaches. First, arbitration laws were examined to ascertain how the provisions of the NYC have been incorporated into the domestic legal systems of GCC states. Second, rigorous case law analysis was conducted to examine the attitudes of the GCC national courts, accompanied by a comparative analysis of the standards of international practice and literature review on the NYC. Finally, interviews were conducted with judges and arbitration practitioners from GCC states to provide a clear understanding of their perceptions on the implementation of the NYC in GCC states.

The thesis contributes to knowledge on international commercial arbitration from two perspectives. The NYC is designed to interact with different national laws, that is, it leaves the doors open for 'local standards' to apply, up to a certain extent. However, national courts shall not expand into local standards to the extent that they supersede the international standards established by the Convention. The thesis shows that the extensive application of the local standards in the GCC states sometimes leads to legal disharmony in the implementation of the NYC, which might be detrimental to the development of international

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959), United Nations Treaty Series 330, Registration No. 4739, commonly known as the 'New York Convention'.

² These states are as follows: Kingdom of Bahrain, Oman, Kuwait, the United Arab Emirates, the Kingdom of Saudi Arabia, and the State of Qatar. For further information, see the official website of the Gulf Cooperation Council <<http://www.gcc-sg.org/eng/>> accessed May 2015.

commercial arbitration. In addition, the thesis makes three specific contributions concerning the implementation of the NYC in the GCC states. First, the thesis shows that there is an urgent need for the states of Qatar and the United Arab Emirates to issue new arbitration laws that take into account the state adoption of the NYC and essential principles of arbitration as a mechanism for dispute resolution. In the Kingdom of Saudi Arabia (henceforth, KSA), the implementation of the NYC is subject to Sharia law (Islamic legal tradition), and the interaction of the NYC and Sharia law generates a certain degree of uncertainty concerning the recognition and enforcement of foreign arbitral awards. Second, the prominent use of the public policy defence, including the undefined role of Sharia public policy in the GCC legal systems (except in the KSA), is one of the major barriers affecting the successful implementation of the NYC in GCC states. Third, any sort of proposal to enhance the system of recognition and enforcement of foreign arbitral awards in GCC states must take into account the poor level of familiarity of the GCC judiciaries with arbitration generally, and the NYC in particular.

II. Acknowledgements and Dedication

First and foremost, my deepest thanks and gratitude goes to the most gracious and the kindest God (*Allah*) for providing me with the opportunity, ability, knowledge and perseverance to complete this thesis. Without His will and generosity, none of this or any other accomplishment would have been possible.

It would have been impossible to complete this thesis without the help and support of many individuals and institutions. I wish to express and acknowledge my deep gratitude to them. My sincerest gratitude to the University of Bahrain for granting me a scholarship to do an LLM and PhD in the United Kingdom. Deepest thanks and gratitude goes also to the University of Sheffield for providing me with an opportunity to gain knowledge on law and research skills during this PhD journey. Special thanks goes to my supervisors Dr. Veronica Ruiz Abou-Nigm and Dr. Richard Kirkham for their continuing encouragement, constructive comments, patience and generous guidance during the conduct of this thesis. Furthermore, I extend special thanks to the staff of the Department of Law at the University of Sheffield for their assistance at various stages of this thesis. My sincere gratitude also goes out to the judges, lawyers, arbitration institutions and arbitration practitioners from the Gulf states, who agreed to be interviewed for the purpose of this thesis.

To my beloved parents, my son Mohammed and the rest of the family: your endless love and support were always a source of inspiration, encouragement, motivation and comfort; for this, I dedicate this thesis to all of you.

III. Table of Contents

I. Abstract	3
II. Acknowledgements and Dedication.....	5
III. Table of Contents.....	7
IV. Abbreviations	15

Chapter One: Introduction

1.1 Background	19
1.2 The NYC and the Arab Gulf states	21
1.3 Thesis problems	24
1.3.1 The problems that hinder the implementation of the NYC in the GCC states....	26
1.4 Objectives of the thesis	29
1.5 Originality and significance of this thesis.....	30
1.5.1 Expected contributions to the case study of the GCC states.....	32
1.6 Research methodology.....	33
1.6.1 The relevance of the empirical research conducted	34
1.7 Thesis structure.....	35

Chapter Two: Legal Framework of International Commercial Arbitration and the 1958 New York Convention

2.1 Introduction.....	39
2.2 State parties' obligation to recognise the arbitration agreement under the NYC	40
2.2.1 Formal validity of the arbitration agreement under the NYC	44
· Signature requirement.....	45
· E-contracts	46
2.2.2 The principles of separability and Kompetenz-kompetenz.....	49
2.3 Party autonomy and choice of laws and rules.....	55
2.3.1 The law governing the arbitration: the 'seat theory'	56
2.3.2 The law that governs the arbitration agreement.....	59

2.3.3	The law that governs the arbitration proceedings	60
2.3.4	The law that governs the merits of the dispute	61
2.3.5	Party autonomy and mandatory rules of law.....	63
2.3.6	The law governing the recognition and enforcement of the arbitral award	65
2.4	State parties' obligation to recognise and enforce the arbitral award	67
2.4.1	The grounds to set aside the award or refuse its enforcement under the NYC...	69
2.4.2	Key features of the grounds for refusal.....	70
2.4.3	Pro-enforcement bias	72
2.5	Summary	73

Chapter Three: The Problem of Different Judicial Interpretations of the NYC

Provisions

3.1	Introduction.....	75
3.2	The importance of harmonised judicial interpretations of the NYC provisions .	76
3.3	Different positions in relation to the enforcement of arbitral awards annulled in the country of origin.....	77
3.3.1	The theoretical debate	78
3.3.2	The discretionary power under the verb <i>may</i> in Article V of the NYC	81
3.3.3	Different use of the discretionary powers of national courts in the enforcement context....	83
	· The refusal of enforcement in the presence of one of the grounds for refusal	85
	· The enforcement of an arbitral award despite the presence of one of the grounds for refusal	87
	· The refusal of enforcement if the ground for refusal affects the outcome of the arbitral award.....	88
3.3.4	The influence of the pro-enforcement bias	90
3.3.5	Ambiguity in some of the provisions of the NYC	93
3.4	Proposal for reform	98
3.4.1	Make section (e) of Article V of the NYC mandatory by amending the ML	99
3.4.2	The absence of an interpretation criterion within the text of the NYC.....	101
3.4.3	The incorporation of the interpretation criterion in arbitration laws.....	103
3.5	Summary	105

Chapter Four: The Historical Development of Arbitration in the GCC States and a General Review of the Implementation of the New York Convention in the GCC states

4.1 Introduction 109

4.2 The history of arbitration in the GCC states 110

4.3 Arbitration in Islamic law 112

 4.3.1 Arbitration in the holy Quran 113

 4.3.2 Arbitration in *Sunnah* 115

 4.3.3 Modern arbitration in the view of Sharia law 117

4.4 Early international arbitration cases in the GCC states 119

4.5 The recognition of arbitration in the GCC laws 121

 4.5.1 The influence of Sharia law on the GCC legal systems 122

4.6 The adoption of the NYC by the GCC states 124

 4.6.1 Kingdom of Bahrain 124

 4.6.2 Oman 125

 4.6.3 Kuwait 126

4.7 Summary 127

Chapter Five: The Implementation of the 1958 New York Convention in Qatar

5.1 Introduction 130

5.2 Inconsistencies deriving from the overlapping enactments on arbitration in Qatar 132

 5.2.1 The case of *ITIIC v. DynCorp* (2008) 134

 · The failure to implement the NYC 137

5.3 The validity of the arbitration agreement in Qatar 139

 5.3.1 Formal validity of the arbitration agreement 140

 5.3.2 Material validity of the arbitration agreement 141

 · The parties’ capacity to enter into the arbitration agreement 143

 · Uncertainty in relation to the applicable law governing the capacity question 144

5.4 The lack of clear recognition of the separability of the arbitration agreement. 146

5.5 The lack of recognition of the competence-competence principle 148

5.6 The importance of party autonomy in relation to the different governing laws in arbitration 150

 5.6.1 Conflict of laws rules and their relation to the arbitration practices in Qatar ... 151

5.6.2	Uncertainty in relation to the law governing the validity of the arbitration agreement	152
5.6.3	Law governing the merits of the dispute	155
5.6.4	Uncertainty in relation to the law governing the arbitration proceedings	158
·	A different angle in the case of DynCorp	159
·	The competent court to set aside the arbitral award under the NYC	161
5.7	Challenges against arbitral awards in Qatar’s legal system	162
5.7.1	Arbitral awards subject to appeal on questions of fact and points of law	163
5.7.2	Res judicata and pleas to reconsider the claim	165
·	Challenging the arbitral award in its merits should be abolished	166
5.7.3	Another grounds to set aside the arbitral award	169
·	The extensive approach to the public policy defence as a ground for refusal to the REFAA under the NYC- a common feature of the GCC jurisprudence	170
·	The strict adherence to formalities under the Qatari approach	171
5.7.4	Lack of differentiation between domestic and international arbitral awards	173
5.8	Summary and suggestions for law reform	175

Chapter Six: The Implementation of the 1958 New York Convention in the United Arab Emirates

6.1	Introduction	179
6.2	Inconsistencies deriving from the overlapping enactments on arbitration in UAE	180
6.2.1	The positive attitude of the UAE courts after the accession to the NYC	181
6.2.2	The case of Construction Company International v. Ministry of Irrigation of the Government of Sudan (2013)	185
·	The failure to implement the NYC	186
6.3	The validity of the arbitration agreement in UAE	188
6.3.1	Formal validity of the arbitration agreement	189
6.3.2	Material validity of the arbitration agreement	191
·	The parties’ capacity to enter into the arbitration agreement	192
·	Uncertainty in relation to the applicable law governing the capacity question	193
6.4	The lack of recognition of the principles of separability and competence-competence under UAE law	195
6.4.1	The judicial recognition of the principle of separability	196

6.5 The importance of party autonomy in relation to the different governing laws in arbitration	197
6.5.1 Uncertainty in relation to the law governing the validity of the arbitration agreement	197
6.5.2 Uncertainty in relation to the law governing the merits of the dispute	200
6.5.3 Law governing the arbitration proceedings.....	201
6.6 Challenges against arbitral awards in the UAE legal system	202
6.6.1 Broad interpretation of the lack of due process as a ground for refusal	204
· Lack of due process: Procedural irregularities	206
· The technical violation of due process and the pro-enforcement bias.....	207
6.6.2 The extensive approach to the public policy defence as a ground for refusal ..	211
· The lack of jurisdiction of the court of origin as a ground for refusal in Dubai...	211
· The purpose of Article III of the NYC	216
6.6.3 Recognition and enforcement of arbitral awards in UAE.....	218
6.7 Summary and suggestions for law reform.....	219

Chapter Seven: The Implementation of the 1958 New York Convention in the Kingdom of Saudi Arabia

7.1 Introduction.....	223
7.2 KSA arbitration law is subject to Sharia law.....	225
7.3 The validity of the arbitration agreement in KSA.....	226
7.3.1 Formal validity of the arbitration agreement	227
7.3.2 Material validity of the arbitration agreement	228
· The influence of Sharia contract law	228
· The capacity of natural persons in Sharia law	230
· The capacity of legal persons in Sharia law	231
· Law governing the capacity and validity of the arbitration agreement	233
7.3.3 Sharia prohibitions related to the material validity of the arbitration agreement.....	235
· Gharar	235
· Riba.....	241
7.4 The principle of separability of the arbitration agreement in KSA.....	243
7.5 The principle of competence- competence in KSA	244
7.6 Party autonomy and limitations imposed by Sharia law	245
7.6.1 Sharia law requirements as to the composition of the arbitral tribunal.....	246

7.6.2	Sharia law and the limitations its impose on the chosen procedural rules by the parties....	248
·	Treating parties in an equal manner.....	249
·	Opportunity to present a case	250
7.7	Recognition and enforcement of arbitral award in KSA.....	252
7.7.1	Definition of ‘arbitral award’ in Sharia law.....	253
7.7.2	Foreign arbitral awards under Sharia law vs. the NYC	255
·	Foreign arbitral awards governed by foreign arbitration laws.....	257
7.7.3	Grounds to set aside the arbitral awards governed by the KSA arbitration law.....	259
·	Another grounds to challenge the enforcement request.....	260
7.7.4	Sharia law as a ground for refusal in the KSA.....	261
·	Compensation for loss of future profit, loss of opportunity or damage to reputation	262
7.8	Summary and suggestions for law reform.....	264

Chapter Eight: The use of Public Policy as a Ground for Refusal in the GCC states

8.1	Introduction.....	269
8.2	The conceptual framework of public policy.....	271
8.3	The definition of public policy in the GCC states.....	274
8.3.1	The concept of Sharia public policy.....	277
8.3.2	The subsidiary role of Sharia law in the GCC legal systems.....	280
8.4	The violation of Sharia public policy in relation to the REFAA in the GCC states	281
8.4.1	Riba and the public policy defence in GCC laws	282
·	Riba is allowed in commercial activities	282
·	Examples of the issue of Riba in the context of REFAA in the GCC courts	284
8.5	The public policy defence in the view of the NYC	287
8.5.1	Distinction between national and international public policy.....	288
·	International public policy	289
·	Transnational public policy	291
8.6	Lack of due process and public policy defence in the GCC states	293
8.6.1	The case of UAE	294
8.6.2	The case of Qatar	296
8.7	Arbitrability and the public policy of the GCC states.....	299
8.7.1	Law applicable to the question of non-arbitrability	300
8.7.2	Non-arbitrability in domestic laws.....	301

· Arbitration is not permitted in matters where conciliation is not permissible.....	303
8.7.3 Disputes that are not arbitrable in the GCC states	305
8.7.4 The impact of Sharia public policy in limiting the scope of arbitrability	307
8.7.5 The distinction between domestic and international arbitrability	309
8.8 Summary	313

Chapter Nine: Understanding the Jurisprudence of the GCC Courts

9.1 Introduction.....	316
9.2 Understanding the operation of the NYC at the domestic level	317
9.2.1 The relationship between international law and domestic law	318
9.2.2 The potential gap in the interpretative approach in the court’s decisions on the REFFA ...	320
9.3 Summary of the interview results	322
9.4 The negative role of GCC judiciaries in the context of the interpretative approach	325
9.5 The principle of autonomous interpretation	327
9.5.1 The lack of autonomous interpretation in the GCC interpretative approach	331
9.6 The role of the comparative approach in the context of the NYC in the GCC states ...	335
9.6.1 The influence of the guidance materials on the NYC	336
9.6.2 Judges’ perspectives.....	338
9.6.3 The difficulty of knowing the exact impact of the comparative approach	339
9.7 Judicial internationalism.....	341
9.7.1 Practical difficulties in the GCC judiciaries.....	342
9.8 Summary	344

Chapter Ten: General Conclusion

10.1 Introduction.....	346
10.2 Problematic different judicial interpretations	347
10.2.1 The proposal for reform	350
10.3 Main findings and suggestions for reform in the case study of the GCC states	353
10.3.1 The urgent need for new arbitration laws in the states of Qatar and the UAE .	353
10.3.2 The difficulties deriving from Islamic legal tradition and Sharia public policy	355
· Relationship between Sharia law and arbitration practices in the GCC region....	356
10.3.3 The public policy bar should be interpreted narrowly and applied exceptionally .	358
10.3.4 Enhancing the efficiency of the GCC judiciaries in their application of the NYC	359

10.4 Scope for further research	361
<u>Bibliography</u>	364
<u>Appendices</u>	394

IV. Abbreviations

ADRLJ	Arbitration and Dispute Resolution Law Journal
All ER	All England Law Reports
ALQ	Arab Law Quarterly
AJCL	American Journal of Comparative Law
APLR	Asia Pacific Law Review
ARIA	American Review of International Arbitration
AIAJ	Asian International Arbitration Journal
BCDR	Bahrain Chamber for Dispute Resolution
CCP	Code of Civil Procedures
CJTL	Columbia Journal of Transnational Law
CJEL	Columbia Journal of European Law
CLOUT	Case Law on UNCITRAL Texts
CUP	Cambridge University Press
DAC	Departmental Advisory Committee
FILJ	Foreign Investment Law Journal
EWHC	England and Wales High Court
F. Supp	Federal Supplement
GCC	Gulf Cooperation Council
GCCAC	Gulf Cooperation Council Arbitration Center
GAR	Global Arbitration Review
HL	House of Lords
IALR	International Arbitration Law Review

IBLJ	International Business Law Journal
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICLQ	International and Comparative Law Quarterly
ICSID	International Center for the Settlement of Investment Disputes
IJAA	International Journal of Arab Arbitration
ILR	International Law Review
ILA	International Law Association
JCL	Journal of Comparative Law
JIA	Journal of International Arbitration
JIS	Journal of Islamic Studies
JDR	Journal of Dispute Resolution
JIDS	Journal of International Dispute Settlement
KSA	Kingdom of Saudi Arabia
KLI	Kluwer Law International
Lloyd's Rep	Lloyd's Law Report
MJIL	Melbourne Journal of International Law
ML	Model Law on International Commercial Arbitration
MLR	Modern Law Review
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OUP	Oxford University Press
OJLS	Oxford Journal of Legal Studies
QB	Queen's Bench
REFAA	Recognition and Enforcement of Foreign Arbitral Awards

SLR	Stanford Law Review
TILJ	Texas International Law Journal
UAE	United Arab Emirates
UKSC	United Kingdom Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
ULR	Uniform Law Review
UNTS	United Nations Treaties Series
VCLT	Vienna Convention on the Law of Treaties
VLR	Virginia Law Review
WLR	Weekly Law Reports
WTO	World Trade Organization
YJIL	Yale Journal of International Law
YBCA	Yearbook Commercial Arbitration

Chapter One: Introduction

1.1 Background

One of the important key features of arbitration that inspired the topic of this thesis is the finality and easy enforceability of arbitral tribunal decisions on the substance of the dispute (arbitral award) throughout the world.¹ International commercial arbitration would be diminished in value if arbitral awards had no effective enforcement mechanism. Accordingly, many countries have endorsed a number of regional and international treaties that regulate the recognition and enforcement of arbitral awards. The most important and widely accepted multilateral treaty is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which is often referred to as the New York Convention of 1958 (NYC).² The Convention was adopted specifically to address the needs of the international business community and this Convention is the subject of examination in this thesis.

The increase in use of arbitration as a form of dispute resolution in international commercial disputes may be attributed to the considerable work of the United Nations Commission on International Trade Law (UNCITRAL).³ The NYC was adopted in 1958 by the United Nations to regulate the recognition and enforcement of foreign arbitral awards (REFAA). Today some 156 nations (up to the time of writing) have ratified the Convention, including most major trading nations and many developing countries from all regions of the world.⁴ The NYC has been broadly considered as the most successful convention in international

¹ Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP, Oxford 2007) at 39, Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn OUP, Oxford 2009) at 28, Gary Born, *International Commercial Arbitration: Cases and Materials* (Aspen Publishers, New York 2011) at 13, David Holloway and others, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell, London 2012) at 587, Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (1st edn, OUP, Oxford 2007) at 623.

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) UNTS 330, Registration No. 4739.

³ A number of surveys were conducted by the Queen Mary University of London – School of International Arbitration in the period of 2006-2015. These surveys empirically proved the prevalence of arbitration over litigation in many different types of international commercial activities. All of these surveys are available at <<http://www.arbitration.qmul.ac.uk>> accessed July 2015.

⁴ UNCITRAL official website.

arbitration, if not in international commercial law.⁵ It was adopted specifically to facilitate the REFAA worldwide.⁶ Despite the brevity of the NYC (it only includes seven substantive articles), it is now widely regarded as the “cornerstone of international commercial arbitration”.⁷

The REFAA does not occur automatically in the state parties to the NYC. National courts retain the authority to refuse recognition and enforcement of arbitral awards for a number of limited reasons that are set out in Article V of the NYC. Article V constitutes the heart and essence of the NYC since it seeks to limit the grounds in which arbitral awards may be refused enforcement by the national courts. In broad terms, Article V (1) of the NYC provides for five grounds for refusal that have to be proven by the defendant (award debtor), and they are as follows: a) the incapacity of a party or invalidity of an arbitration agreement, b) the arbitration proceedings have a lack of due process, c) the arbitral award exceeds the scope of the arbitration agreement, d) the arbitral procedure and composition of the arbitral tribunal was not conducted in accordance with the parties agreement, e) the court of the country of the place of arbitration (seat jurisdiction) annulled the arbitral award. Moreover, Article V (2) of the NYC provides two additional grounds for refusal which may be raised by the court on its own motion: a) the subject matter of the dispute cannot be referred to arbitration, b) the arbitral award violates the state’s public policy.

At the present time, the provisions of Article V of the NYC are part of the national arbitration laws of most, if not all, the state parties to the NYC. The presence of a consistent international and domestic framework of law regulating the REFAA awards is also attributed to the extensive adoption of the 1985 Model Law on International Commercial Arbitration⁸ (ML) as amended in 2006, which was enacted and issued by UNCITRAL and follows the provisions of the NYC. The ML is not binding; its purpose is to assist countries in reforming and moderating their own arbitration laws to accommodate and meet the specific needs of

⁵ Michael Mustill, ‘Arbitration: History and Background’ (1989) 6:2 *Journal of International Arbitration* 34-56 at 47, Holloway and others (n 1) at 580.

⁶ Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International, Netherlands 1981) at 7.

⁷ Born (n 1) at 33.

⁸ UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006. General Assembly Resolution 40/72 (1985) and General Assembly Resolution 61/33 (2006).

international arbitration. Unlike the NYC, the ML regulates arbitration proceedings as a whole and importantly it follows the provisions of the NYC (Article V) regarding the REFAA, in order to bring the ML into closer harmony with the NYC.

The ML has achieved considerable success in practice and has been adopted as a domestic arbitration law to a greater or lesser extent in more than one hundred jurisdictions, and has inspired many other jurisdictions.⁹ When the United Nations Assembly adopted its resolution approving the ML, it acknowledged the family ties between the ML and the NYC, stating: “the ML together with the [NYC]...significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations”.¹⁰

This thesis seeks to address two main problems related to the implementation of the NYC. The first is the different judicial interpretations of the NYC provisions, and to what extent these differences hinder the overall purpose of the international legal framework in arbitration. The second is that the implementation of the NYC in the domestic legal systems of Arab Gulf states has failed in many aspects. Despite the adoption of the NYC in all Arab Gulf states there is wide uncertainty surrounding the legal framework regulating the REFAA under the NYC in these countries. In the following section, an introduction to the Arab Gulf states will be provided and then the thesis problems will be introduced.

1.2 The NYC and the Arab Gulf states

The Arab Gulf states are composed of six states: the Kingdom of Bahrain, Kuwait, Oman, Qatar, the Kingdom of Saudi Arabia (KSA), and the United Arab Emirates (UAE).¹¹ These countries are located in the Arabian Peninsula and overlook the Arabian Gulf Sea.¹² The area is located in the south-western region of the Asian continent. The populations of these countries are part of the Arab world and they share many important aspects, such as

⁹ See UNCITRAL official website.

¹⁰ United Nation documents A/40/17, session 18 for 1985.

¹¹ See the official website of the Cooperation Council of the Arab Gulf States <<http://www.gcc-sg.org/eng/>> accessed May 2015.

¹² “They are surrounded by a number of countries, namely, Iran, Iraq, Jordan, Egypt and Yemen. The total area of the GCC states is 2423.3 1000 km² with a population of 45.9 million. The Gross Domestic Product (GDP) is 1.37 trillion US dollars.” This information is taken from the official website of the Arabian Gulf Cooperation Council” <<http://www.gcc-sg.org/eng/>> accessed May 2015.

language, heritage, religion, political regimes, economic circumstances, legal traditions, and geographical area. The formation of the Arab Gulf states as full sovereign independent states in accordance with the United Nations is a relatively recent development. The UAE, Bahrain, Oman, and Qatar joined the international community in 1971, Kuwait having joined ten years previously. The KSA is the oldest nation and participated in the establishment of the United Nations and the Arab League in 1945.¹³ Prior to that, all of the Arab Gulf states had experienced more or less the same history and the same legal tradition, that is, the Islamic law tradition.¹⁴ Importantly, the establishment of modern legal systems in the Arab Gulf states was largely affected by civil legal traditions, with the Islamic legal tradition having an uncertain impact, except in the KSA, which still rules under the umbrella of the Islamic legal tradition. Therefore, the role of the Islamic legal tradition is relevant for all kinds of legal activities in these countries and to a varying degree might affect the REFAA in this region.¹⁵

On 25 May 1981, the six states of the Gulf formed a cooperation council, better known in the English-speaking world as the Gulf Cooperation Council (GCC).¹⁶ Its task is to create integration in many aspects, similar to the integration of the European Community, and it is registered with the United Nations as a regional entity.¹⁷ In the present day, these states are referred to as ‘GCC states’ and this term will be used throughout this thesis.

In the last three decades, international commercial arbitration has gradually emerged as a hot topic in the GCC states.¹⁸ This can be traced back to the remarkable development of the national economies, which has been largely based on the extraction and global sale of oil.¹⁹ In the early 1990s, the world witnessed a boom in oil prices that resulted in the revival of the

¹³ Official website of the United Nations <<http://www.un.org/en/members/index.shtml>> accessed May 2015.

¹⁴ Khaldoun Al-Naqeeb, *Society and State in the Gulf and Arab Peninsula* (4th edn, Routledge United States 2012) at 11.

¹⁵ Hamad Al-Humaidhi, ‘Arbitration in the Arab–Islamic World’ (2015) 29:1 Arab Law Quarterly 92–99.

¹⁶ The official website of the Gulf Cooperation Council <<http://www.gcc-sg.org/eng/>> accessed May 27 2015.

¹⁷ “Charter of the Co-operation Council for the Arab States of the Gulf (with Rules of Procedures of the Supreme Council, of the Ministerial Council and of the Commission for Settlement of Disputes) (Gulf Cooperation Council GCC) (entered into force 25 May 1985) UNTS 1288, Registration No. 21242”.

¹⁸ Yousif Zainal, ‘The Prevalence of Arbitration in the Gulf Cooperation Council Countries’ (2001) 18:6 Journal of International Arbitration 657–60, Nasser Al Zayed, ‘Commercial Arbitration in the Gulf States: An Overview’ (2010) 2:1 International Journal of Arab Arbitration 37–49.

¹⁹ See the official reports issued by the Organization of the Petroleum Exporting Countries (OPEC). Monthly Oil Market Report August 2015, page 66, Table 5.7, available online at the OPEC official website.

national economies of the GCC states. The 2013 official report of the Organisation of the Petroleum Exporting Countries (OPEC) indicates that the Middle East is currently the key crude oil exporting region and will remain so in the decades ahead.²⁰ Therefore, policy makers in the GCC states have embarked on investing in many different sectors. Currently, a number of huge business projects in many fields such as infrastructure, tourism, construction, financial services, manufacturing, education, and medical services have started and continue to increase and develop.²¹ These investment projects have resulted in an increase in the amount of commercial activities, international commerce, and foreign investments.

From a legal perspective, such development has raised concerns about the need for qualified and acceptable legal support. This has led to the issuance of many national laws, particularly laws that have an effect on national and international commerce. Arbitration was one of the legal aspects that attracted the attention of the policy makers of the GCC states, given the complementary nature of arbitration with economic development, and the fact that it meets the needs of international trade, merchants, and governments.

Therefore, the GCC states have recognised arbitration as a means of dispute resolution in their national laws and have attempted to construct friendly arbitration jurisdictions. The NYC was gradually adopted by the GCC states during the period of 1978–2006.²² Although the adoption of the NYC by the GCC states might show the states' willingness to accept international arbitration, at the domestic level, however, there remains much uncertainty and many unexpected problems. The implementation of the NYC in the GCC domestic legal systems faces various challenges and, like virtually all treaties, its efficacy is dependent on the behaviour of domestic actors. Therefore, the above information served as motivation for choosing the case study of the GCC states to be examined in this thesis.

²⁰ OPEC, *World Oil Outlook* (2013) issued by OPEC, pages 229–30 (Figures 9.2 and 9.3).

²¹ The states of UAE – Dubai, Qatar and the KSA are the most obvious examples that show the rapid development in these business activities. Matteo Legrenzi, *Shifting Geo-Economic Power of the Gulf: Oil, Finance and Institutions* (Ashgate Publishing, United Kingdom 2011) 39–54.

²² UNCITRAL official website.

1.3 Thesis problems

The scope of this thesis is limited to the analysis of some contemporary challenges that the implementation of the NYC faces worldwide, and the examination in detail of the challenges that the implementation of the NYC faces in the GCC domestic legal systems. One of the core benefits of arbitration is that it is insured by an international and domestic framework of law, which provides a significant degree of harmonisation to the process, allowing it to function across state boundaries.²³ Hence, the first problem that this thesis focuses on relates to the different judicial interpretations of the NYC provisions adopted by different national courts, and the extent to which these differences might weaken the efficiency of the consistent framework of law that regulates the REFAA.

The REFAA is not carried out by a coherent system or one court; instead, it is carried out by various national courts of the state parties to the NYC. These different courts often produce different judicial interpretations of the same enacted words. The different judicial interpretations have led in some instances to a different understanding of the effective legal framework established by the NYC and ML. It has also led in some instances to conflicting court decisions based on the NYC in relation to the same arbitral award. However, the topic of harmonious interpretation and uniform application of the NYC is one of the current concerns of UNCITRAL and many publications and different views have contributed to the analysis of this topic.²⁴ A recent report issued by UNCITRAL (2014) noted that:

“The most effective course for the Commission would be to concern itself with *problems of practical application and interpretation of [NYC]*, since the NYC texts were interpreted in various ways and it would be *desirable to encourage a uniform interpretation and application as far as possible...* the NYC had become an essential factor in the facilitation of international trade and that, besides the legislative enactment of the NYC, *it would be useful for the Commission also to consider its*

²³ Holloway and others (n 1) at 580.

²⁴ Ulrich Mayer, ‘The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention’ (1998) 3 Uniform Law Review at 583-599, Albert Berg, (n 6) at 1, See also Albert Berg, ‘Striving for Uniform Interpretation’, *Enforcing Arbitration Awards under the New York Convention Experience and Prospects* (United Nations Publications 1998) <Sales No. E.99.V.2>. See the ‘Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)’ UNCITRAL Document (2008) A/CN.9/656, page 11, para 35–40.

interpretation. Such consideration for that purpose, would serve to promote the NYC and facilitate its use by practitioners”.²⁵

To be specific, part one of this thesis examines one form of the problem of different judicial interpretations and applications of the NYC that causes many difficulties in practice, either for the arbitration parties or for the well-established legal framework regulating the REFAA as developed by the NYC. This relates to the emerging notion of the recognition and enforcement of arbitral awards that are annulled by the country of origin. There are case law evidences in which an arbitral award that was annulled by the country of origin has been enforced in another country under the scheme of the NYC. This approach is opposite to that provided in Article V (1)(e) of the NYC. This provision provides that if the arbitral award was annulled by the court of the country of origin, its enforcement *may* be refused in another country. This provision is also included in the ML and in most national arbitration laws.

The enforcement of arbitral awards that were annulled by the country of origin raises a level of uncertainty relating to the well-established ‘seat theory’. Under this theory the arbitration is anchored to a specific legal system, that is, the country of the place of arbitration (seat jurisdiction), and certain functions are provided to the laws and courts of the country of the place of arbitration. One of these functions is to annul the arbitral award; and this annulment by the court of the country of origin is a ground to refuse its enforcement in other countries. This is clearly incorporated under Article V (1)(e) of the NYC and is followed by the ML and most national arbitration laws. The enforcement of arbitral awards that were annulled by the country of origin also suggests uncertainty surrounding the level of discretionary power, which derives from the use of the verb *may* in the opening line of Article V, to enforce the arbitral award that has been annulled by the court of the country of origin. Many different views and opinions have emerged and are still developing on this question.²⁶ Therefore, this

²⁵ Official Records of the General Assembly (2014) UNCITRAL Report, Forty-seventh Session, Document No. A/CN.9/814, available online at official UNCITRAL website. This report is about the necessity of considering the problem of harmonious interpretation and uniform application of the NYC as much as possible.

²⁶ Jonathan Hill, ‘The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958’ (2015) Oxford Journal of Legal Studies 1-30, Albert Berg, ‘Should the Setting Aside of the Arbitral Award be Abolished?’ (2014) 29:2 ICSID Review 263–88, Christopher Koch, ‘The Enforcement of Awards Annulled in their Place of Origin’ (2009) 26:2 Journal of International Arbitration 267–92, Albert Berg, ‘Enforcement of Annulled Awards’ (1998) 9 The ICC International Court of Arbitration Bulletin 15, Jan Paulsson, ‘Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment’ (1998) 9 The ICC International Court of Arbitration Bulletin 14 also published in Asia Pacific Law Review 6:2 (1998) 1–28, Hamid Gharavi, *International Effectiveness of the Annulment of Arbitral Award* (1st edn, Kluwer Law International, Netherlands 2002), Albert Berg, ‘Enforcement of Arbitral Awards Annulled in Russia: Case

thesis examines the origin of this problem and on what basis the annulled arbitral award by the country of origin is recognised and enforced in other countries within the scheme of the NYC.

After discussing the above outlined problem through a review of jurisprudential views and case law analysis, the thesis aims to introduce a proposal that would help to eliminate the legal disharmony in the implementation of the NYC and further the advantage of harmonious interpretations and uniform applications of the NYC.

1.3.1 The problems that hinder the implementation of the NYC in the GCC states

In the case study of the GCC states, there are a series of problems that the implementation of the NYC faces. The operation of the NYC at the domestic level has proved a bigger challenge than expected. After the adoption of the NYC by the GCC states, not all of the states amended their arbitration laws to take into account the adoption of the NYC. This situation causes much uncertainty and many difficulties associated with understanding the legal framework that regulates the REFAA. This has been aggravated by the recent local standards utilised by some GCC national courts in their decisions on foreign arbitral awards.²⁷

Comment on Court of Appeal of Amsterdam' (2010) 27:2 *Journal of International Arbitration* 179, Ulrich Mayer, 'The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention' (1998) 3 *Uniform Law Review* 583–99, Georgios Petrochilos, 'Enforcing Awards Annulled in their State of Origin under the New York Convention' (1999) 48:4 *International and Comparative Law Quarterly* 856–88, Tweeddale (n 1), at 440, Redfern and others, (n 1) at 649, Peter Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 *Netherland International Law Review* 43–55, Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14(1) *ICSID Review* 16–45.

²⁷ Reza Mohtashami and Merry Lawry, 'The(Non)-Application of the New York Convention by the Qatari Courts: ITIIC V. DYNACORP' (2012) 29:4 *Journal of International Arbitration* 429-436, Minas Khatchadourian, 'Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards' [2013] *Kluwer Arbitration Blog*, Minas Khatchadourian, 'A Halftone Application of the New York Convention by the Qatari Supreme Court' [2014] *Kluwer Arbitration Blog*, Sultan Alabdulla, 'The Legal Nature of Arbitration Awards and the Question of Whether Omitting the Name of the Supreme Authority in the Country from the Award is a Fundamental Flaw Which Justifies Invalidation' (2014) 1 *BCDR International Arbitration Review* 29, Gordon Blanke, 'Case Comment: Public Policy in the UAE: The Story about the Unruly Horse That Turned into a Camel' [2013] *Kluwer Arbitration Blog*, Baker & McKenzie Habib Al Mulla and Gordon Blanke, 'Recent Ruling of Dubai Court of Cassation on Enforcement of Foreign Arbitral Awards: Back to Square One It Is' [2013] *Kluwer Arbitration Blog*, John Gaffney and Dalal Al Houti, 'Arbitration in the UAE: Aiming for Excellence' [2014] *Law Update – Issued by Altamimi and Co Legal Firm*, Gordon Blanke and Soraya Bakhos, 'Enforcement of New York Convention Awards: Are the UAE Courts Coming of Age?' (2012) 78 *Arbitration* 359, Gordon Blanke, 'Enforcement of New York Convention Awards in the UAE: The Story Re-Told' (2013) 5 *International Journal of Arab Arbitration* 19.

Oman and Bahrain have modernised their arbitration laws and brought them into line with the NYC and ML.²⁸ Kuwait has also given special treatment to the implementation of the NYC in its legal system, suggesting that its domestic legal system does not pose a serious challenge to the implementation of the NYC.²⁹

Therefore, the case study of the GCC states examined in this thesis aims to provide an understanding of the operation of the NYC in the states of Qatar, the UAE and KSA. The arbitration laws of Qatar and the UAE are not based on or inspired by the ML. Instead, they are still out-dated and affected by the heritage of the past that neglects most of the features and essential principles pertaining to the operation of arbitration as a means of dispute resolution. For example, the form of arbitration agreement is not defined, the finality of the arbitral award on the merits of the dispute is not recognised, the principle of party autonomy in choosing the law and rules governing the arbitration process is not well recognised, and the principles of separability of the arbitration agreement and *competence-competence* (the right of the arbitral tribunal to rule on its own jurisdiction) are not accepted. Even after the adoption of the NYC in these two states, the national courts in a number of cases have failed to fulfil the states' commitment to implementing the NYC for the REFAA.³⁰ In addition, the ambiguity and unpredictability of the court decisions on foreign arbitral awards shows the difficulty in accepting the NYC as a core treaty that regulates the REFAA in these two states.³¹

Another example of the problems in the GCC is that the KSA arbitration law has been modernised in line with the ML, but this is subject to Islamic legal traditions in all aspects of the arbitration process. The problem in the KSA is that the new arbitration law does not explain what are the rules of the Islamic legal tradition that are relevant for arbitration

²⁸ UNCITRAL official website.

²⁹ Rashid AlAnezi, 'Enforcement of Foreign Arbitral Awards in Kuwait' (2014) 1:1 BCDR International Arbitration Review 85–94.

³⁰ Reza Mohtashami and Merry Lawry, 'The(Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. Dyncorp' (2012) 29:4 Journal of International Arbitration 429-436, Baker & McKenzie Habib Al Mulla and Gordon Blanke, 'Recent Ruling of Dubai Court of Cassation on Enforcement of Foreign Arbitral Awards: Back to Square One It Is' [2013] Kluwer Arbitration Blog.

³¹ See (n27).

practices in the KSA.³²

Therefore, the first problem that will be examined in the case study of the GCC states concerns how the NYC operates in the states of Qatar, the UAE and KSA, and will highlight the shortcomings compared with the NYC and ML and international best practices.

The second problem that will be examined in the case study of the GCC states is related to the public policy defence as a ground for refusal. Most of the court decisions on foreign arbitral awards in the states of Qatar, the UAE and KSA result in the refusal of enforcement because of the strict consideration of the domestic public policy as a ground for refusal.³³ The refusal is also correlated with the Islamic public policy in the KSA. In addition, the results of the interview study conducted for the purposes of this thesis showed that public policy, including the Islamic public policy of the GCC states, is a barrier to the REFAA. The thesis examines the public policy concept as used in the GCC states, and contributes not only to the literature on the implementation of the NYC but also to the emerging literature on the concept of public policy as a ‘safeguard’ against international standards in the broader private international law context.

The last problem that is examined in detail in this thesis is related to the emerging phenomenon whereby the lack of familiarity of the GCC judiciaries with arbitration generally, and the NYC in particular, is seen as a barrier to the REFAA.³⁴ Most of the GCC courts’ decisions on foreign arbitral awards raise serious concerns about the future of the REFAA in the GCC states. The national courts in some cases have breached the key principles that the NYC is built upon. A noteworthy example of the peculiar principles established by the GCC judiciaries is that the Qatari courts are continuously refusing the REFAA on the grounds that

³² Shaheer Tarin, ‘An Analysis of the Influence of Islamic Law on Saudi Arabia’s Arbitration and Dispute Resolution Practices’ (2015) 26:1 *American Review of International Arbitration* 1-24, Jean-Pierre Harb and Alexander G Leventhal, ‘The New Saudi Arbitration Law: Modernization to the Tune of Shari’a’ (2013) 30 *Journal of International Arbitration* 113.

³³ Gordon Blanke, ‘Case Comment: Public Policy in the UAE: The Story about the Unruly Horse That Turned into a Camel’ [2013] *Kluwer Arbitration Blog*.

³⁴ Essam Al-Tamimi, ‘Enforcement of Foreign Arbitration Awards in the Middle East’ (2014) 1:1 *BCDR International Arbitration Review* 95–104 at 99, Ahmed Almutawa and AFM. Maniruzzaman, ‘Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study’ [2015] *Transnational Dispute Management* 25, 28. See also the Appendices of this thesis.

the arbitral award has not been issued under the name of the Emir of Qatar (president of Qatar).³⁵

Another form of this problem relates to the fact that most of the GCC court decisions on foreign arbitral awards do not make reference to the NYC or its internationally accepted features such as pro-enforcement bias, narrow interpretation of the grounds for refusal and exclusive grounds for refusal. There are many other manifestations of this problem such as neglecting the procedural rules chosen by parties to examine a procedural defect, and annulling a foreign arbitral award instead of refusing its enforcement. Therefore, this thesis examines possible solutions that would enhance the level of knowledge of the GCC judiciaries on the texts and features of the NYC. In order to address the problems outlined in this section (1.3), this thesis focuses on two central research questions:

- Do the different judicial interpretations of the NYC provisions hinder the overall purpose of the international legal framework in arbitration?
- What are the main difficulties that need to be addressed in order to enhance the successful implementation of the NYC in the legal systems of the GCC states?

The thesis aims to address these two central research questions in order to achieve the following objectives.

1.4 Objectives of the thesis

This thesis aims to achieve two objectives. The first is to examine to what extent the different judicial interpretations of the NYC provisions provided by different national courts including the GCC national courts might weaken the efficiency of the well-established legal framework that regulates the REFAA as established by the NYC, and developed by the practice of many jurisdictions during the last fifty years. The NYC has become an essential factor in the facilitation of dispute resolution mechanisms in international trade. Besides the presence of an effective legislative framework regulating the REFAA, it would be useful for the NYC to be interpreted and applied consistently by the national courts of the state parties. Such

³⁵ *Party v party* [2013] 2216 Qatar Court of First Instance, *Party v party* [2012] 64 Qatar Court of Cassation, *ABC LLP v. Joint Venture RST and XYZ* [2014] 45, 49, Qatar Court of Cassation, Second Civil Circuit. These cases are highlighted in the Year Book of Commercial Arbitration YBCA (2014), volume XXXIX, 480. See also Alabdulla, 'The Legal Nature of Arbitration Awards and the Question of Whether Omitting the Name of the Supreme Authority in the Country from the Award is a Fundamental Flaw which Justifies Invalidation' (2014) 1 BCDR International Arbitration Review 29–38 (Arabic).

consistency would serve to promote the NYC and facilitate its use by practitioners.

The second core aim is to examine whether the national arbitration laws and court decisions on the NYC in the GCC states are compatible with the best standards of international practice in the field of REFAA under the NYC. In today practice, the international commercial arbitration system based on the NYC effectively facilitates resolution of multinational commercial disputes and contributes to the world's continuing economic development. The GCC states are on a journey of transformation towards becoming part of an economically diverse and internationally and regionally competitive region. They are classified as developing countries with emerging economies that have shown willingness and ambition to establish a friendly arbitration hub by adopting the NYC, establishing a number of arbitration institutions, and making non-integrated attempts to modernise their national arbitration laws. However, there is also a lack of critical analysis regarding the identification of the challenges and barriers associated with the successful implementation of the NYC and how these challenges could be overcome. There is scope for a valuable original contribution to this topic, and this thesis hopes to advance the current debate on the uncertain legal framework regulating the REFAA under the NYC in the GCC states.³⁶

1.5 Originality and significance of this thesis

It is expected that this thesis will contribute to the knowledge on international commercial arbitration from two viewpoints. First, the NYC has achieved great success in facilitating the REFAA and it has become a universal instrument adopted by a wide number of states across the world. However, the degree of harmonisation in the implementation of the NYC is still relative, since the NYC is designed to interact with different national laws and this leaves the doors open for the application of 'local standards' to a certain extent. National courts, including the GCC courts in their decisions on the NYC, shall not expand into local standards to the extent that they supersede the international standards established by the NYC. The local standards may be accepted only in so far as they are in favour of promoting the purpose of the NYC, that is, furthering the REFAA.

A finding of the thesis is that the different judicial interpretations of the NYC provisions do not in every case constitute a problem; they become problematic if they result in different

³⁶ See (n 27).

understandings to the international standards that regulate international arbitration. This divergence may result in disharmony in the implementation of the NYC, and such development might hinder the overall purpose of the international legal framework and affect the structural integrity of arbitration.

As an example of the problematic divergence in interpretation, the thesis examines the recognition and enforcement of arbitral awards that were annulled by the courts of the seat of the arbitration under the scheme of the NYC. This thesis suggests the possible incorporation of section (e) of Article V (1) of the NYC under the mandatory language that directs the state parties of the NYC to refuse enforcement if the arbitral award has been annulled by the court of the seat. The thesis does not suggest issuing a ‘new NYC’ in this context. The amendment platform could start by amending the provisions of Article 36 (1)(a)(v) of the ML that correspond to section (e) of Article V (1) of the NYC. This is to alleviate the use of discretionary power that might affect the structural integrity of arbitration, or result in legal disharmony in the judicial practices relating to the REFAA. By amending the provisions of Article 36 (1)(a)(v) of the ML it would first inspire the state parties of the NYC to incorporate such an amendment into their national arbitration laws. Second, it would encourage the national courts of the NYC state parties not to use the discretionary power derived from the use of the verb *may* in the opening line of Article V (1) of the NYC to the extent that it results in ignorance of the annulment decision issued by the court of the seat (Article V (1)(e) of the NYC).

The second recommendation that might be influential in alleviating the legal disharmony in the implementation of the NYC is as follows: The state parties of the NYC, including the GCC states, may add an interpretation criterion to the domestic law (arbitration law) that regulates the REFAA. This interpretation criterion could direct the national courts to take into account the ‘international standards’ and the advantage of uniform application in their decisions on the REFAA. The best interpretation criterion in this regard is Article 2A of the ML.³⁷

³⁷ ML 1985 as amended in 2006 Article 2A states that: “(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”

1.5.1 Expected contributions to the case study of the GCC states

The second expected contribution to knowledge on international commercial arbitration is related to the case study of the GCC states. There are some studies and PhD theses on the area of international arbitration practice in the GCC states.³⁸ None of these studies and publications have specifically examined the operation of the NYC in the GCC states in a similar way to the approach taken in this thesis. Therefore, the thesis takes its originality from its attempt to analyse the implementation of one of the globally recognised multilateral treaties in the field of international arbitration, which has not been done before in the literature on international arbitration in the GCC states. The findings of this thesis in relation to the case study of the GCC states are based mainly on the analysis of some of the GCC arbitration laws that have proven to be problematic in terms of accepting the NYC, case law on the foreign arbitral awards, and the results gained from interviews conducted with judges and arbitration practitioners from the GCC states. Given that the GCC states are countries that are recognised as developing states with emerging economies, the amount of case law on the foreign arbitral awards is relatively limited and is analysed in detail in this thesis.³⁹

The thesis identifies three essential challenges that undermine the successful implementation of the NYC in the GCC legal systems and which might need to be urgently addressed by the GCC policy makers: (a) the deficiencies of the arbitration laws of Qatar and the UAE, (b) the extensive use of the public policy of the GCC states as a barrier to the REFAA, and (c) the serious lack of familiarity of the GCC judiciaries with arbitration generally and the NYC in

³⁸ Jalal el-Ahdab Abdul Hamid El.Ahdab, *Arbitration With the Arab Countries* (3rd edn, Kluwer Law International, Netherlands 2011), Abdulla Alenezi, 'An Analytical Study of Recognition and Enforcement of Foreign Arbitral Awards in the GCC States' (University of Stirling, PhD thesis 2010), Faisal Al-Fadhel, 'Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law' (Queen Mary College, University of London, PhD thesis 2010). Mohamed Al-Siyabi, 'A Legal Analysis of the Development of Arbitration in Oman with Special Reference to the Enforcement of International Arbitral Awards' (University of Hull, PhD thesis 2008). Aida Maita, 'Development of a Commercial Arbitration Hub in the Middle East: Case Study – The State of Qatar' (Golden Gate University, PhD thesis 2013). Mohammed Al.Jarba, 'Commercial Arbitration in Islamic Jurisprudence' (University of Wales, Aberystwyth, PhD thesis 2001). Naif Alshareef, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention 1958' (University of Dundee, PhD thesis 2001). Abdulrahman Yahya Baamir, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (Brunel University, PhD thesis 2008).

³⁹ The case law that is analysed in relation to the case study of the GCC states was either collected by the researcher from the GCC national courts, or was published in a limited number of journals that specialise in arbitration practices in the GCC states. In addition, a very limited number of cases were also found in the Yearbook of Commercial Arbitration. There are no online databases or systematic platforms specialising in publishing GCC court decisions.

particular. These challenges are not just related to the REFAA but are also related to enhancing the system of arbitration as a dispute resolution mechanism in the GCC states.

1.6 Research methodology

Modern and contemporary legal research often depends on a combination of legal research methods to answer the research questions; the present research is no exception.⁴⁰ The thesis relies on two key research methodologies: legal doctrinal analysis and a comparative methodology, with a limited resort to an interview study. Doctrinal analysis is the traditional legal methodology.⁴¹ The role of the analytical approach is to study why a set of legal norms appears at first glance to be not clear or difficult to understand, as in, for example, the case of the arbitration laws of Qatar, the UAE and KSA. An analytical study always aims to bring about consistency and coherence by providing an in-depth analysis of those legal rules.⁴² The laws and legal norms are usually linked to certain legal principles, which can be detected by studying the relevant laws. Therefore, the analysis of these laws leads to an evaluation of the compatibility of these laws with the relevant principles and is explained according to that framework.⁴³

A doctrinally based thesis would not argue that the law needs reform because it is not in line with the values and principles of society, or because of it being unfair, but because this law is ambiguous or inconsistent, and thus leads to uncertainty in its implementation.⁴⁴ This is the main justification for the use of doctrinal analysis in this thesis. Therefore, the analytical methodology in this thesis draws mainly on the NYC provisions, which are the primary legal materials that are under examination in this thesis. The analytical approach is also used in this thesis to analyse different case law examples on the NYC, including the GCC courts' decisions on the NYC. It is also used to analyse the arbitration laws of Qatar, the UAE and KSA. It is also applied to analyse some aspects of the public policy of the GCC states such as the Islamic public policy to understand to what extent this might affect the REFAA.

⁴⁰ Terry Hutchinson, 'Research and Writing in Law' (Law Book Co., NSW, Australia 2006) at 6–8.

⁴¹ Roger Brownsword, 'An Introduction to Legal Research' (2006) at 4, Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing, Oxford 2011) at 30.

⁴² Hutchinson, (n40) at 63.

⁴³ Caroline Morris and Cian Murphy, *Getting a PhD In Law* (Hart, Oxford 2011) at 33.

⁴⁴ *Ibid* at 31.

Besides the analytical method, the thesis also relies on comparative methodology. The comparative methodology can open the researcher's mind to new ways of finding solutions to legal problems.⁴⁵ Therefore, throughout the analysis in this thesis reference is made to the ML and NYC through comparing the arbitration laws of the GCC states with the NYC and ML. In addition, comparative case law analysis is also applied in this thesis to compare the GCC courts' decisions on foreign arbitral awards with case law examples from developed arbitration jurisdictions such as the United Kingdom, Europe, and the United States.

1.6.1 The relevance of the empirical research conducted

The analysis of some GCC arbitration laws that have proven to be problematic in terms of accepting the NYC, and case law analysis helped to identify a series of problems around the implementation of the NYC in the GCC states. However, in order to unpack the nature and causes of the problems, further empirical enquiry was required. The researcher conducted semi-structured face-to-face interviews with twenty judges and arbitration practitioners from the GCC states, with the aim of identifying the source of the challenges facing the REFAA under the NYC. The method of semi-structured interviews refers to the situation where the researcher prepares a set of questions to the interview, and has the opportunity to ask more questions depending on the interviewees' responses.⁴⁶ In this type of interview, the interviewer usually has some flexibility to ask further or supplementary questions in response to what are seen as significant responses.⁴⁷ The use of semi-structured face-to-face interviews is a suitable method of research for exploring new knowledge or to explore an uncertain area, such as, for example, the level of familiarity of the GCC judiciary with the NYC.⁴⁸

Detailed information on the interview study is attached in the Appendix of this thesis. The interviews were conducted with arbitration practitioners from GCC states and judges from the Bahrain and Dubai courts. The interviewed practitioners put forward three main barriers that undermine the REFAA in the GCC states: 1) lack of developed arbitration laws – the arbitration laws are not consistent with the NYC and ML in most of the GCC states; 2) public

⁴⁵ Caroline Morris and Murphy, (n 43) at 37.

⁴⁶ Alan Bryman, *Social Research Method* (3rd edn Oxford University Press, Oxford 2012) at 195.

⁴⁷ Nigel Newton, 'The Use of Semi-structured Interviews in Qualitative Research: Strengths and Weaknesses' [2010] available at the University of Bristol website.

⁴⁸ Louise Barriball, 'Collecting Data using a Semi-structured Interview: A Discussion Paper' (1994) 19:2 *Journal of Advanced Nursing* 328–35.

policy, including the Islamic public policy; 3) lack of knowledge of GCC judiciaries on arbitration generally, and the NYC in particular, is a barrier to the REFAA in the GCC states. A recently published empirical study on a wide number of arbitration practitioners in the GCC states also found out that the GCC judiciaries' lack of knowledge on the NYC is one of the barriers to the REFAA in the GCC states.⁴⁹ In addition, the judges interviewed by the researcher showed a serious lack of familiarity with the role of the NYC in international arbitration. Although the results gained from these interviews helped to identify the challenges facing the implementation of the NYC in the GCC states, they did not provide answers to the reasons behind the existence of these challenges and how to overcome them. Therefore, this thesis discusses and analyses these challenges with a view to advancing the legal regimes that regulate the REFAA under the NYC in the GCC states.

1.7 Thesis structure

This thesis is divided into two parts. In Part I, (chapters 2 and 3), the essential principles of the operation of arbitration as an effective method of dispute resolution in international trade are outlined, alongside with some of the potential points of contention in the existing international system. In Part II, the system of commercial arbitration within the GCC is first introduced (chapter 4) and then analysed, with in-depth coverage of the law and its application in Qatar, the UAE and KSA (chapters 5-7).⁵⁰ Numerous problems are identified which correlate to many of the well-known weak points of international commercial arbitration. In chapters 8 and 9, two particular generic concerns, the use of the public policy defence under the NYC⁵¹ and systemic problems of interpretation of international arbitration law by the local judiciary, are explored in more depth.

The implementation of the NYC has caused problems in many countries but this thesis identifies particular cause for concern in the GCC states. To address these problems there are solutions available, and these reforms are suggested throughout the thesis. The thesis

⁴⁹Ahmed Almutawa and AFM. Maniruzzaman, 'Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study' [2015] *Transnational Dispute Management* 25, 28.

⁵⁰ Some of the results from Chapter 7 that relate to the Islamic law requirement in relation to the validity of contractual relations, including arbitration agreements, have recently been published in the *Journal of Arab Law Quarterly*, Reyadh Seyadi, 'Legal Aspect of Islamic Finance' (2015) 29:3 *Arab Law Quarterly* 285-95.

⁵¹ See also, Reyadh Seyadi, 'Public Policy as a Ground for Refusal to Enforce Foreign Arbitral Awards in the Arab Gulf States', Paper presented at the Arbitration and Private International Law Conference, University of Edinburgh, 27 February 2015 < <http://www.pilim.law.ed.ac.uk/outputs/>> accessed May 2015

concludes by discussing the future prospects of the REFAA in the GCC states and outlines the areas that might need further research.

Chapter Two: Legal Framework of International Commercial Arbitration and the 1958 New York Convention

2.1 Introduction

Arbitration is a means through which disputes can be definitively resolved, pursuant to the parties' agreement, by an independent third party who can be an individual or group of individuals known as an arbitrator or arbitral tribunal.¹ There is no universal accepted definition of arbitration, either in international treaties or in soft law instruments.² There are as many definitions of arbitration as there are commentators on the subject. The comparative advantages and disadvantages of arbitration as opposed to litigation have been the subject of substantial discussion in the literature; therefore there is no need to repeat in full this discussion here.³ International arbitration does not exist or work in a legal vacuum.⁴ There is a legal framework that is either found in international law such as the New York Convention⁵ (NYC) and Model Law on International Commercial Arbitration⁶ (ML), or is found in the national arbitration laws. Most of the modern national arbitration laws are consistent with the NYC and ML.⁷

¹ Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn Kluwer Law International, Netherlands 2001) at 1.

² Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP, Oxford 2007) at 33, Loukas Mistelis and others, *Comparative International Commercial Arbitration* (1st edn Kluwer Law International, Netherlands 2003) at 3.

³ George Bermann, 'International Commercial Arbitration: Past, Present, Future' (2015) 33:5 *Alternatives to the High Cost of Litigation* 65-76, Thomas Stioanwich, 'Arbitration: The New Litigation' (2010) 1 *University of Illinois Law Review* 1-59, Michael Kerr, 'International Arbitration v Litigation' (1980) *Journal of Business Law* 164, David Holloway and others, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell, London 2012) 586.

⁴ Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn OUP, Oxford 2009) 164, Tweeddale (n 2) at 250.

⁵ "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739."

⁶ "UNCITRAL Model Law on international Commercial Arbitration 1985 as amended in 2006. General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006) articles 34-36."

⁷ This is not necessarily the case to all NYC state parties. For example, KSA, Qatar and the UAE have adopted the NYC but their arbitration laws breach some of the fundamental provisions of the NYC. Another example is France. Although France ratified the NYC, its arbitration law is not consistent with Article V of the NYC.

This chapter seeks to review the legal framework governing the process of international arbitration, with a special focus on the legal framework governing the recognition and enforcement of foreign arbitral awards (REFAA), as established by the NYC. This legal framework is built upon a number of legal principles, and unfortunately there is uncertainty over the acceptance of these elementary principles that are essential to the operation of arbitration in the GCC states. Therefore, a review of these core principles is essential at the outset of this thesis, as the implementation of these principles will be analysed in detail in the case study of the GCC states.

The chapter is structured as follows. Section 2.2 examines the validity of the arbitration agreement under the NYC and its legal effect, including the principles of separability of the arbitration agreement from the underlying contract and the principle of *competence-competence* (the authority of the arbitral tribunal to rule in its own jurisdiction). Section 2.3 discusses the main laws and rules that may be chosen by arbitration parties to govern the arbitration process, and the limits of this autonomy. Section 2.4 discusses the conditions required by the NYC for the REFAA, and the limited grounds to challenge the arbitral award provided by the NYC. Throughout this review, the chapter highlights issues that have proved problematic in the global implementation of the NYC, which are discussed in the next chapter. The chapter also highlights the issues that have proven problematic in the implementation of the NYC in the GCC states.

2.2 State parties' obligation to recognise the arbitration agreement under the NYC

Arbitration is a creature of contract, or it is a “consensual dispute resolution process”.⁸ The basis of arbitration is that the parties agree to submit the dispute for resolution by arbitration. There can be no arbitration if there is no valid arbitration agreement.⁹ Arbitration also contains a judicial element.¹⁰ This does not mean that the arbitration process ought to mirror judicial proceedings. The parties to an arbitration agreement (unlike a litigant before national courts) enjoy a great degree of freedom to choose the arbitral tribunal and the law and procedure through which their dispute is to be resolved. The arbitration agreement may be

⁸ Holloway and others (n3) at 581.

⁹ Redfern and others (n 4) at 15.

¹⁰ Tweeddale (n 2) at 37, Holloway and others (n 3) at 582, Loukas Mistelis and others (n2) at 3, Emmanuel Gaillard and others, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (1st edn, Cameron May 2008) at 615, Redfern and others (n 4) at 40, MattiKurkela and SanttuTurune, *Due Process in International Commercial Arbitration* (2nd, OUP, Oxford 2010) at 12.

found in the form of a clause in the underlying contract, the so-called arbitration clause,¹¹ and in this clause, the parties agree that any dispute arising out of the contract, or in relation to the contract (depending on the formulation of the clause), will be referred to arbitration. The arbitration agreement may also be found in a separate and different contract, the so-called ‘submission agreement’.¹² The difference between the arbitration clause and separate arbitration contract may relate to the time in which the parties concluded the arbitration agreement.¹³ If the agreement takes the form of a clause in the underlying contract, it is acknowledged that the parties have agreed to refer the dispute to arbitration before the dispute arose. On the other hand, if the arbitration is found in a separate contract, it is acknowledged that the parties agreed to refer to arbitration after the dispute had arisen.

However, the Islamic legal tradition provides a different treatment in relation to the validity of the arbitration clause.¹⁴ There is a prohibition in the Islamic contract law, called *Gharar*,¹⁵ which may affect the parties’ ability to agree on arbitration before the dispute arises. This prohibition may affect the validity of the arbitration clause in the Kingdom of Saudi Arabia (KSA) as the validity of the arbitration agreement in KSA is subject to Islamic law. This is discussed in detail in chapter seven.

An arbitration agreement, like any other agreement, operates under the umbrella of contract law and this agreement must meet the requirements of formal and substantive validity to be able to be recognised and enforced under the law. Otherwise, it will just be a statement of intent which may be morally binding on the parties but without legal effect.¹⁶

Article II (1) of the NYC provides that:

¹¹Holloway and others (n 3) at 581, Tweeddale (n 2) at 34.

¹²Redfern and others (n 4) at 15.

¹³Ibid.

¹⁴The Islamic legal tradition is introduced in chapter four of this thesis.

¹⁵Nadhirah Nordin and others, ‘contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?’ (2014) 10:15 Journal of Asian Social Science 37-47, Reyadh Seyadi, ‘Legal Aspect of Islamic Finance’ (2015) 29:3 Arab Law Quarterly 285-295 at 288.

¹⁶Michael Hoellering, ‘International Arbitration Agreements: A Look Behind The Scenes’ (1998) 53:4 Dispute Resolution Journal 64-70 at 65.

“Each Contracting State shall recognise an agreement in *writing* under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a *defined legal relationship*, whether contractual or not, concerning a *subject matter capable of settlement by arbitration*.”

In this provision there are three conditions that should be met by the arbitration agreement in order for the award to be recognised and enforced by the national courts.¹⁷ First, there should be an existing written agreement; second, there must be a “defined legal relationship”. Third, “the subject matter of the dispute must be capable of settlement by arbitration”.¹⁸ However, although the states of Qatar, the UAE and the KSA have adopted the NYC, their arbitration laws provide for different conditions for the validity of the arbitration agreement than those established by the NYC. Therefore, it is important in this chapter to discuss the validity of the arbitration agreement under the NYC and ML. A comparison will be made in chapters five, six and seven in order to understand the requirements of the validity of the arbitration agreement in these three states compared with the NYC and international best practices.

The first condition to the validity of the arbitration agreement under the NYC is the written form. An arbitration agreement, like any other contract, can vary in terms of form. The NYC requires the agreement to be in writing. The reason for imposing the written requirement is self-evident¹⁹ as most, if not all, arbitration legislation, including that of the GCC states, requires the arbitration agreement to be in writing, thus the oral agreement cannot be valid under the NYC II (1).²⁰ The second condition is a defined legal relationship. Most present arbitration agreements arise out of a contractual relationship. This is basically because the contract is one of the main sources of legal obligation, particularly in private activities. The NYC also recognises the written arbitration agreement, even if the dispute arises out of a non-contractual relationship such as an issue governed by tort law. What constitutes a defined legal relationship will differ from country to country. It is common to find that the phrase

¹⁷Tweeddale (n 2) at 109.

¹⁸Ibid

¹⁹Redfern and others (n4) at 89.

²⁰Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International, Netherlands 1981) at 196, See also Neil Kaplan, ‘Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?’ (1996) 12:1 *Arbitration International* at 27.

‘defined legal relationship’ is interpreted widely.²¹ However, this condition is not suggested as a difficulty in practice and might have a common understanding among different legal traditions.

The third condition is that the subject matter of the dispute should be able to be resolved by arbitration. Within every legal system, there are certain matters that are considered fundamental to the public policy of the state, and thus cannot be resolved by arbitration.²² For example, what is arbitrable in one state may be not arbitrable in another state. Article II (1) of the NYC does not, however, expressly state which law identifies the arbitrability of the subject matter of the dispute. Arbitrability is potentially governed by a number of different laws.²³ The first is that the law of the seat of the arbitration may govern what matters can be referred to arbitration. Second, the law applicable to the arbitration agreement, if different to the law of the seat, may affect issues of arbitrability. Third, the law of the place where the award is to be enforced may also be relevant to the issue of arbitrability. The issue of the applicable law to be used to determine the arbitrability of the dispute internationally is still open for debate, despite the general trend that the law of the place of arbitration and the law of the enforcement state govern the issue of arbitrability.²⁴ However, if the issue of arbitrability arises during the arbitral proceedings, it is usually determined by reference to the law of the seat of the arbitration, or the law governing the arbitration agreement if this is different.²⁵ There is almost a consensus that unless the issue of the ‘subject matter of the dispute’ conflicts with the public policy where the arbitration takes place, the arbitration agreement should be enforced.²⁶ The GCC states provide a wide range of disputes that are not arbitrable, including some disputes where arbitration is prohibited because of the public policy of the Islamic legal tradition. All these issues are examined in detail in chapter eight of this thesis, which examines the public policy of GCC states.

²¹Tweeddale (n 2) at 110.

²²Born, (n1) at 768, Mistelis and others, (n2) para 9-35, Redfern and others (n4) at 655.

²³Tweeddale (n 2) at 109.

²⁴Stavros Brekoulakis and Loukas Mistelis, *Arbitrability: International and Comparative Perspectives* (1st edn, Kluwer Law International 2009) at 97.

²⁵Tweeddale (n2) at 25.

²⁶Bernard Hanotiau, ‘The Law Applicable to Arbitrability’ (2014) 26 *Singapore Academic Law Journal* 874, Stavros Brekoulakis, ‘Law Applicable to Arbitrability: Revisiting the Revisited *lex fori*’ (2009) 21 *Queen Mary University of London, School of Law, Legal Studies Research Paper No. 21/2009*, Tweeddale (n 2) at 229.

2.2.1 Formal validity of the arbitration agreement under the NYC

The arbitration laws of Qatar and the UAE state that the written form is an essential requirement for the validity of an arbitration agreement, without identifying the form of writing and whether the national court accepts new means of written forms or not. Therefore, it is important in this discussion to examine how the NYC and ML and international best practice interpret the form of written agreement, as this question is examined in detail in chapters five, six and seven.

Article II (2) of the NYC provides that:

“The term agreement in writing *shall* include an arbitral clause in a contract or an arbitration agreement, *signed* by the parties or *contained in an exchange of letters or telegrams*”.

Article II (2) of the NYC sets down the means of communication (i.e. letters and telegrams) that were commonly used during the time when the NYC was formulated in 1958. However, as time went on, letters and telegrams have been almost entirely replaced by new means of communication, such as telex, fax, email and e-contracts, which provide the same basic function but with much more advanced features. The critical question that needs to be highlighted is exactly how, or to what extent, a liberal interpretation of Article II (2) could be performed to be consistent with the present-day practice of international trade such as via fax, email, and digital technologies. Two main approaches have been adopted regarding this question.²⁷ First, the means of modern correspondence that are not mentioned in Article II (2) can be allowed in the light of an expansive interpretation of Article II (2). The English text of Article II (2) uses the word *shall* to mean ‘but not limited to’. Accordingly, the written agreement requirement of Article II (2) might be liberally interpreted in the light of modern means of communication.²⁸ This approach has been adhered to, for example, by the English court in *Heifler International Inc v Christiansen*.²⁹

²⁷Albert Berg, ‘Consolidated Commentary’ (2003) XXVIII Year Book of Commercial Arbitration at 584-87, Toby Landau, ‘The Requirement of a Written Form for an Arbitration Agreement: When Written Means ‘Oral’ (2002) 11 ICCA Congress Series 19-81 at 20.

²⁸Mistelis and others, (n2) para 7-9 and 7-10.

²⁹*Heifler International Inc v Christiansen* [2007] EWHC 3015.

The second main approach is that Article II (2) of the NYC may be interpreted in light of Article 7(4) of the ML, which contains a wider functional definition of the form of written agreement requirement.³⁰ For example, the Swiss Supreme Court in *Companie de Navigation et Transports SA v MSC (Mediterranean Shipping Company) SA*³¹ noted that Article II (2) of the NYC must be interpreted by reference to Article 7(4) of the ML. Equally, a Hong Kong High Court noted that if one looks at the definition of ‘agreement in writing’ in Article II (2), one can observe that the definition is not exclusive and does not bar the application of Article 7(4) of the ML.³² However, in today’s practices most modern arbitration laws define the form of written arbitration agreement in line with the definition provided in Article 7(4) of the ML. Difficulties have arisen in some jurisdictions that adopted the NYC, where their arbitration laws do not define the form of written arbitration agreement such as the arbitration laws of the states of Qatar and the UAE. This has left much uncertainty as to whether or not the national courts of these two states will recognise and enforce arbitration agreements that were concluded by modern means of communication. This question will be answered in detail in chapter five and six of this thesis through case law analysis.

- **Signature requirement**

Article II (2) of the NYC (quoted above) requires the arbitration agreement to be signed by both parties. However, the formulation of the signature requirement is not very precise and provides room for divergence.³³ Article II (2) of the NYC sets out two alternatives for the signature requirement. The first is that an arbitration clause in a contract, or the separate agreement to arbitrate, should be signed by both parties. The second is that the written requirement should be proven in an ‘exchange letters or telegrams’, potentially without

³⁰ ML, Article 7(4) provides that: “The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”.

³¹ *Companie de Navigation et Transports SA v MSC (Mediterranean Shipping Company) SA* (2005) cited in Tweeddale (n 2) at 102.

³² *Jiangxi Provincial Metal and Minerals Import and Export Corp [China] v. Sulanser Co Ltd* [2010] HKCFI 449.

³³ Tweeddale (n 2) at 101.

signatures.³⁴ The question to be raised is whether the written record of the arbitration agreement might be equal to the arbitration agreement signed by both parties or not.³⁵

It may be noted, however, that the arbitral clause need not be specifically signed, and that signing the contract containing the clause as a whole might be sufficient.³⁶ On the other hand, although the party's signature for an arbitral clause would appear to be necessary according to the letter of the first limb of Article II (2) which mentioned *signed by parties*. The US Appeal Court, for example, in *Sphere Drake Insurance PLC v. Marine Towing, Inc.*,³⁷ clearly concluded that an arbitral clause in a contract does not necessary have to be signed independently by the parties to constitute an 'agreement in writing' pursuant to Article II (2) of the NYC. On the contrary, a number of courts adopted the view that the parties must sign both arbitral clauses in contracts and submission agreements if they have not been part of an exchange of letters or telegrams, in accordance with Article II (2) of the NYC.³⁸

- **E-contracts**

There is a question as to whether an arbitration agreement concluded via email or a more general electronic digital contract meets the written requirement of Article II (2). However, the question of e-contracts would appear to be vital and more significant than other new means of communications and its use in the context of international trade keeps increasing significantly each day. Thus, the issue of e-commerce has been the subject of noteworthy dissection by the UNCITRAL Working Group on Arbitration in the work of its 39nd session in 2006, which was satisfied that the written requirement of Article II (2) should be interpreted dynamically to cover the modern means of electronic communication. The report includes the following:

³⁴ Toby Landau, 'The Requirement of a Written Form for an Arbitration Agreement: When Written Means 'Oral' (2002) 11 ICCA Congress Series 19-81 at 35. *Golden Ocean Group Ltd v. HumpussIntermodaTransportasiTbk Ltd and another* [2013] EWCA 1220 (civ), *Czarina LLC v WF Poe Syndicate* [2002] 254 FSupp2d 1229 (US District Court M D Florida).

³⁵ Tweeddale (n 2) at 102.

³⁶ Berg, (n20) at 71.

³⁷ *Sphere Drake Insurance PLC v. Marine Towing, Inc* [1994] U.S. Court of Appeals, Fifth Circuit United States, Case No. 93-3200.

³⁸ Albert Berg, 'Consolidated Commentary' (2003) XXVIII Year Book of Commercial Arbitration at 586.

“The Recommendation encourages States to apply Article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law.”³⁹

Accordingly, it may be submitted that an arbitration agreement fulfils the written form requirement of Article II (2) of the NYC if it is concluded by email or e-contract, consistent with Article 7 of the ML. In addition, UNCITRAL has issued Model Laws concerning electronic commerce and electronic signatures, which both provide definitions of writing and signature requirements in an electronic contract.⁴⁰

Many national laws consider electronic communication to be equal to written documents.⁴¹ The foregoing approach can draw further support from the technical point of view that an exchange of email, for example, can be deemed as analogous to an exchange of telegrams. The current time is witnessing an extraordinary increase in the use of such means in national and international trade practice. Thus, interpreting the written requirement under Article II (2) widely and dynamically to include modern means of communication in general and e-contracts and email in particular must be followed. Article II (2) of the NYC does not set forth an exhaustive list of acceptable recording means. It rather provides an example of what was commonly used in 1958, and does not include an explicit or implicit indication to exclude the new means that provide the same basic function of recording evidence with much more advanced features, and the end justifies the means.

All arbitration laws in the GCC states require that the arbitration agreement should be in writing. Qatar and the UAE do not identify the form of writing used to ensure the validity of the arbitration agreement.⁴² The question over whether the courts in these two states will accept electronic means of writing is still uncertain and is discussed in detail in chapters five

³⁹ “UNCITRAL Model Law 1985 as amended in 2006”, page 29. See also UNCITRAL document A/61/17.

⁴⁰ “UNCITRAL Model Law on Electronic Commerce 1996, article 6 (1), UNCITRAL Model Law on Electronic Signatures 2001”, article 6(1).

⁴¹ Mistelis and others (n2) at 132, Richard Hill, ‘On-line Arbitration: Issues and Solutions’ (1999) 15:2 *Arbitration International* 199 at 200-203.

⁴² Qatar Arbitration law 1990, article 190: “No agreement for arbitration shall be valid unless evidenced in writing”, UAE Arbitration Law 1992, article 203 (2): “No agreement for arbitration shall be valid unless evidenced in writing”.

and six. Finally, Article II (3) of the NYC obliges the national courts upon the request of one of the parties to refer the parties to arbitration if the courts find that a valid arbitration agreement exists. However, this provision does not oblige the national courts to refer the parties to arbitration if the court finds that the underlying contract is invalid. The ML and most modern national arbitration laws have recognised this gap and provide for full implementation of the principle of separability of the arbitration agreement from the underlying contract, as will be discussed below.⁴³

Once the arbitration agreement has been validly made, it starts to deploy its effects. However, the valid arbitration agreement does not merely serve to establish the obligations on the parties to arbitrate the dispute; rather, the agreement to arbitrate is the source that defines the authority of the arbitral tribunal to resolve the dispute.⁴⁴ The legal effects of a valid arbitration agreement can be summarised as follows.⁴⁵ First, the parties are obliged to refer disputes coming within the scope of the arbitration agreement to be resolved by arbitration. Second, the arbitral tribunal selects the jurisdiction to decide the dispute. Third, the arbitration agreement may also provide the arbitral tribunal with the law and rules governing the arbitration process. Fourth, the arbitration agreement may prevent the national court from deciding the substance of the dispute. Even if the arbitration agreement takes the form of a clause in the underlying contract, and the contract is considered null and void, the arbitration agreement might still exist and be binding upon the parties. This is because of two well-established legal principles: the principle of separability of the arbitration agreement and the principle of *Kompetenz-kompetenz*. These two principles are not recognised in the arbitration laws of Qatar and the UAE, and the national courts show a hesitant attitude towards accepting them, as will be analysed in chapters five and six.

⁴³ML 1985 as amended in 2006 article (16).

⁴⁴Redfern and others (n4) at 21.

⁴⁵Holloway and others (n3) at 588.

2.2.2 The principles of separability and Kompetenz-kompetenz

The principles of separability and Kompetenz-kompetenz⁴⁶ were developed to enhance the effectiveness of arbitration as a favourite method of dispute resolution in international trade.⁴⁷ The doctrine of separability means that the arbitration clause is a separate agreement from the other terms of the contract;⁴⁸ therefore, it will be treated as an independent agreement from the underlying contract. This doctrine differentiates between the underlying contract that governs the parties' rights and obligations, and the arbitration agreement that governs the arbitration process.

Schwebel noted that when the parties enter into a contract that includes an arbitration clause, they are in fact entering two contracts,⁴⁹ with each of these two contracts independent from the other and possibly governed by different laws.⁵⁰ The applicable laws to the main contract may have no connection with the applicable laws to the arbitration agreement.⁵¹ The rationale behind the separability principle is that if the arbitration agreement is not considered a separate agreement, then the termination of the main contract will extend to the arbitration clause or arbitration agreement.⁵² The effect of the doctrine of separability is that the nullity or invalidity of the main contract does not result in the automatic invalidity of the arbitration clause or the arbitration agreement.⁵³ The arbitral tribunal might still have the authority to decide on its own jurisdiction to hear the dispute pursuant to the arbitration clause or the separate arbitration agreement.

⁴⁶ “This is a German name for the principle has established itself in English usage. In its original German usage, it designated not to the general notion of the arbitral tribunal’s powers to come to a determination on its own jurisdiction. The term denotes the general notion of the power to determine the jurisdiction”. See William Park, ‘The Arbitrability *Dicta* in *First Options v. Kaplan*: What Sort of Kompetenz–Kompetenz Has Crossed the Atlantic?’ (1996) 12:2 *Arbitration International* 137-160, at 137.

⁴⁷ Gaillard and others (n10) para 400-406, Some criticisms of these two main principles are found, for example, in Phillip Landolt, ‘The Inconvenience of Principle: Separability and Kompetenz-Kompetenz’ (2013) 30 *Journal of International Arbitration* at 5.

⁴⁸ Gaillard and others (n10) at 198.

⁴⁹ Mistelis and others, (n2) at 102.

⁵⁰ Stephen Schwebel, *International Arbitration : Three Salient Problems* (1st edn, CUP, Cambridge 1987) at 5.

⁵¹ Gary Born, *International Commercial Arbitration: Cases and Materials* (Aspen Publisher, New York 2011) at 173.

⁵² Schwebel, (n50) at 5.

⁵³ Mistelis and others, (n2) at 333.

Kompetenz-kompetenz is a German term and is referred to in English as *competence-competence*.⁵⁴ It refers to the authority of the arbitral tribunal to determine and rule on its own jurisdiction to hear the dispute.⁵⁵ It means that if the arbitration parties have gone directly to the arbitral tribunal, and have raised the jurisdictional issue before the tribunal, the arbitrators have the power to decide independently whether they possess jurisdiction or not.⁵⁶ Even if the parties raise the jurisdictional challenge before the national court at the beginning of arbitration, or during the arbitration process, the court may reject the suit and refer the parties to the arbitral tribunal to determine the jurisdictional question.⁵⁷ The advantage of this principle in the arbitration process is that the tribunal has the independent power to rule on its jurisdiction, which makes the role of arbitration effective as a dispute resolution mechanism.

These two principles together (separability and competence-competence) generate a number of legal effects.⁵⁸ First, once the arbitral tribunal is constituted, the party may not be allowed to challenge the arbitration process with an allegation that the main contract is null and void, and therefore the arbitration agreement is null and void. Second, the arbitral tribunal has the authority to hear and decide questions about its own jurisdiction.⁵⁹ The arbitral tribunal may only hear and decide the disputes that parties submit to it. This is to avoid challenging the final arbitral award before the national courts on the ground that the arbitral tribunal has exceeded its jurisdiction as stipulated in Article V (1)(c) of the NYC. The principles of separability of the arbitration agreement and competence-competence is recognised in the ML and in most of the major arbitration rules and national arbitration laws.⁶⁰

However, these two principles do not completely deprive the national courts from considering the question of the invalidity of the arbitration agreement and the question of the jurisdiction

⁵⁴William Park, (n46) at 137.

⁵⁵Mistelis and others, (n2) at 332.

⁵⁶Antonias Dimolista, 'Separability and Kompetenze-kompetenze' in ICCA Congress Series No. 9, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer law international, Netherlands 1999) at 217-228.

⁵⁷Tweeddale (n 2) at 123.

⁵⁸Holloway and others (n3) at 583.

⁵⁹Ibid.

⁶⁰ICC Arbitration Rules 2012, article 6(4), LCIA arbitration rules 2014, article 23(2), UNCITRAL arbitration rules 2012, article 21(2), UNCITRAL Model Law 1985 as amended in 2006, article 16(1).

of the arbitral tribunal.⁶¹ The reasons for an underlying contract becoming void may also affect the validity of the arbitration agreement.⁶² It is argued that the arbitration agreement may be held to be void if the reasons for the nullification of the underlying contract concern public policy elements, or if the illegality of the underlying contract goes to the root of the arbitration agreement.⁶³ There is no uniform understanding between the national courts as to the extent of limitation of the principle of separability of the arbitration agreement.⁶⁴ For example, in the famous case of *Fiona Trust*,⁶⁵ the English courts confirmed the principle of separability of the arbitration agreement from the underlying contract, and held that the arbitrators, not the courts, should determine the question of validity of the underlying contract *unless* the invalidity of the underlying contract was directed at the arbitration clause in particular. In this case, one of the contract parties applied to the court seeking to restrain the arbitration on the basis that the underlying contract (including the arbitration clause) had been rescinded for bribery and fraud. The English courts ruled that the arbitration clause was valid and wide enough to encompass the fraud and bribery claims.⁶⁶

The same sort of underpinnings apply to the principle of competence-competence as it has been recognised by the ML and most modern national arbitration laws, but national courts vary in their interpretation of the level of recognition and there are differences as to the extent and the stage at which judicial intervention occurs.⁶⁷ These differences have even resulted in a conflict in court decisions on the NYC for the same arbitral award.⁶⁸

⁶¹UNCITRAL Model Law 1985 as amended in 2006, article (16), See also William Park, 'Determining Arbitral Jurisdiction of Tasks Between Court and Arbitrators' (1997) 8 American Review of International Arbitration at 133.

⁶² Tweeddale (n 2) at 127.

⁶³Ibid at 125.

⁶⁴ Redfern and others (n4) at 119.

⁶⁵*Fiona Trust and Holding Corporation and others v Privalov and others* [2007] UKHL 40. See also the case of *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd and others* [1993] QB 701.

⁶⁶Ibid.

⁶⁷William Park, 'Determining Arbitral Jurisdiction of Tasks Between Court and Arbitrators' (1997) 8 American Review of International Arbitration at 133.

⁶⁸David Holloway, 'Avoiding Duplicative Litigation about Arbitration Awards within the EU' (2011) 2:2 Journal of International Dispute Settlement 435-457.

For example, in the case of *Dallah Real Estate and Tourism Holding Company (Dallah) v. Ministry of Religious Affairs Government of Pakistan (GoP)*,⁶⁹ the arbitration took place in France and was governed by French arbitration law. The French court accepted the determination of the arbitral tribunal on its jurisdiction under the principle of competence-competence and enforced the arbitral award. In contrast, the English court refused the determination of the arbitral tribunal on its jurisdiction and refused to enforce the arbitral award. The case in summary is as follows: In a memorandum of understanding *signed* in 1995, *Dallah* agreed with the GoP to provide housing facilities for Muslim pilgrims who wished to visit Saudi Arabia for the religious event the *Hajj*.⁷⁰ Thereafter, in September 1996 the GoP created a state-owned enterprise called Trust, which *signed* the agreement that included the arbitration clause with *Dallah* for the construction of housing in Mecca City (Saudi Arabia). In December 1996, Trust ceased to exist as a government entity due to the new government that came to the cabinet. *Dallah* then requested the International Chamber of Commerce (ICC) in Paris to start the arbitration proceeding against the GoP (which was not a signatory to the contract) pursuant to the arbitration clause in the underlying contract, and claimed for compensation. *Dallah* won the arbitration case and thereafter sought recognition and enforcement in France and England over the assets of the GoP in these two jurisdictions. However, the GoP challenged the enforcement request pursuant to Article V (1)(a) of the NYC, arguing that it was a non-signatory to the arbitration agreement and the arbitral tribunal wrongly assumed the jurisdiction over the GoP. The UK Supreme Court upheld the lower court's decisions and ruled that the GoP was not party to the arbitration agreement and therefore the arbitral tribunal seated in Paris did not have the jurisdiction to rule over the GoP because the latter was not a signatory to the arbitration agreement. By contrast, the Paris Court of Appeal accepted the jurisdiction of the arbitral tribunal over the GoP and enforced the arbitral award.⁷¹

The *Dallah* case show the situation where two jurisdictions reached contrary court decisions on the NYC for the same arbitral award, despite the fact that both jurisdictions have applied

⁶⁹*Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46, [2011] Paris Court of Appeal 09/28533.

⁷⁰Hajj is one of the five pillars of Islam, and a religious duty which every adult Muslim must carry out at least once in their lifetime.

⁷¹*Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan* [2011] Paris Court of Appeal. 09/28533

the *same law* (law of the seat) to the same question, namely, whether the arbitral tribunal has a jurisdiction over the GoP. The English courts (enforcing court) confirmed that the arbitral tribunal jurisdiction could be challenged before the court of the seat and before the *enforcing court*. Importantly, the court also noted that even if the arbitral tribunal jurisdiction can no longer be challenged before the court of the seat (as in the *Dallah* case), this does not preclude the consideration of the issue before the enforcing court. This determination might be quite critical compared with the well-established supervisory role of the court of the place of arbitration, particularly in relation to the issue of the arbitral tribunal jurisdiction.⁷² The English court refused the plea brought by *Dallah* that the pro-enforcement policy of the NYC would require the enforcing courts to take a more liberal approach to the determination of the arbitral tribunal on the jurisdiction question,⁷³ given that the arbitration took place in France and French law governed the arbitration agreement.

However, the conflicting court decisions on the NYC for the same arbitral award might lead to a sense of injustice in terms of having one arbitral award seeking enforcement in two jurisdictions, and both jurisdictions applying the same treaty, that is, the NYC, and the same law (law of the seat: France arbitration law) to the same question (validity of the arbitration agreement), and finally both jurisdictions reaching opposite conclusions. In this line one of the leading commentators on international arbitration, Gary Born, has commented on the *Dallah* case saying that:

“The different outcomes undermine the spirit and purpose of the New York Convention in ensuring uniform treatment of arbitral awards. Those goals are undermined when, a decade after an arbitral tribunal decides that parties concluded a binding agreement, courts in different Contracting States reach conflicting conclusions as to the correctness of the tribunal’s award – with a foreign court disagreeing with the courts of the arbitral *seat over the application of its own law*”.⁷⁴

The arbitration laws of England and France both recognise the principle of *competence-competence* and give the arbitral tribunal seated in their countries the power to rule on their

⁷² Gary Born and Michal Jorek, ‘Dallah and the New York Convention’ [2011] Kluwer Arbitration Blog.

⁷³ *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46 at page 21, Para 39.

⁷⁴ Gary Born and Michal Jorek, (n72).

own jurisdiction subject to the supervisory rule of the court. The scope of the supervisory role of the court over the jurisdiction in question varies between each state and might reflect the origin of the conflicting decisions reached in the *Dallah* case, though both courts have applied the French law (seat law) to determine the jurisdictional question. In France, the arbitral tribunal *must* initially rule on its own jurisdiction. If there is a challenge before the court regarding the arbitral tribunal jurisdiction, the court *must* decline to hear this challenge *unless* the court finds that the arbitration agreement was *manifestly* void or voidable.⁷⁵ The 1996 UK Arbitration Act provides permissive language. It states that the arbitral tribunal *may* rule on its jurisdiction and subjects this power to three conditions.⁷⁶

Therefore, *Dallah* case show how the expanded approach of local standards suggested by the English court (enforcing court) resulted in a conflict in court decisions on the NYC for the same arbitral award, although both courts applied the same law (law of the seat: France law) to examine the same question (arbitral tribunal jurisdiction). Some commentators argue that in the *Dallah* case, the English court provided intensive judicial scrutiny, which should be limited to the supervisory courts at the seat of arbitration (French court).⁷⁷ The decision of the English court in the *Dallah* case seems to suggest that even if the arbitration took place abroad and the question of the arbitral tribunal jurisdiction became final *according to the law of the place of arbitration*, the English court (enforcing court) had competence to examine the question of the arbitral tribunal jurisdiction.⁷⁸ This position might be detrimental to the international formwork of international commercial arbitration and correlates with some reservations of the Common Law jurisdictions on the principle of competence-competence that might be seen as not being supportive to arbitration.⁷⁹

⁷⁵ France arbitration law 2011, article 1458 stated that: “Where a dispute, referred to an arbitration tribunal pursuant to an arbitration agreement, is brought before a court of law of the State, the latter must decline jurisdiction. Where the case has not yet been brought before arbitration tribunal, the court must also decline jurisdiction save where the arbitration agreement is manifestly null. In both cases, the court may not raise *suasponde* its lack of jurisdiction.”

⁷⁶ UK Arbitration Act 1996, article 30 (1).

⁷⁷ Jan Kleinheisterkamp, ‘Lord Mustill and the Courts of Tennis – *Dallah v Pakistan* in England, France and Utopia’ (2012) 75 *The Modern Law Review* 606, at 644.

⁷⁸ *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46 at page 42, Para 98.

⁷⁹ *ibid*, page 41, Para 94, The court states that ‘the German doctrine of *Kompetenz-kompetenz* resolves logical difficulties in legal systems where the jurisdiction of state courts and the jurisdiction of arbitrators under a valid arbitration agreement are mutually exclusive in legal theory. In these legal systems, the state court *must* ‘dismiss’ legal proceedings brought in violation of a valid arbitration agreement, thereby retaining no competence over the parties, but in the case of an invalid or non-existent arbitration agreement, the arbitrators can have no jurisdiction

The different results hinder the spirit and purpose of the NYC in ensuring uniform treatment of arbitral awards, with a foreign court (English courts) disagreeing with the courts of the arbitral seat over the application of its own law (France courts).⁸⁰ It also might lead to a sense of injustice in terms of having one arbitral award seeking enforcement in two jurisdictions, and both jurisdictions applying the same treaty, that is, the NYC, and the same law (law of the seat) to the same question (arbitral tribunal jurisdiction), and finally both jurisdictions reaching opposite conclusions.

Unfortunately, not all arbitration laws of the GCC states have recognised these two vital principles in the operation of international arbitration, as will be examined in part two of this thesis.⁸¹ In the following discussion, a review of the law and rules that govern the arbitration process will be provided. The arbitration laws of Qatar and the UAE that are analysed in chapters five and six are silent about the possible laws and rules that govern the arbitration process. Therefore, in the following discussion it is important to understand the roles of these different laws with a view to support the analysis in chapters five and six.

2.3 Party autonomy and choice of laws and rules

The principle of party autonomy in contractual relations has been described as “a key principle of current arbitration law”.⁸² It has also been described as the “cornerstone of modern arbitration”.⁸³ Party autonomy in the arbitration process is reflected in the parties’ right to choose the place of arbitration and the parties’ freedom to choose the law and rules governing the arbitration process. The principle of party autonomy is expressly recognised in

at all. *Who then decides what and in what order in the absence of a suitable doctrine of Kompetenz-Kompetenze?* In contrast the court in most common law countries (including England) merely ‘stay’ legal proceedings because in legal theory an arbitration agreement can never oust the Court’s jurisdiction over the parties: and this logical problem over jurisdiction has not arisen in the same form... For these reasons the law and practice of English arbitration does not require express doctrine of Kompetenz-Kompetenze. English law achieves the same result as the German doctrine by a different route. The practice of arbitration tribunals determining their own jurisdiction, subject to the final decision of the English court has long been settled in England”.

⁸⁰Gary Born and Michal Jorek, (n72).

⁸¹Only the Oman, Saudi Arabia and Bahrain arbitration laws have recognised the doctrines of the separability of the arbitration agreement and competence of the arbitral tribunal to rule independently on its jurisdiction. Oman arbitration law 1997, article (23). Bahrain arbitration law 2015, article 16 (1). Saudi Arbitration law 2012, article (21).

⁸²*Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] All ER (D) 229, UKPC 34.

⁸³*DiagnosticalInc v CenterchemInc* (1998) 44 New South Wales Law Review at 312-342.

the texts of the ML and NYC and in most national arbitration laws. In *XL Insurance Ltd v Owens Corning*,⁸⁴ the Commercial Court in England held that:

“It is a general principle of English private international law that it is for the parties to choose the law which is to govern their agreement to arbitrate and the arbitration proceedings, and that English law will respect their choice.”

As a consequence of the application of the principle of party autonomy and separability of the arbitration agreement, there may be more than one system of law governing different aspects of the process of arbitration. The parties may choose the law governing the arbitration agreement, the law governing the substance of the dispute, and the law governing the arbitration procedure. The following section reviews these different laws and rules that may govern the arbitration proceedings. The first and most important of these laws is the law of the place of arbitration.

2.3.1 The law governing the arbitration: the ‘seat theory’

International arbitration usually takes place in a specific country. This country, in many cases, is ‘neutral’ in the sense that none of the parties to the arbitration has a business or place of residence in it.⁸⁵ In practice, the choice of the place of arbitration might be determined according to the extent that the laws and courts of that state are known as a friendly arbitration jurisdiction. The traditional theory of territoriality holds that the state is sovereign within its borders, and that its laws and courts have exclusive jurisdiction over acts and legal relations occurring within its territory; the arbitration that takes place in any country is not an exception to this theory.⁸⁶

The seat of arbitration refers to the legal location of the arbitration, even if the hearings need not necessarily be held in that country.⁸⁷ The notion that arbitration is governed by the law of the place in which the arbitration takes place is commonly known as the ‘seat’ or ‘forum’ of

⁸⁴*XL Insurance Ltd v Owens Corning* [2001] 1 All ER, Queen’s Bench Division, Commercial Court 530.

⁸⁵Redfern and others (n4) at 173.

⁸⁶Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (1st edn, OUP, Oxford 2007) at 677.

⁸⁷Holloway and others (n3) at 589, See also ML 1985 as amended in 2006, ‘Salient features of the Model Law’, page 26, para 14.

arbitration.⁸⁸ The seat theory takes its starting point from the concept that every act of arbitration is rooted in a certain legal system, and this legal system recognises the existence of this arbitration.⁸⁹ Redfern noted that the core point of the seat theory was based on the fact that it provides a certain legal system governing the arbitration process.⁹⁰ In fact, the seat theory establishes a legal link between the arbitration proceedings, and the laws of the where the arbitration legally takes place.⁹¹

Thus, the party autonomy to choose different laws or rules to govern the arbitration agreement, or arbitral procedure, or substantive matters of the dispute, is limited to the extent that it is allowed by the law of the seat.⁹² The starting point of this theory is always to examine the law of the seat, and if the law of the seat permits other such laws to affect the arbitration process, the parties can make this choice and the court of the place of arbitration shall recognise the parties' choices.⁹³ The ML and NYC, as well as most of the modern arbitration laws, recognise the parties' right to choose different laws other than the law of the seat to govern the arbitration process.

Therefore, states usually issue laws to regulate the conduct of arbitrations that occur within their own territory. This law is normally the arbitration law of the country where the arbitration takes place, sometimes referred to as the curial law, or *lex arbitri*.⁹⁴ This law is not necessarily the same law that governs the merits of the dispute or the same law governing the main contract. The arbitration law of the seat, the *lex arbitri*, plays a significant role in the arbitration process. For example, it may provide for some mandatory rules as to the procedure of arbitration. It may also allow access to the national court of the place of arbitration in order to support the conduct of arbitration at several stages, e.g. issuing interim injunctions,

⁸⁸Redfern and others (n4) at 180.

⁸⁹Tweeddale (n2) at 235.

⁹⁰Redfern and others (n4) at 191.

⁹¹Jonathan Hill, 'Determining the seat of an international arbitration: party autonomy and the interpretation of arbitration agreements' (2014) 63:2 ICLQ 517-534 at 517, William Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32:1 International and Comparative Law Quarterly (ICLQ) at 21, Redfern and others (n4) at 180, Tweeddale (n 2) at 233.

⁹²George Bermann, 'Introduction: Mandatory Rules of Law in International Arbitration' (2007) 18 American Review of International Arbitration, at 1.

⁹³Anibal Sabater, 'When Arbitration Begins without a Seat' (2011) 27 Journal of International Arbitration 443.

⁹⁴Holloway and others (n3) at 590.

securities for cost, or appointing and challenging the appointment of arbitrators or the arbitral tribunal.⁹⁵ The court of the seat also plays a crucial role in challenging the final arbitral award. For example, under the scheme of the NYC, the court of the seat has the exclusive jurisdiction to set aside or annul the arbitral award.⁹⁶ If the court of the seat annuls the arbitral award, it may not be enforceable in other countries within the scheme provided by the NYC and ML.⁹⁷

There is also another debate concerning the extent to which it is possible to detach international arbitration from national law, in particular, the national laws of the country where the arbitration is legally based (seat jurisdiction).⁹⁸ This debate is also referred to as “delocalisation theory”, “floating arbitration”, “detached arbitration”, “transnational arbitration” and “a-national”.⁹⁹ The delocalisation theory takes its rationale from the autonomy of the parties that aim to free arbitration as much as possible from national laws.¹⁰⁰ It has two basic roots. First, it is assumed that international commercial arbitration is independent and regulated by its own rules chosen by the parties or by the arbitral tribunal. Second, any control over the arbitration should only come from the law of the country where the arbitral award is seeking enforcement.¹⁰¹

However, the power of the seat theory is that it provides a certain legal system instead of being a floating arbitration; the arbitration is firmly anchored to a specific legal system. Delocalisation theory, in contrast, is based on detaching the arbitration from being controlled by any legal system except at the enforcement stage. This theory (delocalisation) is purely theoretical in the sense that it found its application in limited case law that in fact caused a problem for the well-established seat theory adopted by the NYC and ML and most national

⁹⁵Ibid

⁹⁶ This issue is discussed in detail in next chapter.

⁹⁷ NYC, article V (1)(e).

⁹⁸ Jan Paulsson, ‘Delocalisation of international commercial arbitration: when and why it matters’ (1983) 32:1 ICLQ 53-61.

⁹⁹ Goldman and others, *International Commercial Arbitration* (Kluwer Law International, Netherlands 1999) at 635, Tweeddale (n 2) at 246.

¹⁰⁰ Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards* (Peter Lang GmbH, Netherlands 2010) at 50.

¹⁰¹ Redfern and others (n4) at 190.

arbitration laws. It is difficult to see the full application of the delocalisation theory, as will be shown in the case law analysis in the next chapter.¹⁰²

2.3.2 The law that governs the arbitration agreement

The law governing the validity of the arbitration agreement refers to the law that determines the formal and substantive validity of the arbitration agreement. For example, it may relate to determining the validity of mutual consent, common intentions, the form of writing, the form of signature, and may also relate to substantive issues, such as the legality of the whole arbitration agreement or the arbitrability of the dispute. As a result of the international acceptance of the principle of separability of the arbitration agreement from the underlying contract, the parties in arbitration are free to choose the law governing the arbitration agreement. This law might be the same law governing the main contract or it might be a different one. In practice, it would be unusual for parties to draft arbitration clauses and subject the arbitration agreement to a particular law.¹⁰³ However, the ML and NYC and most modern arbitration laws permit the parties to subject the arbitration agreement to a specific law.¹⁰⁴ The question to be raised is if no such choice has been made by the parties, which law will govern the validity of the arbitration agreement?

There are other possibilities, but the principle in the absence of choice is either the law of the place of arbitration or the law governing the original contract.¹⁰⁵ Commentators are divided on this issue.¹⁰⁶ The NYC and ML include provisions relating to the REFAA and stipulate that the validity of the arbitration agreement shall be examined under the law that the parties have chosen, and failing any indication thereon, under the law of the place of arbitration.¹⁰⁷

¹⁰² *Hilmarton Ltd v Omnium de Valorisation* [1994] case no. 92-15.137 French Court of Cassation, published in XX YBCA (1995) at 663, *Société Egyptian General Petroleum Corporation v Société National Gas Company* [2011] 10/16525 Paris Court of Appeal.

¹⁰³ Tweeddale (n2) at 217, Mustill and Boyed, *The Law and Practice of Commercial Arbitration in England* (2nd Butterworths, London 1989) at 62.

¹⁰⁴ UNCITRAL ML, article 34, NYC article V(1)(a).

¹⁰⁵ For more details on this point, see Julian Lew, 'The Law Applicable to the Form and the Substance of the Arbitration Clause' (1998) 14 ICCA Congress Series, Redfern and others (n4) at 166.

¹⁰⁶ Julian Lew, 'The Law Applicable to the Form and the Substance of the Arbitration Clause' (1998) 14 ICCA Congress Series, at 145.

¹⁰⁷ UNCITRAL ML, article 34, NYC Article V (1)(a).

Despite this provision, there are different interpretations among the national courts in the absence of express choice of the law governing the validity of the arbitration agreement. In countries that have adopted the ML, the validity of the arbitration agreement will be determined by the law of the place of arbitration. The other approach in the absence of choice is that the validity of the arbitration agreement might be determined by the conflict of laws rules¹⁰⁸ of the place of arbitration.¹⁰⁹ In most cases this method will result in the arbitration agreement being governed either by the law of the place of arbitration or the proper law of the contract. The relation between the conflict of laws rules and arbitration practices is examined in chapter five where the law that governs the arbitration agreement in the states of Qatar is examined in detail. The arbitration laws of the UAE and Qatar are silent about the parties' freedom to choose the law governing the arbitration agreement. In addition, the validity of the arbitration agreement in the KSA is subject to it not violating Islamic legal traditions. All these issues are discussed in detail in part two of this thesis.

2.3.3 The law that governs the arbitration proceedings

Article V (1)(d) of the NYC provides that the court may be denied recognition or enforcement if the arbitral award suffers from procedural irregularities. Therefore, the arbitral tribunal must conduct the arbitration in accordance with the procedural rules chosen by parties, subject to the mandatory rules of the *lex arbitri*. If it fails to do so, the arbitral award may be set aside or refused recognition and enforcement. There are many procedural issues, such as the composition of the arbitral tribunal, the conduct of hearings, evidence gathering, and many other matters found in the chosen arbitration rules or *lex arbitri*.

The principle of party autonomy is also found in the parties' right to choose the law and rules governing the arbitration proceedings. This is because the NYC, ML and most arbitration laws allow parties to make this choice. If the parties do not agree on specific procedural rules to govern the arbitration proceedings, then the arbitration law of the place of arbitration may impose these rules unless the arbitral tribunal permits the parties to make any other choice.

¹⁰⁸ "Conflict of laws is a term of art originally used in the United States. Its most common European equivalent is 'private international law'. Roy Goode defined conflict of law rules "as that branch of any national legal system that deals with cases (fact patterns) having a foreign element and that determines which national law governs the solution of the various problems involved in the case." Goode and others (n86) at 57.

¹⁰⁹ Tweeddale (n2) at 218, Giuditta Moss 'International Arbitration and the Quest for the Applicable Law' (2008) 8:3 Global Jurist Article 2, 1-42 at1, Burcu Yüskel, 'The relevance of the Rome I Regulation to international commercial arbitration in the European Union' (2011) 7:1 Journal of private international law 149-178.

However, even if the arbitration parties or the arbitral tribunal makes the choice, it is not without limits. The arbitration law of the seat, the *lex arbitri*, still plays an important role in the arbitration proceedings.¹¹⁰ For example, if the parties choose arbitration rules other than those provided by the arbitration law of the seat, then a sensitive relationship between these two laws emerges. The arbitral tribunal is responsible for taking this relationship into account to avoid the arbitral award being set aside or refused enforcement. It can be said that the law governing the procedural aspects of arbitration works in tandem to the extent that the chosen arbitration rules do not breach the mandatory provisions of the arbitration law of the seat.¹¹¹

In today's practice, most arbitration laws impose few mandatory rules concerning the arbitration procedure, and provide more respect for party autonomy and the chosen procedural rules.¹¹² However, the arbitration laws of Qatar and the UAE are not clear about the parties' freedom to choose any arbitration rules governing the arbitration proceedings. The KSA recognises this right subject to the rules not violating the provisions of the Islamic legal tradition.¹¹³ In addition, in a case in the Qatari courts the procedural rules chosen by the parties were controversially neglected and the courts applied their own arbitration law to investigate a procedural defect; in this case, the arbitration took place in France under the arbitration rules of the International Chamber of Commerce (ICC).¹¹⁴

2.3.4 The law that governs the merits of the dispute

This law is commonly described as the “governing law”, the “applicable law”, the “substantive law” or the “proper law” of the contract.¹¹⁵ It is commonplace for the arbitration parties to select a system of national law or *legal rules* to determine the substance of the dispute. The legal rules refer to the international legislation that reflects the best practice of international trade. For example, the parties may choose the soft law instruments that are

¹¹⁰ Holloway and others (n3) at 590.

¹¹¹ Tweeddale (n 2) at 241.

¹¹² Luca Brozolo, ‘Mandatory Rules and International Arbitration’ (2012) 23 ARIA at 49.

¹¹³ This is analysed in detail in chapter seven of this thesis where the implementation of the NYC in Saudi Arabia is examined.

¹¹⁴ Reza Mohtashami and Merry, ‘The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. DynCorp’ (2012) 29:4 Journal of International Arbitration at 429-436.

¹¹⁵ Tweeddale (n 2) at 179.

continuously issued by the International Institute for the Unification of Private Law¹¹⁶ (UNIDROIT), or *lex mercatoria*,¹¹⁷ as an applicable law to the merits of the dispute.¹¹⁸ However, this autonomy is respected because the wide adoption of the ML has confirmed this position.¹¹⁹

The only limitation of this choice is related to the mandatory rules of the place of arbitration, particularly those mandatory rules reflecting the public policy of the country where the arbitration takes place.¹²⁰ In case of conflict between the chosen ‘applicable law to the merits’ and the mandatory rules of the law of the place of arbitration, the arbitral tribunal may have to make consideration to the mandatory rules in order to render the award valid and enforceable and to avoid any uncertainty.¹²¹ The task of determining the applicable law to the merits of the dispute is significantly easier in cases where the parties have chosen the law or legal rules. In such a case, the general rule is that the arbitral tribunal must respect the parties’ choice and give effect to the chosen law.

When the parties have not chosen an applicable law, the arbitral tribunal or arbitral institution must select the applicable law. There are two common approaches.¹²² The arbitral tribunal may determine the laws to be applied to the arbitration by using a conflict of laws approach. Alternatively, the arbitral tribunal may choose the laws by direct application of a substantive law. Traditionally, and as stipulated by the ML,¹²³ the arbitral tribunal (in the absence of choice) may apply the law determined by the conflict of law rules “which are considered applicable”. It follows that where national legislation gives the arbitral tribunal this freedom

¹¹⁶ Official website of the UNIDROIT < <http://www.unidroit.org/> > Accessed March 2015.

¹¹⁷ Ole Lando, ‘The *lex mercatoria* in International Commercial Arbitration’ (1985) 34 International Comparative Law Quarterly (ICLQ) at 752-755. Roy Goode defined *lex mercatoria* as “part of transnational commercial law, which consists of unwritten usage, and customs of merchants, so far as satisfying externally set criteria for validation”. This definition excludes written codifications of customs and practice. See Goode and others (n86) at 38.

¹¹⁸ Goode and others (n86) at 664.

¹¹⁹ UNCITRAL Model Law, art 28.1, See also UK Arbitration Act 1996, s46 (2).

¹²⁰ Redfern and others (n4) at 205.

¹²¹ Pierre Mayer, ‘Mandatory Rules of Law in International Arbitration’ (1986) 2:4 Arbitration Internationalat 274-293 at 275.

¹²² Tweeddale (n 2) at 205, Redfern and others (n4) at 235.

¹²³ UNCITRAL ML 1985 as amended in 2006, article 28 (2).

then it does not necessarily need to apply the conflict of laws rules derived from the applicable law, or the law of the seat of the arbitration. The alternative approach is that the arbitral tribunal must apply some conflict of laws rules to determine the applicable law.¹²⁴ In addition, if the *lex arbitri* does not allow the parties to choose the law applicable to the merits of the dispute, then the arbitrator may ignore the choice made by the parties, and refer to the appropriate conflict of laws rules to determine the appropriate applicable law to the merits of the dispute.¹²⁵

The arbitration law of the UAE is silent about the parties' right to choose the applicable law. The Qatari arbitration law provides a mandatory provision that, in the absence of choice, the Qatari law is the applicable law to the merits of the dispute. The arbitration law of the KSA subjects the choice of the applicable law to it not violating the public policy of the Islamic legal tradition. All these issues are discussed in detail in part two of this thesis.

2.3.5 Party autonomy and mandatory rules of law

In international arbitration there may be a number of laws relevant to the arbitration proceedings, as discussed above. Each of these laws may contain mandatory provisions, which could, if neglected by the arbitral tribunal, render the arbitral award invalid and non-enforceable.¹²⁶

The concept of mandatory rules of law is well known in the domain of international commercial law and private international law.¹²⁷ The subject has also become significant to the practice of international arbitration and it is a much-debated topic.¹²⁸ Many academics and practitioners define mandatory rules as those rules of law that cannot be overridden by the parties' agreement.¹²⁹ In principle, any choice of law and rules in the arbitration process might

¹²⁴ Tweeddale (n2) at 205, Giuditta Moss, (108) at 1.

¹²⁵ Tweeddale (n2) at 201.

¹²⁶ *ibid* at 237.

¹²⁷ George Bermann, 'Introduction: Mandatory Rules of Law in International Arbitration' (2007) 18 ARIA 1-27 at 1.

¹²⁸ Journal of American Review of International Arbitration 'ARIA' (2007) volume 18 issues 1-2. These two issues focused on discussing the mandatory rules in international commercial arbitration in a number of articles.

¹²⁹ Catherine Kessedjian, 'Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?' (2007) 18 ARIA 147, George Bermann, 'Introduction: Mandatory Rules of Law in International Arbitration' at 1.

be subject to the mandatory rules of the chosen laws, and importantly, also subject to the mandatory rules and public policy of the seat jurisdiction or the country where the arbitral award is sought recognition and enforcement. There is no consensus, however, as to what extent the arbitral tribunal should take into account the mandatory rules of laws that are imposed by these different laws that may be relevant in a particular case.¹³⁰

However, the most important mandatory rules that should be taken into account are the mandatory rules of the law of the seat jurisdiction.¹³¹ This is to avoid the nullification of the arbitral award by the court of the seat, which might affect the enforceability of the arbitral award in other jurisdictions. An example of the difficulties around the effect of mandatory rules may prove illustrative. If the parties choose a law other than the law of the seat to govern the arbitration agreement, it is accepted that this choice is subject to the mandatory rules of the place of arbitration. Assuming that the *mandatory rules* of the law chosen to govern the arbitration agreement (that are applied by the arbitral tribunal) are in conflict with the mandatory rules of the law of the seat, which legal system should prevail? If the court of the place of arbitration considers this a breach of its own mandatory rules, what is the benefit of making this choice?

The United Nations Commission on International Trade Law (UNCITRAL) recognised this tension in its report prior to the implementation of the ML. It stated that:

“It will be one of the more delicate and complex problems of the preparation of the ML to strike a balance between the interests of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto”.¹³²

Despite the uncertainties around this difficult topic, there is a trend in the arbitration community to distinguish between domestic and international mandatory rules, mirroring the distinction between domestic and international public policy.¹³³ For example, in 2003 the

¹³⁰ Tweeddale (n 2) at 237.

¹³¹ George Bermann, (n127) at 3.

¹³² United Nations document A/CN.9/207, para 21.

¹³³ Pierre Mayer and others ‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19:2 *Arbitration International*, 249 -263.

International Law Association (ILA) Committee on International Commercial Arbitration¹³⁴ issued a report that recommended national courts to differentiate between domestic and international mandatory rules. The ILA Report noted that not every breach of the mandatory rules constituted a public policy ground for refusal. The report stated that “every public policy rule is mandatory, but not every mandatory rule forms part of public policy”.¹³⁵ Therefore, excessive judicial involvement under the justification of protecting the state interests is perceived as being detrimental to the arbitral process and militates against the choice of a particular country as the place for arbitration.

However, it is remarkable that many countries extend the application of the principle of party autonomy and respect the parties’ choice in order to attract a greater number of arbitrations to take place in their jurisdiction. Contrarily, the mandatory procedural rules of Qatar and the UAE have blocked the REFAA in a number of cases.¹³⁶ The national courts in these cases made strict consideration to the natural justice requirements that, in the courts’ views, violate the public policy of their states. These cases are analysed in detail in chapter five and six of this thesis.

2.3.6 The law governing the recognition and enforcement of the arbitral award

Recognition of arbitral awards is a necessary requirement of enforcement, but there are also awards which only need to be recognised and not enforced.¹³⁷ Recognition indicates that the award has been validly accepted by the national courts and has been validly made.¹³⁸ A party may only wish that the arbitral award be recognised in one jurisdiction so as to prevent the

¹³⁴ “The International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, are “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law”. The ILA has consultative status, as an international non-governmental organization, with a number of the United Nations specialized agencies.” For more information visit the official website <<http://www.ila-hq.org>> accessed May 2015.

¹³⁵ Pierre Mayer and others, (n133) at 253.

¹³⁶ *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai* [2003] 503 Dubai Court of Cassation, *Construction Company International v Ministry of Irrigation of the Government of Sudan* [2013] 156/2013 Dubai Court of Cassation, *Party v party* [2012] 64 Qatar Court of Cassation, *Party v party* [2013] 2216 /2013 Qatar Court of First Instance, *Party v party* [2012] Qatar Court of Cassation, Petition No. 64/2012, *ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit.

¹³⁷ Herbert Kronke and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, Netherland 2010) at 149.

¹³⁸ Tweeddale (n 2) at 320.

other party litigating the dispute already decided in the arbitration.¹³⁹ Thus, recognition is often described as a ‘defensive’ challenge that seeks to ensure the finality and validity of the arbitral award. The party who did not succeed in the arbitration may also initially request the court of the seat jurisdiction to annul the arbitral award to prevent the recognition and enforcement in other jurisdictions.¹⁴⁰ Enforcement goes a step further than recognition. It is described as a positive reaction to the claim of whatever the arbitral award has ordered.¹⁴¹ The court that recognises the award as valid and binding upon the parties implies that the arbitral award can be enforced upon the request of the party.¹⁴²

The law that governs the recognition and enforcement may be more than one law, and it depends on the number of states where the arbitral award is seeking to be recognised and enforced. One of the core benefits of arbitration is that the REFAA is regulated by an international and domestic legal framework of law. It is common to find that the national arbitration laws provide for similar provisions regulating the REFAA to those listed in Article V of the NYC. This is particularly the case in the states that adopted the ML as national arbitration law in which Articles 34-36 of the ML modelled the provisions listed in Article V of the NYC. Even in the states that have not adopted the ML as their national arbitration law it is common to find that they provide for similar provisions to those listed in Article V of the NYC. However, there are also some national arbitration laws that provide for different grounds for refusal than those listed in Article V of the NYC. These are particularly relevant to the case study of the GCC states as they have adopted the NYC, and some national arbitration laws of the GCC states provide for different grounds for refusal than those listed in Article V of the NYC, as will be shown in part two of this thesis.

In the states of Qatar and UAE the NYC is implemented in the domestic legal systems by a dedicated legal instrument called the NYC implementing decree.¹⁴³ This law implements the

¹³⁹ Ibid.

¹⁴⁰ Redfern and others (n2) at 627.

¹⁴¹ Ibid 322, Tannock, ‘Judging the Effectiveness of Arbitration through the Assessment of Compliance with Enforcement of International Arbitration Awards’ (2005) 21:1 *Arbitration International* at 83.

¹⁴² Ibid 10-12.

¹⁴³ Qatar legislative decree No (29) for 2003 on implementing the provisions of the NYC, UAE Federal legislative decree no (43) for 2006 on implementing the provisions of the NYC.

provisions of the NYC in their entirety without any alterations. However, there is case law evidence in which the national courts of these two states have refused to refer to the NYC implementing decree. Further, in these cases the courts have refused the REFAA applying pre-existing national arbitration law. This situation creates a sphere of confusion and uncertainty about the applicability of the NYC to the REFAA in these two states.¹⁴⁴ This uncertainty is analysed in detail in chapter five and six of this thesis.

2.4 State parties' obligation to recognise and enforce the arbitral award

The central obligation imposed upon NYC contracting states is to recognise and enforce the arbitral awards that come under its scope.¹⁴⁵ The NYC covers two types of arbitral awards: foreign and non-domestic arbitral awards.¹⁴⁶ A foreign arbitral award is an award issued in one state which seeks recognition and enforcement in another state.¹⁴⁷ All other elements, such as the nature of the dispute, nationalities of the parties, domicile, or subject matter of the dispute, are irrelevant to determine whether the award is foreign or not.¹⁴⁸ It is essential that the forum state and the state of enforcement are different. The only criticism that can be directed to the use of the term 'foreign' is that, in theory, the NYC also applies to the recognition and enforcement of arbitral awards that govern domestic disputes.¹⁴⁹ Although the NYC is primarily intended to facilitate arbitration in international commercial disputes, it does not include any explicit indication that the arbitral awards or the dispute should be international in nature.

The second category of awards covered by the NYC is the non-domestic arbitral awards.¹⁵⁰ A non-domestic award is defined as an arbitral award issued in one country which seeks

¹⁴⁴ Reza Mohtashami and Merry, 'The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. DynCorp' (2012) 29:4 *Journal of International Arbitration* at 429-436, Habib Al Mulla and Gordon Blanke, 'Recent Ruling of Dubai Court of Cassation on Enforcement of Foreign Arbitral Awards: Back to Square One It Is' [2013] *Kluwer Arbitration Blog*.

¹⁴⁵ NYC, article III.

¹⁴⁶ NYC, Article I (1).

¹⁴⁷ Berg (n20) at 12.

¹⁴⁸ Alfons Claudia, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation* at 27.

¹⁴⁹ Berg (n20) at 17.

¹⁵⁰ NYC Article I (1).

recognition and enforcement in the same country where it was issued.¹⁵¹ The NYC grants the state parties the right to decide which awards are non-domestic according to its arbitration laws. The ML stipulated the situation where the award should be deemed as international or non-domestic.¹⁵² This, of course, has achieved a wide degree of harmonisation in this respect and particularly between the states that adopted ML as a national arbitration law.

However, the arbitration laws of the states of Qatar and the UAE do not differentiate between domestic and non-domestic awards, and subjects both of them to the same provisions that generally violate the provisions of the NYC. In addition, the enforcement of foreign arbitral awards in these two states is subject to similar provisions to the enforcement of foreign judgments. As Qatar and the UAE are NYC state parties, the provisions of the NYC should be applicable to the recognition and enforcement of non-domestic and foreign arbitral awards. Unfortunately, this was not the case as will be seen in chapter five and six of this thesis. In addition, foreign arbitral awards governed by *foreign arbitration laws* received different treatment in the KSA and are not subject to the KSA arbitration law when it comes to recognition and enforcement in the KSA. This is because of the different views of the Islamic legal tradition regarding the concept of ‘foreign’ arbitral awards to those established by the NYC.

Article III of the NYC obliges the national courts to recognise and enforce the foreign and non-domestic arbitral awards as binding, and to enforce them in accordance with their national rules of procedure subject to the provisions of Article V.¹⁵³ The NYC does not govern the procedural rules of recognition and enforcement, and leaves this question to the national procedural rules of the relevant state. Thus, there is a clear difference between the enforcement provisions that are included within the texts of the NYC (Article V), and the procedural rules of enforcement that leave it to the enforcing states.

Some national courts controversially invoke the national procedural rules and refuse the REFAA.¹⁵⁴ For example, in one case the UAE courts did not differentiate between the

¹⁵¹ Berg (n20) at 28.

¹⁵² UNCITRAL Model Law Article 1(3).

¹⁵³ NYC, article III.

¹⁵⁴ Victor Reynes, ‘Forum Non Conveniens: A Hidden Ground to Refuse Enforcement of Arbitral Awards in the United States’ (2013) 30 :2 Journal of International Arbitration 165-175.

‘national rules of procedures’ that come with the text of Article III of the NYC and the enforcement provisions limited to those mentioned in Article V of the NYC.¹⁵⁵ The UAE courts in this case referred to the national rules of procedures (Article III) as a justification to refuse REFAA. The court in this case referred to the procedural rules concerning the court’s jurisdiction to hear the merits of the dispute in the court litigation as a justification to add additional grounds for refusal, that is, *forum non-conveniens*. This case is discussed in detail in chapter six of this thesis in relation to the implementation of the NYC in the UAE.

2.4.1 The grounds to set aside the award or refuse its enforcement under the NYC

Article V of the NYC constitutes the heart and essence of the NYC,¹⁵⁶ since it seeks to limit and unify the reasons upon which national courts may refuse to recognise and enforce arbitral awards. Most national arbitration laws and the ML (34-36) list the grounds to set aside the award or refuse its enforcement in a similar way to those in Article V of the NYC. Article V (1) of the NYC provides for five grounds for refusal that have to be proven by the defendant (award debtor), and they are as follows: a) the incapacity of a party or invalidity of an arbitration agreement, b) the arbitration proceedings have a lack of due process, c) the arbitral award exceeds the scope of the arbitration agreement, d) the arbitral procedure and composition of the arbitral tribunal was not conducted in accordance with the parties agreement, e) if the arbitral award has not yet become binding on the parties, or has been set aside or suspended by the court of the country of the place of arbitration (seat jurisdiction). Moreover, Article V (2) of the NYC provides two additional grounds for refusal which may be raised by the court on its own motion: a) the subject matter of the dispute cannot be referred to arbitration, b) the arbitral award violates the state’s public policy.

The opening line of Article V (1) of the NYC states that:

“Recognition and enforcement of the award *may* be refused at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority”.

¹⁵⁵ *Construction Company International v Ministry of Irrigation of the Government of Sudan* [2013] 156/2013 Dubai Court of Cassation. [2013] 40 Dubai Court of Appeal, [2012] 489 Court of First Instance, Published in BCDR Journal of International Arbitration (2014) volume 1 issue 1 at 137-141.

¹⁵⁶ Peter Sanders, 'The History of the New York Convention' [1998] 9 ICCA Congress Series, at 13.

The level of discretion granted to the national courts under the use of the verb *may* in refusing the REFAA in the presence of one or more of the grounds for refusal listed in Article V has been interpreted differently in practice.¹⁵⁷ An example of this different interpretation that has caused difficulty in practice is that there are some national courts which enforce the annulled arbitral award by referring to this discretion, despite the presence of Article V (1)(e). Article V (1)(e) lists the setting aside of the arbitral award by the court of the seat jurisdiction as a ground to refuse enforcement in other countries.¹⁵⁸ Some national courts ignore the annulment decision that was issued by the court of the seat and enforce the annulled arbitral award. This approach leaves open for debate the question of whether it is possible under the scheme of the NYC to recognise and enforce arbitral awards that were annulled by the court of the seat. This is discussed in depth in the next chapter.

2.4.2 Key features of the grounds for refusal

Throughout the thesis, a reference is made to the phrase ‘NYC features’. There are three main features that might reflect the spirit and purpose of the NYC: Pro-enforcement bias, narrow interpretation of the grounds for refusal, and exclusive grounds for refusal. These three features are widely accepted by many national courts and authorships on the NYC, and also appear in the preparatory work of the NYC and many other UNCITRAL works.¹⁵⁹ The GCC national courts in their decisions on the NYC seem to give less weight to these features. This may be due to the GCC judiciaries’ lack of knowledge on the NYC, as proven by the judge interviews and case law analysis in part two of this thesis.¹⁶⁰

One of the key features in interpreting any international convention is that it should be interpreted in light of its object and purpose.¹⁶¹ The purpose of the NYC is to facilitate the

¹⁵⁷ Jonathan Hill, ‘The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958’ (2015) *Oxford Journal of Legal Studies* 1-30.

¹⁵⁸ This problem is examined in detail in the next chapter.

¹⁵⁹ Berg (n20) at 264, Redfern and others (n4) at 638-639, Tweeddale (n2) at 412, International council for commercial arbitration, ‘ICCA’S Guide to the interpretation of the 1958 New York Convention’ (2011) *A Handbook For Judges*, ICCA ISBN 978-90-817251-1-8, available at www.arbitration-icca.org at 14, ML 1985 as amended 2006, page 34-35, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration at 133.

¹⁶⁰ This is proved empirically by interviews with judges and case law analysis in part two of this thesis. See chapter nine of this thesis.

¹⁶¹ Vienna Convention on the Law of Treaties (adopted in 22 My 1969, entered into force 27 January 1980) United Nation, Articles (31) (32).

REFAA.¹⁶² It also aims to “unify the standards by which arbitral awards are enforced in the signatory countries”.¹⁶³ One of the leading commentators on the NYC has stated that:

“As far as the grounds for refusal for enforcement of the award as enumerated in Article V are concerned, it means that they have to be construed narrowly”.¹⁶⁴

This may indicate that the interpretation to be followed by the courts is that the provisions of the NYC, particularly Article V, are to be interpreted narrowly, which means that these bars to enforcement should play a role in limited and circumscribed circumstances.¹⁶⁵ Most of the national courts have accepted this feature, particularly in developed arbitration jurisdictions. In addition, the trend in modern arbitration law is to limit the grounds under which national courts can review arbitral awards to those listed in Article V of the NYC. The arbitral award is not open to review on its merit before the national courts.¹⁶⁶ The reason for the adoption of this trend is the desire of the international community to promote the finality of arbitral awards and to activate the principle of party autonomy in choosing arbitration rather than litigation in national courts. Not every arbitration law has taken this relaxed approach to the review of arbitral awards; for example, the arbitration law of Qatar controversially allowed a review of the merits of an arbitral award and allowed an appeal to the arbitral award similar to the court decision.¹⁶⁷ In the KSA and UAE, the grounds for setting aside arbitral awards are different from the grounds to refuse their enforcement, and neither is consistent with Article V of the NYC. All these issues are discussed in detail in part two of the thesis.

¹⁶² International council for commercial arbitration, ‘ICCA’S Guide to the interpretation of the 1958 New York Convention’ (2011) A Handbook For Judges, ICCA ISBN 978-90-817251-1-8 ,available at www.arbitration-icca.org at 14, see also *Government of the Kaliningrad region (Russia) v Republic of Lithuania* [2010]09/19535 Paris Court of Appeal.

¹⁶³*Fritz Scherk v. Alberto-Culver Co* (1974) Supreme Court of the United States, published in Yearbook Commercial Arbitration I (1976) pp. 203-204

¹⁶⁴Berg (n20) at 267-268.

¹⁶⁵ International council for commercial arbitration, ‘ICCA’S Guide to the interpretation of the 1958 New York Convention’ (2011), UNCITRAL, ‘Digest of Case Law on the Model Law on International Commercial Arbitration’ (2012) at 139 and 174, Sales No. E.12.V.9.

¹⁶⁶Berg (n20) at 265, UNCITRAL ML 1985 as amended in 2006, page 34.

¹⁶⁷ Qatar arbitration law 1990, article 205 and 206.

2.4.3 Pro-enforcement bias

Article VII (1) of the NYC states that:

“The provisions of the present Convention *shall* not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed *by the law or the treaties* of the country where such award is sought to be relied upon”.

This provision is sometimes referred to as the “more favourable right provision”.¹⁶⁸ It provides that the party seeking REFAA can rely on any other international treaty ratified by the state, or even the national laws of the state, if they provide more liberal room to enforce the arbitral award than the provisions established by the NYC. This article caused a great deal of debate in practice, as it does not provide further explanation about the extent of this liberality.¹⁶⁹ This provision is not included in the ML. However, some state parties to the NYC do not list some of the grounds for refusal that come under Article V of the NYC in their national arbitration laws. Therefore, the national courts of these states interpret Article VII (1) of the NYC in a way that allows the courts to enforce an arbitral award in the presence of one of those grounds listed in Article V of the NYC.

This situation has caused much difficulty in practice. For example, some national courts such as France and the United States as will discuss in next chapter relied on this article and enforced arbitral awards that had been annulled by the court of the seat and neglected Article V (1)(e). An alternative view is that Article VII (1) should be retained in its present form and, further, that it will become increasingly important as national courts seek to escape from the restrictions of Article V of the NYC.¹⁷⁰ In addition, the courts of Bahrain and Kuwait have provided a critical approach when enforcing a foreign arbitral award based on the domestic

¹⁶⁸ Kenneth Davis, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 Texas International Law Journal 43, Berg (n20) at 81.

¹⁶⁹ Ibid.

¹⁷⁰ Gaillard and others (n10) at 270.

law (more favourable law) without even making reference to Article VII (1) of the NYC. These cases are analysed in detail in chapter nine, where the familiarity of the GCC judicial jurisprudence on the NYC is examined.¹⁷¹

2.5 Summary

This chapter has demonstrated how the legal framework governing international commercial arbitration interacts with a complex matrix of laws. This legal framework is incorporated within the texts of the NYC and ML and most of the modern national arbitration laws. However, the provisions of the NYC are not interpreted and applied in a harmonious way by different national courts. In some instances these differences have led to a different understanding of the legal framework that regulates the REFAA as established by the NYC, followed by the ML and most national arbitration laws. The next chapter examines how these differences in some instances have resulted in legal disharmony in the implementation of the NYC that may weaken the efficacy of the NYC as an essential treaty that regulates the REFAA in contemporary arbitration practices.

¹⁷¹ *Party v party* [2012] 1470 Bahrain High Civil Court- Chamber 3, *Saudi Establishment v. Bahraini Limited Liability Company* (2012) Appeal No. 746 for 2010, published in Year Book for Commercial Arbitration YBCA, Vol XXXVIII for 2013, page 574. See also *party v. party* [2012] Appeal No. 101 for 2010 Bahrain Court of Cassation, *Party v. party* [1988] Appeal No.78 for 1988, Kuwaiti Court of Cassation, see also *Party v Party* [1987] Appeal No.166 for 1987, Kuwaiti Court of Cassation, *Party v party* [1997] Appeal No.80 for 1997, Kuwaiti Court of Cassation, *Party v. party* [2004] Appeal No.1202 for 2004, Kuwaiti Court of Cassation.

Chapter Three: The Problem of Different Judicial Interpretations of the NYC Provisions

3.1 Introduction

The previous chapter showed how the provisions of the New York Convention¹ (NYC) were designed to interact with different national laws such as the law chosen by the parties to govern the arbitration agreement, or the law chosen by the parties to govern the arbitration process, or the law of the place of arbitration, or the law of the countries where recognition and enforcement is sought. This means that these different national laws might open the door to local standards up to a certain extent, which is not a problem in itself. However, in some instances the local standards utilised in the interpretation of this interaction by national courts may be, in direct conflict with the international standards that regulate international arbitration. These conflicts might be detrimental to the development of international commercial arbitration and might affect the efficiency of the well-established legal framework that regulates the recognition and enforcement of foreign arbitral awards (REFAA) as established by the NYC and which are followed by the Model Law on International Commercial Arbitration² (ML) and most national arbitration laws.

This chapter examines one example to illustrate this problem. The example relates to the emerging notion of the recognition and enforcement of arbitral awards that have been annulled by the country of origin. Some national courts, such as the French courts, have enforced an annulled arbitral award under the scheme of the NYC and suggested that the arbitral award is not anchored to any legal system, including the country of the place of arbitration. The United States (US) courts have also in a number of cases enforced annulled arbitral awards and suggested that the annulled arbitral award was enforceable in the US unless its enforcement violates the international public policy of the US. These two approaches suggested by the French and US courts are different to what is suggested by the seat theory in the sense that the law of the seat governs the arbitration process and certain functions granted to the law of the seat pursuant to the provisions of Article V (1) of the NYC. It also suggest differences in interpretation of Article V (1)(e) of the NYC, which

¹ “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739.”

² “UNCITRAL Model Law on international Commercial Arbitration 1985 as amended in 2006. General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006) articles 34-36.”

provides that the enforcing courts *may* refuse to enforce arbitral awards that have been set aside by the court of their country of origin.

To explore these uncertain areas in the implementation of the NYC this chapter is divided into three parts. Part one examines the legal basis under which some national courts recognise and enforce arbitral awards that have been set aside by the country of origin under the scheme of the NYC. The second part discusses the legal effects and difficulties caused by the recognition and enforcement of the arbitral award that have been annulled by the court of the seat under the scheme of the NYC. The third part discusses the proposal to amend the provisions of Article V (1)(e) of the NYC that would limit the legal disharmony in the implementation of the NYC. This part also discusses the possible incorporation of an interpretation criterion within the arbitration laws of the NYC state parties that could direct the national courts to take into account the ‘international standards’. Such a solution would also emphasise the importance of the uniform application by national courts in their decisions on the REFAA.

3.2 The importance of harmonised judicial interpretations of the NYC provisions

The general argument that this chapter tries to defend is that the divergent judicial interpretation of NYC provisions in some instances threatens the efficiency of the legal framework regulating the REFAA worldwide. However, it is accepted that not even core pieces of domestic legislation in a large European country or in the US with a great number of courts are interpreted consistently in all details by all the courts within those systems. Hence, why do divergent judicial interpretations of the NYC provisions matter?

In the words of Redfern and Hunter, in an “ideal world the provisions of the NYC would be interpreted in the same way by courts everywhere. Sadly, this does not happen. There are different court decisions on the NYC”.³ Goode also noted that although the state parties to NYC are bound by the text of the NYC, the interpretation of the text has given rise to considerable difficulties, and it has not been interpreted in a uniform manner across the jurisdictions.⁴ Berg also noted that “the significance of the NYC for international commercial

³ Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn OUP, Oxford 2009) at 642.

⁴ Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (1st edn, OUP, Oxford 2007) at 633. Goode in his book wrote a chapter titled “The obstacles to achieving and maintaining uniformity”. This chapter deals generally with the issue of interpreting the uniform law that emerged from international sources such as conventions or model laws, at 701.

arbitration makes it even more important that the Convention is interpreted uniformly by the courts”.⁵ In addition, UNCITRAL considers the problem of different interpretations of the NYC provisions as one of the contemporary problems facing the implementation of the NYC and is currently working on a proposal to enhance the harmonious interpretation and application of the NYC.⁶

3.3 Different positions in relation to the enforcement of arbitral awards annulled in the country of origin⁷

Article V (1)(e) of the NYC states that:

“Recognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:”

“(e) The award has not yet become binding, on the parties, or has been *set aside* or suspended by a *competent authority* of the country in which, or under the law of which, that award was made.”

⁵ Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International, Netherlands 1981) at 1. See also Albert Berg, ‘Striving for Uniform Interpretation’, *Enforcing Arbitration Awards under the New York Convention Experience and Prospects* (United Nations Publication 1998) <Sales No. E.99.V.2>.

⁶ See UNCITRAL, forty-seventh session July (2014) document A/69/17 at 32.

⁷ Jonathan Hill, ‘The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958’ (2015) *Oxford Journal of Legal Studies* 1-30, Ulrich Mayer, ‘The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention’ (1998) 3 *Uniform Law Review* at 583-599, Albert Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ (2014) 29:2 *ICSID Review* 263-288, Christopher Koch, ‘The Enforcement of Awards Annulled in their Place of Origin’ (2009) 26:2 *Journal of International Arbitration* 267-292, Albert Berg, ‘Enforcement of Annulled Awards’ (1998) 9 *The ICC International Court of Arbitration Bulletin* at 15, Jan Paulsson, ‘Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment’ (1998) 9: *The ICC International Court of Arbitration Bulletin*, at 14 also published in *Asia Pacific Law Review* 6:2 (1998) 1-28, Hamid Gharavi, *International Effectiveness of the Annulment of Arbitral Award* (1st edn, Kluwer Law International 2002). Albert Berg, ‘Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam’ (2010) 27:2 *Journal of International Arbitration* at 179, Georgios Petrochilos, ‘Enforcing Awards Annulled in their State of Origin under the New York Convention’ (1999) 48:4 *International and Comparative Law Quarterly* at 856-888. Keren Tweeddale Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP, Oxford 2007) at 440, Redfern and others (n 3) at 649, Emmanuel Gaillard, ‘The Enforcement of Awards Set Aside in the Country of Origin’ (1999) 14:1 *ICSID Review* at 16-45.

Enforcement of an arbitral award that has been annulled by the court of the seat constitutes a much-debated problem and many different views and opinions have emerged and are still developing.⁸ It is crucial to ask whether it is possible under the NYC to enforce an arbitral award that has been annulled by the court of the seat. This question is not just important in the context of the NYC, but also in the broader context of international arbitration. The first, and a widely held opinion, is that an arbitral award annulled by the court of the country of origin does not have any legal validity and thus cannot be enforced in other countries.⁹ According to the above-quoted provision, if the arbitral award is set aside by the court of the country of origin, it might not be enforced in other countries. There are two conditions that can be derived from Article V (1)(e): the award has first been annulled by the ‘competent authority’ and second under the law of which the award was made (arbitration law of the seat). It is a generally accepted principle that the courts of the country where the arbitration takes place have exclusive authority to annul the arbitral award.¹⁰ This is understandable from the wording of Article V (1)(e) and was discussed in detail in the previous chapter.¹¹

However, there are different opinions and court decisions in relation to the extent of this provision, as annulled arbitral awards by the country of origin have also been enforced on the basis of the NYC. The core of the different opinions concerns two vital arguments. The first is the legal effect of the annulled arbitral award and whether it still has legal validity to be enforced in other countries. The second is the textual argument related to whether it is possible to enforce an annulled arbitral award according to the discretionary power derived from the use of the verb *may* in the opening line of Article V (1) of the NYC.

3.3.1 The theoretical debate

Some commentators suggest that the enforcement of annulled arbitral awards is possible despite Article V (1)(e).¹² The supporters of this opinion argue that the annulled arbitral award could be enforced in other courts because of the text of Article V (1)(e) of the NYC.

⁸ Ibid, “This approach was developed by the French scholar Goldman and is continually adopted by the French courts”. Cited in Berg, (n 7) at 283.

⁹ *ibid* at 269.

¹⁰ Gharavi, (n7) at 12.

¹¹ Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ (n 7) at 266.

¹² Paulsson, (n7) at 1, Mayer, (n7), at 588, Julian Lew and others, *Comparative international commercial arbitration* (1st edn, Kluwer Law International, Netherlands 2003) Para 26-68.

The use of the verb *may* instead of *shall* in the opening line of Article V of the NYC indicates a level of discretion granted to the national courts. Therefore, even if the arbitral award was annulled by the court of the seat, other countries may enforce the annulled arbitral award by referring to the discretion granted to the court under the use of the verb *may*. However, the rationale of this opinion lies in the fact that the national courts should allow international arbitration to become truly international.¹³ Paulsson, a leading scholar supporting this vision argued that if the annulment was based on “local standards annulment” then the arbitral award should be enforced in other countries, while if the arbitral award was annulled for “international standards annulment” then it may not be enforced in another country.¹⁴ The difficult question, therefore, is what is the criteria to differentiate between national and international standards when it comes to annulments of arbitral awards?

There is no precise answer to this question. In terms of the examples provided by the supporters of this position, local annulment standards refer to the situation whereby the arbitral award has been annulled because of reasons that are not internationally recognised. For example, some arbitration laws allow for an appeal of the arbitral award on its merits, and thus the arbitral award annulled on its merits according to this position can be enforced in other courts within the scheme of the NYC. Another example is that if the arbitral award has been annulled for domestic public policy reasons, it can be enforced in other countries.¹⁵ This view goes further and argues that this is also allowed under the scheme of the NYC because of the use of the verb *may* in the opening line of Article V of the NYC and Article VII (1) of the NYC.

The first possible criticism of this view is that the reasoning might not be legally correct.¹⁶ If the arbitral award annulled by the court of the place of arbitration no longer exists, how can a court in a different country enforce an arbitral award that does not exist or has been declared illegal? Opponents argue that the question of validity of the arbitral award is not exclusively limited to the court of the place of arbitration, and have reasoned that “as long as the courts of country X have properly established their jurisdiction, they may conclude that a contract or a

¹³ Jan Paulsson, ‘Delocalisation of international commercial arbitration: when and why it matters’ (1983) 32:1 ICLQ 53-61 at 55.

¹⁴ Paulsson, (n7) at 25.

¹⁵ Ibid at 27.

¹⁶ Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ (n7) at 279.

marriage or an adoption is valid and the same for the arbitral award”.¹⁷ This example however, may not be helpful, as it does not differentiate between the jurisdiction of the court of the seat and the jurisdiction of the other countries within the scope of the NYC. Although any national courts could establish jurisdiction over the arbitral award, this jurisdiction is not without limits. The question of whether the arbitral award is valid or not is of exclusive competence granted to the courts of the place of arbitration pursuant to Article V (1)(e).¹⁸ If this was not the case, what is the benefit of having an international convention such as the NYC that regulates the jurisdiction of the national courts over the arbitral award? The enforcing court has the jurisdiction to enforce or not enforce the arbitral award, but the question of the validity of the arbitral award is limitedly granted to the court of the seat.

This is because Article V (1)(e) considers the ‘competent court’ to annul the arbitral award as the court of the seat of the place of arbitration. If this is not the case then the party would try to enforce the annulled arbitral award from country to country until he/she found a court that accepted the enforcement of the annulled arbitral award. The party would refrain from doing this if the annulled award was not open to enforcement in any other state. This might have a negative impact on the effectiveness of arbitration as a preferred dispute resolution mechanism in international trade. This seems to be the philosophy behind the presence of Article V (1)(e) of the NYC.

In addition, one can also criticise this view on the basis that neither the NYC nor the preparatory works provide for such classifications of “international and national annulments standards”.¹⁹ Article V of the NYC has set out the minimum conditions that should be met by the arbitral award for its enforcement to be granted by national courts. One of these conditions is that if the court of the seat has annulled the arbitral award, other countries *may* not enforce the arbitral award. Therefore, the enforcing courts under the scheme of the NYC are not required to examine whether the annulments were based on national or international annulment standards.

¹⁷ Paulsson,(n7) at 11.

¹⁸ Gharavi, (n7) at 11-15.

¹⁹ UNCITRAL, ‘UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Excerpt, guide on article VII’ (2013) Forty-sixth session, document No. A/CN.9/786. See page 14, para40.

In addition, how can the national court in the enforcement states differentiate between international and national annulment standards? For example, even if the arbitral award was annulled due to an invalid arbitration agreement or procedural irregularities (which might be considered in this categorisation as an international annulment standard), the annulment might be correlated with reasons of domestic public policy. Therefore, what is considered an invalid arbitration agreement in one country might not be in another country. This means that the invalid arbitration agreement or procedural irregularities might also come within the meaning of national annulment standards. The differentiations between national and international annulment standards might suggest another tier of different interpretations to what constitutes international and national annulment standards. However, the rationale of this view (held by the supporters of the enforcement of annulled arbitral awards) may be based on the use of the verb *may* in the opening line of Article V of the NYC.

3.3.2 The discretionary power under the verb *may* in Article V of the NYC

The use of the verb *may* in the opening line of Article V of the NYC caused much debate in practice.²⁰ The debate is centred around the question of up to what extent the national courts may exercise their discretion under the verb *may* and enforce an arbitral award despite the presence of one or more of the grounds for refusal listed in Article V of the NYC. This even led one commentator to argue that it might not be helpful to understand the judicial exercise of discretion under the verb *may* as it is better to understand the means of discretion in different legal systems.²¹ However, in order to clearly understand the nature of this debate it is important at the outset of this discussion to understand the meaning of discretionary power in the legal doctrinal sense.

In the context of the doctrinal debates about the nature of law and judicial practices, Ronald Dworkin highlighted three different ways in which the word ‘discretion’ is conventionally used.²² First, the judge might have a wide degree of discretionary power when the legal rules provide for open concept or open-text legal rules. For example, Article V (1)(b) of the NYC provides that the arbitral award may be refused enforcement if one of the parties is not given

²⁰ Hill (n7) at 1-30, Mayer, (n7), at 588.

²¹ Ibid at 3.

²² Ronald Dworkin, *Taking Rights Seriously* (1st edn, Harvard University Press, United States 1977) at 31-39, 68-71.

proper notice or a fair opportunity to present his case. The NYC does not explain what is the proper notice or what is the fair opportunity. In such open-text legal rules the judge has a wide range of discretion to evaluate the facts of the case in order to examine whether there is a lack of due process or not. However, section (e) of Article V (1) of the NYC is not suggesting open-text legal rules, such as the rest of the grounds for refusal. It expressly mentions that the setting aside of the arbitral award in the country of origin is a ground to refuse its enforcement in another country. There is no grey area in the wording of section (e) to evaluate whether or not the arbitral award has been annulled by the court of the seat.

The second way in which the word ‘discretion’ is conventionally used is that the judge might have a wide degree of discretion if the articulation of the legal rule is not providing for binding standards.²³ This is exactly relevant to the use of the verb *may* in the opening line of Article V of the NYC, which results in different interpretations among the national courts to the extent of exercising discretionary power to enforce an arbitral award despite the presence of one of the grounds for refusal listed in Article V of the NYC. The effect of these differences is not necessarily a problem in itself, as will be shown in the following discussion; however, in some instances it has led to uncertainty surrounding the question of up to what extent the national courts might enforce an arbitral award despite the presence of one of the grounds for refusal? The problem might get worse if that discretion is interpreted in a way that supports the local standards superseding the international standards that regulate the REFAA. For example, in some cases where an annulled arbitral award has been enforced in a French court, the court suggests that the international arbitral award is not anchored to any legal system, including the country of the place of arbitration.²⁴ The court also argues that this is allowed under the discretionary power granted to the national courts under the use of the verb *may* in the opening line of Article V of the NYC. The US courts also differentiate between national and international annulment standards in their court decisions that have enforced annulled arbitral awards.²⁵ Importantly, both courts justify the application of these local norms under the discretion granted by the use of the verb *may*.

²³ Ibid.

²⁴ *Hilmarton Ltd v Omnium de Valorisation* [1994] case no. 92-15.137 French Court of Cassation, published in XX YBCA (1995) at 663, *Société Egyptian General Petroleum Corporation v Société National Gas Company* [2011] 10/16525 Paris Court of Appeal.

²⁵ *Corporacion Mexicana de Mantenimiento Integral v. PEMEX* [2013] 962 F Supp 2d 642 (Southern District, New York, 2013).

The third category of the conventional uses of discretionary power is related to the situation where the decision of the court is not subject to review by another court. This refers to the situation where a case reaches the highest court of the state, where the judge might have wider discretion than the judges in lower courts. This category seems to have no relation to the sort of discretion derived from the use of the verb *may* in the opening line of Article V of the NYC and thus it might not be relevant to our discussion.

Throughout the analysis in this chapter reference will be made to the two different ways in which the word ‘discretion’ is conventionally used (open-text legal rules and non-mandatory language) as they are relevant to the wording of Article V (1)(e) of the NYC that is under examination in this part of the thesis. Having discussed the meaning of discretion in the legal doctrinal sense, we will now narrow this discussion to understand how the discretionary power derived from the verb *may* is interpreted in practice.

3.3.3 Different use of the discretionary powers of national courts in the enforcement context

This section seeks to understand how the discretionary power is interpreted in the practices of REFAA. On the one hand, the use of the term *only if* in the opening line of Article V indicates that neglecting or relying upon other grounds for refusal than those listed in Article V of the NYC constitutes a violation of the NYC.²⁶ On the other hand, the use of the verb *may* indicates that the national court is not obliged to refuse enforcement in the presence of one of the grounds for refusal listed in Article V such as the arbitral award being annulled by the court of the seat. This is because Article V of the NYC uses the term *may* rather than *shall*. The language is permissive, not mandatory. The question to be raised is how is this discretion applied in the practice of REFAA?

A leading commentator on the NYC noted that: “As far as the grounds for refusal for enforcement of the award as enumerated in Article V are concerned, it means that they have to *be construed narrowly*”.²⁷ Another leading commentator stated that: “even if one of the grounds listed which would justify refusal of enforcement is proven by the award debtor, the court has a *residual discretion* to enforce the award”.²⁸ Although this opinion is supported by

²⁶ Berg, (n 5) at 265.

²⁷ Ibid 267 and 268.

²⁸ Julian Lew and others, *Comparative international commercial arbitration* (1st edn, Kluwer Law International, Netherlands 2003) Para 26-68.

a literal reading of Article V of the NYC, it is potentially misleading.²⁹ Some national courts seem sympathetic to this opinion. The problem with this opinion is that the use of discretion to enforce an arbitral award, despite the presence of one of the grounds for refusal listed in Article V of the NYC, led *in some instances* to a different understanding to the international norms that regulate the REFAA. The typical example that illustrates this is the use of discretion to enforce an arbitral award that was annulled by the country of origin. For example, the French Supreme Court in the well-known case of *Hilmarton*³⁰ enforced an arbitral award that had been annulled in the country of origin (Switzerland) and established that:

“Lastly, the award rendered in Switzerland is an *international award* which is *not integrated in the legal system* of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy”.³¹

It might be difficult to accept the local standards suggested by the French courts in *Hilmarton* case under the legal framework regulating international arbitration as developed by the NYC and ML. The rationale adopted in the *Hilmarton* case was that the international arbitral award was not linked to the legal system of the place of arbitration. This argument found its basis in the delocalisation theory discussed in the previous chapter.³² In the hypothesis of delocalisation theory, if the international arbitral award is not anchored to any legal system, including the country of the place of arbitration, how can justice be achieved? Indeed, in what legal basis can the national courts of the place of arbitration support the process of arbitration? The arbitration parties may need to request a court to assist in the appointment of the arbitral tribunal or order interim measures of protection and many other functions discussed in chapter two.³³

²⁹ Hill (n7) at 3.

³⁰ *Hilmarton Ltd v Omnium de Valorisation* [1994] case no. 92-15.137 French Court of Cassation, published in XX YBCA (1995) at 663.

³¹ *Ibid* at 665, Para 5.

³² Goldman and others, *International Commercial Arbitration* (Kluwer Law International, Netherlands 1999) at 635, Redfern and others (n 3) at 188, Tweeddale (n 7) at 246, Goode and others, (4) at 649, Jan Paulsson, (n13) at 53-61.

³³ Tweeddale (n 7) at 250.

Another argument put forward recently referred to the discretion to enforce an arbitral award despite the presence of one of the grounds of refusal listed in Article V of the NYC “is discretionary only in a formal sense; in substance it depends on the application of the framework of rules and principles that are provided in certain legal systems”.³⁴ This argument may reflect the hidden factor that fuels the recognition and enforcement of arbitral awards annulled by the country of origin as seen in *Hilmarton* case. It also supports the argument that it is local rather than international standards what fuels the recognition and enforcement of annulled arbitral awards.

However, the extent of discretion granted to the national courts under the use of the verb *may* has caused different interpretations in practice. This discretion has received at least three different interpretations, as follows:

- **The refusal of enforcement in the presence of one of the grounds for refusal**

Notwithstanding the use of the verb *may* in the opening line of Article V, some national courts refused to grant recognition and enforcement if they found that one or more grounds for refusal exist.³⁵ This is the prevailing interpretation that is supported by the words *only if* that are also found in the introductory sentence of Article V and also because of the exclusivity and narrow interpretation features discussed in the previous chapter.³⁶ For example, in the case of *Diag Human SE v. The Czech Republic* [2014],³⁷ the England and Wales High Court affirmed that:

“Under the Convention the grounds for refusing enforcement are restricted and *constructed narrowly*, enforcement may be refused *only if* one of the listed grounds, which are *exclusive*”.³⁸

³⁴ Ibid at 3.

³⁵ International council for commercial arbitration, ‘ICCA’S Guide to the interpretation of the 1958 New York Convention’ (2011) A Handbook For Judges, ICCA ISBN 978-90-817251-1-8, available at www.arbitration-icca.org> accessed at 5 August 2014, at 83, Hill (n7) at 5.

³⁶ Albert Berg, ‘New York Convention of 1958: Refusals of Enforcement’ (2007) 18 ICC International Court of Arbitration Bulletin, issue No. 2, at 2, Albert Berg, ‘Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam’ (2010) 27:2 Journal of International Arbitration 179-198.

³⁷ *Diag Human SE v. The Czech Republic* [2014] EWHC 1639 (Comm)

³⁸ Ibid, para 12.

Again, the UK Supreme Court in *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs*³⁹ affirmed that it could not enforce arbitral awards by referring to the discretionary power granted by the word *may* in the opening line of Article V of the NYC.⁴⁰ In this case, the court found that the arbitration agreement was not valid under Article V (1)(a) of the NYC and thus refused to enforce the arbitral award that was recognised and enforced in France (seat jurisdiction). Although the *Dallah* case presents a conflict in terms of court decisions on the NYC, the situation is different from the analysis presented in this section. The arbitral award in the *Dallah* case has been recognised and enforced in France (seat jurisdiction) and refused enforcement in England.⁴¹ Likewise, the Swiss⁴² and Dutch⁴³ courts have asserted that the grounds for resisting enforcement are limited to those listed in Article V. The Egyptian Courts of Cassation in a case ruled that:

“Although the Act number 27 for 1994 which was amended by Act number 8 for 2000 has been allowed to challenge the arbitration awards, the Act has *exclusively limited* the grounds for refusal to those mentioned in article 53 which is based on the NYC”.⁴⁴

Many leading commentators on the NYC noted that: “As far as the grounds for refusal for enforcement of the award as enumerated in Article V are concerned, it means that they have to *be construed narrowly*”.⁴⁵ This approach is supported by the majority of national courts, as it reflects the spirit and features of the NYC, that is, to facilitate the REFAA.⁴⁶

³⁹*Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*[2010] UKSC 46

⁴⁰*Ibid*, page 32-33, para 67-69.

⁴¹*Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46, [2011] Paris Court of Appeal. 09/28533, see also Albert Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ (n7) at 270.

⁴²*Party v party* [2010] Switzerland tribunal federal 4A_233/2010.

⁴³*Societed’Etudes et de Commerce SA v Weyl Beef Products BV* (2001) XXIV Yearbook Commercial Arbitration, page 827

⁴⁴*Party v party* [2007] 824/933 Egypt court of cassation.

⁴⁵Albert Berg, (n 5) at 267- 68.

⁴⁶ *ibid* at 264, Redfern and others (n 3)at 638-639, Tweeddale (n 7) at 412, see also International council for commercial arbitration, ‘ICCA’S Guide to the interpretation of the 1958 New York Convention’ (2011), UNCITRAL, ‘Digest of Case Law on the Model Law on International Commercial Arbitration’ (2012) at 139 and 174, Sales No. E.12.V.9.

- **The enforcement of an arbitral award despite the presence of one of the grounds for refusal**

The literal reading of Article V of the NYC supports the enforcement of arbitral awards despite the presence of one of the grounds for refusal. This is because of the use of permissive language, that is, the verb *may* in the opening line of Article V of the NYC. Some national courts grant the REFAA even if one or more grounds for refusal exist.⁴⁷ This is a normal result of the presence of permissive language, that is, the verb *may* in the opening line of Article V of the NYC, which logically indicates that the national courts have the general discretion to enforce or refuse enforcement. For example, the Supreme Court in Australia confirmed the power of discretion to grant enforcement, even if one or more grounds of refusal exist.⁴⁸ The domestic law that regulates the REFAA in Australia has omitted the words *only if* that appear in the opening paragraph of Article V of the NYC.⁴⁹ In *Europcar Italia S.p.A. v. Alba Tours International Inc.*,⁵⁰ the Canadian courts held the same position. However, the courts in these cases did not identify the extent of this discretion.

It might be accepted, according to the literal reading of Article V of the NYC, to enforce an arbitral award despite the presence of one of the grounds for refusal listed in Article V of the NYC. However, some commentators suggests that the enforcement of an arbitral award despite the presence of one of the grounds of refusal should not be the case with all of the grounds for refusal listed in Article V of the NYC, and in some instances the refusal *is mandatory*.⁵¹ This view is particularly relevant to Article V (1)(e) of the NYC, which

⁴⁷*IPOC International Growth Fund Limited v. LV Finance Group Limited* (2008) Brazil Court of Appeal published in YBCA XXXIII (2008) at 408-432.

⁴⁸*Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd* [1993] Supreme Court of Queensland, Published in YBCA XX (1995) pp. 628–650. Original source 118 ALR 655.

⁴⁹ In 2010 a new arbitration Act was enacted in Australia, which has added the words ‘only if’ to the text of the law. See Garnett and Nottage, ‘The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia’ (2011) 1: 7 *Asian International Arbitration Journal* 7, page 3.

⁵⁰*Europcar Italia S.p.A. v. Alba Tours International Inc*[1997] Ontario Court of Justice, Canada, General Division, Published in CLOUT case 366, issue No. 33. See also *Robert E. Schreter v. GasmacInc*[1992] CLOUT case No. 30 Issue No.2

⁵¹ Hill (n7) at 6, Albert Berg, ‘Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam’ (n7) at 196.

provides to refuse enforcement if the court of the country of origin has annulled the arbitral award.⁵²

This view might be partially accepted under the doctrinal means of discretionary power discussed above (open-text legal rules). This is because section (e) of Article V does not provide for open-text legal rules, as is the case with the rest of the grounds for refusal. For example, regardless of the discretion derived from the use of the verb *may*, the enforcing courts still have another form of discretion available to evaluate whether the public policy, lack of due process, and procedural irregularities exist or not, and whether they are sufficient as a ground to refuse enforcement or not. By contrast, section (e) of Article V (1) of the NYC is not used as an open-text legal rule similar to the rest of the grounds for refusal. It is clearly mentioned that an annulment decision issued by the court of the seat is a ground to refuse enforcement in other jurisdictions. Therefore, there is no discretion under the wording of section (e) of Article V of the NYC.

However, the use of the verb *may* in the opening line of Article V of the NYC also suggests a level of discretion within the conventional means of discretion (non-mandatory legal rule: the verb *may*) to enforce the arbitral award despite it having been set aside by the court of the seat. Nevertheless, Berg, who is one of the leading commentators on the NYC, argues that “the current version of the [NYC] offers no possibility to recognise and enforce an arbitral award *that has been set aside* in the country of origin”.⁵³ This opinion is difficult to accept within the current formulation of Article V of the NYC. It might be partially accepted if one reads section (e) of Article V separately, and applies the doctrinal means of discretion in the sense that section (e) does not provide for an open-text legal rule, as might be the case with the rest of the grounds for refusal. In the following the third category of the different interpretations of the verb *may* under Article V of the NYC will be examined.

- **The refusal of enforcement if the ground for refusal affects the outcome of the arbitral award**

There is also another argument and case law evidence that refers to the discretion under the use of the verb *may* to enforce the arbitral award if the alleged ground for refusal is minor or

⁵² Ibid.

⁵³ Albert Berg, ‘Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam’ (n7) at 196.

does not affect the outcome of the arbitral award.⁵⁴ For example, some national courts make a balance between the discretionary power and the extent that the ground for refusal affects the outcome of the arbitral award. In the case of *Paklito Investments Ltd. v. Klockner East Asia Ltd.*,⁵⁵ a Hong Kong court refused to enforce a foreign arbitral award on the basis that a party was given no chance to examine the expert reports relied upon by the arbitral tribunal, which, in effect, prevented the party from presenting its case. Therefore, the party's right to comment on the report of the tribunal-appointed expert had been held to be a basic right by the Hong Kong court.⁵⁶ It was held by the court that a party should have the opportunity to comment on all facts and factual issues which may be relevant for the arbitral award. However, the Hong Kong court ruled that: "one factor that could justify making use of the court's pro-enforcement discretion was the fact that the violation of the relevant rule did not affect the outcome of the case, i.e. that the additional material to be submitted in the arbitral proceedings would not have changed the arbitral tribunal's view".⁵⁷ Although this approach might sound reasonable, there is a trend in the practice of the REFAA that not every breach of the due process is a ground for refusal under the NYC. Some national courts differentiate between the technical and substantial breaches of due process, and enforce the arbitral award if there is a technical breach that does not amount to a substantial breach. This is explored in more depth in chapter six of this thesis where the Dubai courts show a broad interpretation of the lack of due process as a ground for refusal.

In summary, despite the presence of different interpretations of the verb *may* regarding the level of discretion granted to national courts, it seems that these differences do not necessarily in every case lead to a different understanding of the legal framework that regulates the REFAA or a different understanding of the well-established international standards governing arbitration. However, one could also argue in favour of having a harmonious understanding of the level of discretion granted to the national courts under the use of the verb *may* to enforce or refuse to enforce the arbitral award in the presence of one of the grounds of refusal listed in Article V of the NYC. It might be difficult to find a uniform means of discretionary power, given the fact that every legal system is operating in a different legal tradition, and thus the

⁵⁴ Albert Berg, (n 5) at 268.

⁵⁵ *Paklito Investments Ltd. v. Klockner East Asia Ltd* [1993] MP 2219 for 1991 Supreme Court of Hong Kong.

⁵⁶ *ibid*

⁵⁷ *ibid*

discretion is exercised differently. On these lines, Hill argues that the discretion provided under the use of the verb *may* must be interpreted by referring to international standards and doctrines rather than relying solely on the court's views of the exercise of that discretion.⁵⁸

However, the problem in the use of the discretion that derives from the verb *may* led in some instances to a problematic understanding of the operation of the NYC in 'hard cases'⁵⁹ such as the recognition and enforcement of annulled arbitral awards. Nevertheless, Berg has argued that no single court has used discretionary powers under the use of the verb *may* to enforce an annulled arbitral award.⁶⁰ In his opinion, the enforcement occurs because Article VII (1) of the NYC provides a justification to the national courts to refer to their national arbitration laws and to act more liberally than the provisions of Article V of the NYC.⁶¹ This argument might not be completely precise, as suggested by the judicial practices that have enforced annulled arbitral awards under the scheme of the NYC. However, the literal reading of Article VII (1) of the NYC also provides room for the national courts of the NYC state parties to enforce an arbitral award that has been annulled by the country of origin despite the presence of Article V (1)(e) of the NYC.

3.3.4 The influence of the pro-enforcement bias

Article VII (1) of the NYC was introduced in the previous chapter (section 2.4.3). This provision is limited to those countries where the arbitration law, or any other treaties they have ratified, provide more liberal grounds for refusal than those listed in Article V of the NYC. In the context of this discussion it refers to the states whose arbitration laws do not list the setting aside of an arbitral award by the country of origin as a ground to refuse enforcement. For example, the French arbitration law and the US Federal Arbitration Act (FAA) do not list the setting aside of the award in the country of origin as a ground to refuse enforcement, and thus the parties may ask the courts of France and US to enforce the arbitral award according to the French arbitration law and the US FAA as a more favourable law of

⁵⁸ Hill (n7) at 8.

⁵⁹ Ibid at 3.

⁶⁰ Albert Berg, 'Should the Setting Aside of the Arbitral Award be abolished?' (n7) at 278.

⁶¹ Ibid.

enforcement.⁶²

For example, in *Chromalloy Aeroservices v Arab Republic of Egypt*,⁶³ the Paris Court of Appeal and the US courts enforced a foreign arbitral award that was previously annulled by the court of the seat, that is, the Egyptian Court of Appeal.⁶⁴ Both the French and US courts made reference to Article VII (1) of the NYC and applied the same arguments discussed above (more favourable law for enforcement). The US court noted that:

“While under Article V, recognition and enforcement of an award *may* be refused if it has been set aside under the *lex arbitri*, Article VII of the New York Convention stated that “no party *shall* be deprived of the rights it would have to avail itself of an arbitral award in the manner and to the extent allowed by the law ... of the country where such award is sought to be relied upon”.⁶⁵

Thus, the US court in this interpretation confirmed the permissive language of the verb *may* and referred to its discretion to enforce the annulled arbitral award. The court also confirmed the mandatory language of the verb *shall* of Article VII (1) of the NYC used to ensure the party had the right to invoke the more favourable national law of the country where the enforcement was sought. The above-quoted interpretation of the US court contrasted with Berg’s argument that there is no single court that has used the discretionary power under the verb *may* to enforce an annulled arbitral award.⁶⁶ However, the French court⁶⁷ affirmed this

⁶² France Arbitration law 2011, article (1525) and article (1520), US Federal Arbitration Act (1994), section (10). The US FAA takes an arguable position. Gary Born notes that: “there is considerable ‘overlap’ among the various sources of U.S. law affecting international arbitration agreements and awards. Arbitral awards and agreements falling under the New York Convention are of course governed by both the Convention and the second chapter of the FAA (which implements the Convention). However, these awards are also ordinarily governed by the first, ‘domestic’ chapter of the FAA, at least to the extent it is not in conflict with the Convention ... It is not always clear whether precedents developed under the domestic FAA are applicable under the Act’s second chapter.” See Gary Born, *International commercial arbitration in the United States: commentary and materials* (Kluwer Law and Taxation Publishers, California 1994) at 32.

⁶³ *Chromalloy Aeroservices v Arab Republic of Egypt* [1997] 95/23025 Paris Court of Appeal, *Chromalloy Aeroservices v. The Arab Republic of Egypt* [1996] Case no. 94-2339 U.S. District Court, District of Columbia United States.

⁶⁴ *Chromalloy Aeroservices v. The Arab Republic of Egypt* [1995] Cairo Court of Appeal, published in 24 YBCA (1999) at 265–68.

⁶⁵ *Chromalloy Aeroservices v. The Arab Republic of Egypt* [1996] Case no. 94-2339 U.S. District Court, District of Columbia United States.

⁶⁶ Albert Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ (n7) at 278.

position in many other cases while the US courts have changed their position and attacked the rationale provided in the *Chromalloy* case by relying on Article VII (1) of the NYC.⁶⁸

Although the US court in a number of cases⁶⁹ refused to enforce the arbitral award that was annulled by the country of origin by relying on Article VII (1) of the NYC, the court also suggested that the arbitral award annulled by the court of origin *may* be enforced in the US under the scheme of the NYC *only if* the annulment reason was because the arbitral award violated the domestic public policy of the seat jurisdiction.⁷⁰ It seems that the US court gave effect to the concept of international and national annulment standards that were discussed earlier. For example, in the case of *Corporacion Mexicana de Mantenimiento Integral v. Pemex*⁷¹ dated 2013 the US courts enforced the arbitral award, notwithstanding the annulment decision issued by the court of the seat (Mexican court). The US court in this case justified the enforcement on the basis that the annulment decision issued by the Mexican court was based on the fact that the arbitral award violated the basic notion of justice of the domestic legal system of Mexico, which does not violate the international public policy of the US.⁷²

This position is also critical and has been adopted recently in a case dated 2014.⁷³ Under this concept it has become well established in the US courts that annulled arbitral awards are not

⁶⁷The last published decision of the French courts on Article VII (1) of the NYC is found in *Société Egyptian General Petroleum Corporation v Société National Gas Company* [2011] 10/16525 Paris Court of Appeal.

⁶⁸*Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. & Chevron Corp, Inc; Baker Marine (Nig.) Ltd. v. Danos and Curole Marine Contractors, Inc* [1999] 191 F.3d 194 2d Cir, Published in 24 YBCA (1999) at 909–14, *Termorio S.A.E.S.P. v. Electranta S.P* [2006] 241 F. Supp. 2d 87 (D.D.C. 2006) published in XXXI YBCA (2006) 1457–73. In the case of *Baker Marine* the US court notes that: “We reject Baker Marine’s argument. It is sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated *under the laws* of Nigeria... Furthermore, as a *practical matter*, mechanical application of domestic arbitral law to foreign awards under the NYC *would seriously undermine finality and regularly produce conflicting judgments*. If a party whose arbitration award has been issued in its favour can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary *with enforcement actions from country to country until a court is found, if any, which grants the enforcement*”. See YBCA (1999) at 911.

⁶⁹ *Ibid.*

⁷⁰ Hill (n7) at 25.

⁷¹ *Corporacion Mexicana de Mantenimiento Integral v. PEMEX* [2013] 962 F Supp 2d 642 (Southern District, New York, 2013).

⁷² *Ibid*, page 31.

⁷³*Thai-Lao Lignite (Thailand) Co.LTD and Hongsa Lignite (Lao PDR) v. Government of the Lao Peoples Democratic Republic* [2014] 10-Cv-5256 U.S. District Court, Southern District of New York, page 13.

enforceable in the US under Article VII (1) of the NYC (more favourable law of enforcement). This argument is in line with what suggested earlier by Gary Born when he noted that: ‘there is considerable ‘overlap’ among the various sources of U.S. law affecting international arbitration agreements and awards. Arbitral awards and agreements falling under the NYC are of course governed by both the NYC and the second chapter of the FAA (which implements the Convention). However, these awards are also ordinarily governed by the first, ‘domestic’ chapter of the FAA, at least to the extent it is not in conflict with the NYC ... It is not always clear whether precedents developed under the domestic FAA are applicable under the Act's second chapter.⁷⁴ It seems that the US courts use the discretionary power that derives from the verb ‘may’, at the opening line of Article V, to examine the reasons for annulment, and whether they are domestic or international annulment standards.⁷⁵

3.3.5 Ambiguity in some of the provisions of the NYC

Article V of the NYC sets out the grounds under which a party may seek to challenge an award at the recognition and enforcement stage. However, the NYC is not the only way in which a party may seek to enforce an award. Article VII of the NYC recognises that there may be other Treaties or domestic laws which provide the parties with other avenues in which to enforce the award. Article VII is sometimes referred to as the “more favourable right provision”.⁷⁶ It provides that the party seeking REFAA can rely on any other international treaty ratified by the state, or even the national laws of the state, if they provide more liberal room to enforce the arbitral award than the provisions established by the NYC. However, some state parties to the NYC do not list some of the grounds for refusal that come under Article V of the NYC in their national arbitration laws. Therefore, some national courts of these states interpret Article VII (1) of the NYC in a way that allows the courts to enforce an arbitral award in the presence of one of those grounds listed in Article V of the NYC. For example, France and the United States relied on this Article VII and enforced arbitral awards that had been annulled by the court of the seat.

⁷⁴ Gary Born, *International commercial arbitration in the United States: commentary and materials* (Kluwer Law and Taxation Publishers, California 1994) at 32.

⁷⁵ *Ibid*, Christopher Koch, (n7) at 284.

⁷⁶ Kenneth Davis, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Texas International Law Journal* 43, Albert Berg (n 5) at 81.

However, it is generally accepted that the purpose of the NYC is to promote arbitration and facilitate the REFAA. Although the objectives of the NYC are clear, some of its language is ambiguous. One ambiguity in particular has provoked intense debate.⁷⁷ Article V of the NYC lists the grounds in which recognition and enforcement may be refused. Subsection (1)(e) considers the annulment decision issued by the court of the seat as a ground for refusal in other countries. For example, suppose that the national arbitration law of the country where the award creditor seeks enforcement does not list the annulment decision issued by the court of seat as a ground for refusal. There would be tension about whether the enforcing court should respect the annulment decision issued by the court of the seat, and refuse enforcement according to Article V (1)(e), or whether it should apply its own national arbitration law and grant enforcement of the award under Article VII (1).

These two rules – Articles VII (1), V (1) (e) – have given rise to two different schools of thought when it comes to the enforcement of arbitration awards which have been set aside by the court of the seat. The first is the classic approach based on Article V (1)(e), which allows the enforcement court not to enforce a foreign award that has been annulled by the court of the seat.⁷⁸ The second is based on Article VII (1) of the NYC, also known as the more favourable rule clause, which is based on the literal wording of Article VII (1), and is also based on the argument of differentiations between international and local annulment standards, as discussed earlier.⁷⁹

It might be generally accepted that the system set up by the NYC allows the enforcement court not to enforce an award which has been annulled in its country of origin. This is because Article V incorporates the annulment decision issued by the court of the seat as a ground for refusal. Indeed, by allowing the enforcement court to refuse enforcement of such an award, Article V (1)(e) creates a presumption that annulled awards are not enforceable foreign awards. However, the presumption is rebuttable because the language used in the opening line of Article V (1) is permissive, not mandatory: “Recognition and Enforcement *may* be refused....”. The NYC thus opens the possibility for the national courts of the country where enforcement is sought to practise their discretion and enforce the arbitral award that has been

⁷⁷ Christopher Koch, (n7) at 268, Davis, Kenneth, (n76) at 43-87.

⁷⁸ Christopher Koch, (n7) at 287, Albert Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ at 285.

⁷⁹ Jan Paulsson, ‘Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment’ (1998) 9: The ICC International Court of Arbitration Bulletin, at 14 also published in Asia Pacific Law Review 6:2 (1998) 1-28.

annulled by the court of the seat. In addition, the underlying idea of Article VII (1) of the NYC is to make possible the enforcement of foreign awards in the greatest number of cases possible. Therefore, Article VII might be seen as being in favour of facilitating the REFAA within the policy of the NYC pro-enforcement bias.

Nevertheless, some thought might be given to the legal position suggested in Article VII (1) of the NYC. Relying on Article VII (1) in omitting one of the grounds for refusal listed in Article V of the NYC might raise a concern about the international commercial arbitration justice system that sought to be protected by the provisions of Article V by listing a number of international grounds for refusal. Assume that the national arbitrational law of the enforcing state does not list the invalidity of the arbitration agreement as a ground to refuse REFAA, and the invalidity of the arbitration agreement was obvious perhaps due to the parties' incapacity or illegality reasons. In terms of the basic notion of justice, it might be doubtful to enforce such a foreign award according to Article VII of the NYC. However favourable to enforcement Article VII of the NYC may be, it does not enhance the establishment of a consistent legal regime governing the REFAA. Exclusive applicability of the NYC to the REFAA would increase the degree of certainty as to which awards are enforceable and which are not. As it now stands, those awards which do not comply with the NYC have an uncertain status. The exclusive applicability of the NYC could have put greater pressure on practice to conform to the NYC conditions.⁸⁰

The French and US approaches discussed above are logically coherent and conform to the letter of the NYC. For example, in the *Chromalloy* case, the US and French courts relied upon Article VII (1) of the NYC. Reading this article, and taking into consideration the use of the verb *shall*, one cannot ignore the logic of the courts' decisions despite the arbitral award being annulled in the country of origin. Article VII (1) provides room for the party to ask the court to enforce the arbitral award that was *either annulled or not* according to the more favourable domestic law. The French arbitration law and the US FAA did not provide that setting aside the arbitral award by the country of place of arbitration was a ground to refuse enforcement. In this sense, one could argue that the texts and provisions of the NYC already allow the enforcement of arbitral awards according to the more favourable law of enforcement.

⁸⁰ Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (n5) at 83.

However, for all its intellectual coherence, the local standard suggested by the French and US approach under Article VII of the NYC may not correspond to the spirit of the NYC. It would involve creating a national set of enforcement standards for foreign awards that, in effect, bypasses the NYC, namely, the international harmonisation of the rules pertaining to the enforcement of arbitral awards. What would the world of international award enforcement look like, if every country of the over 150 countries that have adhered to the NYC, defined its own, ostensibly more favourable, standards to evaluate the validity of a foreign award? Enforcement would not become simpler but more complex because the international coordination effect created by a uniform set of rules would be lost.

Moreover, local standard enforcement also runs against party autonomy.⁸¹ When parties directly or indirectly choose a seat of arbitration, this choice implies an agreement to submit the arbitration to the *lex arbitri* and the supervisory powers of the judicial system at the seat. Local standard enforcement ignores this choice, making it completely unpredictable whether an award may be seen to be valid or not. The enforcement of an annulled arbitral award obviously eliminates the steering effect of a “primary” jurisdiction to which the NYC gives the power to determine the international validity of an award. This is obviously not to the advantage of anyone, not even necessarily to the party benefiting from the enforcement of an annulled award. The seat jurisdiction is a direct or indirect choice of the parties. If parties have chosen a country that is not arbitration-friendly, enforcement courts are not there to rescue such a choice.⁸²

In addition, Article VII (1) of the NYC suggests a different understanding to the debatable position that national law could prevail over international law.⁸³ It is accepted that there is a different understanding of the implementation of international law in domestic legal systems (dualism and monism theories), and it is out of the scope of this thesis to examine this in detail. It seems that Article VII (1) of the NYC is biased in favour of the position that national law could prevail over international law. It also suggests tension between the words *only if* in the opening line of Article V and Article VII (1) of the NYC.⁸⁴

⁸¹ Christopher Koch, (n7) at 288.

⁸² Albert Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ (n 7) at 286.

⁸³ Goode and others, (n4) at 680.

⁸⁴ Kenneth Davis, (n76) at 44.

One of the logical consequences of the literal reading of Article V and Article VII (1) of the NYC is that they may suggest confusion or be misleading. This is because the opening line of Article V provides that the grounds for refusal *are limited* to those listed in Article V of the NYC by using the term *only if*. At the same time, Article VII (1) of the NYC provides authority to the state parties to refer to their national laws and act more liberally than the provisions of Article V of the NYC. Therefore, if the national arbitration law does not list one of the grounds for refusal listed in Article V of the NYC, then the national court is free to refer to its own national arbitration law and enforce the arbitral award despite the presence of one of the grounds for refusal listed in Article V of the NYC.

On the one hand, reading Article VII (1) of the NYC separately as a justification to enforce an annulled arbitral award might violate the spirit of the NYC.⁸⁵ Neither the text nor the legislative history of the NYC allows the Convention to be interpreted as permitting a court to enforce an award that has been set aside in the country of origin. Article V provides the minimum grounds for recognition and enforcement that should be met by the arbitral award in order for it to be enforced. It is argued that Article V of the NYC leaves no room for doubt that the drafter of the NYC aimed to put in place the minimum conditions for setting aside the award or refusing its enforcement.⁸⁶ The states have the discretion to act more liberally than the NYC under Article VII (1), but not to ignore or omit one of the minimum grounds listed in Article V of the NYC.⁸⁷ Therefore, Article VII (1) of the NYC might be interpreted within the limitation of the word *only if* that appears in the opening line of Article V of the NYC.

On the other hand, there might be a valid opposite argument in this context. Article VII (1) of the NYC does not state that the state party is restricted to not omitting or ignoring one of the grounds listed in Article V of the NYC. It allows the state to refer to the more liberal domestic law without any further explanation. In addition, Article VII (1) should be retained in its present form and, further, it will become increasingly important as national courts seek to escape from the restrictions of Article V of the NYC.⁸⁸ However, it might be useful for

⁸⁵ Christopher Koch, (n7) at 287, Albert Berg, ‘Should the Setting Aside of the Arbitral Award be abolished?’ (n7) at 286.

⁸⁶ Albert Berg, (n5) at 264.

⁸⁷ Albert Berg, ‘Enforcement of Annulled Awards’ (n7) at 15.

⁸⁸ Emmanuel Gaillard and others, *International Commercial Arbitration* ((Kluwer Law International, Netherlands 1999) at at 270.

UNCITRAL to issue guidance material that clarifies the level of liberality that the national courts are allowed to practise under Article VII (1) of the NYC. It is recommended that this guidance may explain the extent of this liberality to not ignore the presence of one of the grounds for refusal listed in Article V of the NYC, particularly section (e). The level of liberality might be within the narrow interpretations of the grounds for refusal and pro-enforcement bias, but does not involve omitting one of the grounds of refusal listed in Article V of the NYC.

3.4 Proposal for reform

The verb *may* in the opening line of Article V and Article VII (1) of the NYC, make room for the local standards to develop, but this development cannot be without any limits, since unlimited development in this sense might affect the structural integrity of arbitration, and might be detrimental to the development of international commercial arbitration.

Having discussed the means of discretionary power in a doctrinal legal sense (section 3.3.2), one could argue that the literal reading of section (e) of Article V (1) of the NYC (notwithstanding the use of the verb *may* in the opening line of Article V) does not suggest an open-text legal rule that would permit the courts to exercise their discretion, such as the rest of the grounds for refusal. It might be accepted that whenever the legal rules provide for open-text legal rules, such as the lack of due process or public policy as grounds for refusal, the national court would have the discretion to evaluate the alleged breach of public policy or due process, and whether or not they are sufficient to be a ground for refusal.

This level of discretion might not be relevant to the wording of section (e) of Article V (1) of the NYC. This is because the wording of this section does not provide for an open-text legal rule or grey area such as the rest of the grounds for refusal. It expressly considers that the annulment of an arbitral award by the court of the seat is a ground to refuse its enforcement in other countries. Therefore, the enforcing court is only required to investigate whether or not the arbitral award has been annulled by the court of the seat, which basically has to be proven by the defendant /award debtor.

In fact, as discussed earlier (section 3.3.2) the use of discretion under the use of the verb *may* does not necessarily in every case lead to a different understanding to the international norms that regulate international arbitration. The problem of discretion that derives from the use of

the verb *may*, as described by one commentator, provides for a problematic understanding of the operation of the NYC in ‘hard cases’ such as the recognition and enforcement of an annulled arbitral award.⁸⁹

3.4.1 Make section (e) of Article V of the NYC mandatory by amending the ML

This thesis suggests that Article V (1)(e) of the NYC, which provides the possibility to refuse the recognition and enforcement of an arbitral award that was annulled by the country of origin, should be separated from the rest of the grounds for refusal. It might be reasonable to incorporate section (e) of Article V (1) of the NYC under mandatory language that obliges the national courts to refuse enforcement if the arbitral award has been annulled by the court of the seat. This is to avoid the use of discretion to enforce the annulled arbitral award, which has caused tension concerning the international standards that regulate the REFAA, as discussed in detail previously.

In fact, the need to modernise some texts and provisions of the NYC, particularly Article V, is not a novel argument, and many other academics and practitioners share similar views.⁹⁰ For example, in an event titled ‘The Celebration of the 50th Anniversary of the NYC’, a new draft of the ‘new NYC’ was suggested and presented.⁹¹ Berg is one of the leading scholars who drafted this proposal, and he argued that the draft was based on current practices of international commercial arbitration.⁹² Importantly, he also noted that:

⁸⁹ Hill, (n7) at 3.

⁹⁰ VV Veeder, ‘Is there a Need to Revise the New York Convention?’ (2010) Oxford Journals, 1:2 Journal of International Dispute Settlement. 499–506, Emmanuel Gaillard, ‘The Urgency of Not Revising the New York Convention’ (2008) 14 ICCA Congress Series. pp 689, Werner Melis, ‘Considering the advisability of preparing an additional Convention, complementary to the New York Convention’ (1999) papers presented in New York on 10 June 1998 to celebrate the 40th anniversary of the Convention, United Nations Publications, ISBN 92-1-133609-0 pp 44. Gerold Herrmann, ‘The 1958 New York Convention Its Objectives and Its Future’ (1998) 9 ICCA Congress Series at 15, Albert Berg, ‘The Application of the New York Convention by the Courts’ (1998) 9 ICCA Congress Series at 34, Carolyn Lamm, ‘Comment: Comments on the Proposal to Amend the New York Convention’ (2009) 14 ICCA Congress Series 697.

⁹¹ Albert Berg, ‘ICCA Conference Held in Dublin Coincided with a Momentous Event, Namely the 50th Anniversary of the Signing of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 10 June 1958’ (2009) 14 ICCA Congress series 649-711.

⁹² Albert Berg, ‘New York Convention v Hypothetical Convention: A closer look at the proposed new New York Convention’ (2008) 3:3 Global Arbitration Review 14-21.

“When preparing the draft and explanatory note, I started to realise that the NYC is really ageing and that sooner or later it needed to be modernised, also because courts have become *more critical* of arbitration”.⁹³

Gaillard also noted that some of the NYC provisions are at times ‘aged’ and a number of its provisions could be modernised.⁹⁴ Thus, it might not be wrong to amend some provisions of Article V of the NYC after 57 years of the existence of the NYC.

The important question is how this modernisation would occur in a consistent way and whether having a new NYC as suggested by Berg is beneficial. However, reaching agreement between the states regarding the new NYC is not an easy task compared with that achieved for the current NYC.⁹⁵ There would be no benefit in the idea, and such revisions would establish additional hurdles, particularly those correlated with the process of revision.⁹⁶ Replacing the NYC with another new convention would “add words for the sake of more words, and reform for the sake only of reform”, which would lead to a two-tiered NYC.⁹⁷

It is believed that soft law instruments are the best method to use to embark on the harmonisation of any hard law (national arbitration law).⁹⁸ Therefore, the thesis suggests separating Article 36 (1)(a)(v) of the ML (corresponding to section (e) of Article V (1) of the NYC) from the rest of the grounds for refusal, and incorporating it under the mandatory legal rules that would oblige the national courts to refuse enforcement of an arbitral award that has been annulled by the court of the seat. By amending the provisions of Article 36 (1)(a)(v) of the ML it would first inspire the state parties of the NYC to incorporate such amendments into their national arbitration laws. Second, it would inspire the national courts of the NYC state parties to not use the discretionary power derived from the verb *may* in the opening line of Article V (1) of the NYC, to the extent that it results in ignorance of the annulment decision

⁹³ Ibid at 21.

⁹⁴ Gaillard, (n90) at 690.

⁹⁵ Carolyn B. Lamm, (n90) at 697.

⁹⁶ Gaillard, (n90) at 689.

⁹⁷ VV Veeder, (n90) at 499–506.

⁹⁸ Gerold Herrmann, ‘The Role of UNCITRAL’ in Marise Cremona Ian Fletcher, Loukas Mistelis, *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) at 33.

issued by the court of the seat (Article V (1)(e)). In so doing, one could implicitly renew Article V (1)(e) of the NYC without risking the stable balance of the NYC by issuing another ‘new NYC’. Reaching agreement between the states regarding the new NYC is not an easy task compared with the current NYC achievement.

It is understandable that the ML is not mandatory and would not oblige states such as France and the US to refuse enforcement of an annulled arbitral award even if such an amendment had been done. The recommendation that may be forwarded to these two jurisdictions is to limit the expanded approach of local standards in their court decisions on the REFAA. The local standards might be accepted in so far as they are in favour of advancing the purpose of the NYC, that is, to facilitate the REFAA.

In the following another proposal will be discussed that also might be influential to limit the legal disharmony in the implementation of the NYC and which might be detrimental to the development of international commercial arbitration.

3.4.2 The absence of an interpretation criterion within the text of the NYC

It is increasingly remarked upon in contemporary practice of international commercial law treaty making to provide interpretation criteria within the texts of these instruments, in aid of harmonious interpretation and uniform application by national courts or relevant entities.⁹⁹ In most cases, the interpretation clause refers to ‘international standards’ and ‘uniformity applications’, which were designed to encourage national courts to ensure that, as far as possible, their decisions support the advantages that a harmonious interpretation of these instruments represents: to fulfil the commercial needs of their users. However, this sort of interpretation clause was not included in the NYC, which might be considered as one of its gaps. State parties are therefore not contractually bound to provide an interpretation that takes into account the advantage of uniform application. This gap might have occurred because of the relative age of the NYC, with the treaty being drafted at a time when the problem of

⁹⁹Sandeep Gopalan, ‘New Trends in the Making of International Commercial Law’ (2004) 23 *Journal of Law and Commerce* 117, Goode and others, (n4) at 118, see also for example, United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) article 7, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) article 5, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”) article 2, United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) article 14, United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the “Hamburg Rules”) article 3, United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) article 5, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) article 7.

divergent interpretations and applications of international commercial law treaties was not well recognised.

For example, there is no legal obligation for the national court to take into account the advantage of uniform application of the NYC in their decisions on the REFAA. Another angle of this problem might be related to the fact that most state parties of the NYC embodied its provisions either directly or indirectly into domestic laws.¹⁰⁰ Indeed, the REFAA occurred at the domestic level through national arbitration laws, in addition to the states' commitment at the international level to recognise and enforce foreign arbitral awards. This caused a legal gap in relation to the interpretative approach to be followed by the national courts. On the one hand, the judge is more likely to refer to the international rules of interpretation that are classified for international treaties if he/she has to directly interpret the NYC, and is more likely to follow the domestic rules of interpretation (local standards) if he/she has to interpret the domestic law that regulates the REFAA. In this case, the judge might lose sight of the international origin of this domestic law.¹⁰¹ On the other hand, there is no legal obligation that would oblige the national court to interpret the domestic law that regulates the REFAA in the context of the NYC or even oblige the national courts to take into account the advantage of uniform application of the NYC.

This argument is also supported, for example, by a UNCITRAL survey among 108 states that monitored the rules of interpretation used by the national courts to interpret the provisions of the NYC.¹⁰² In this survey, UNCITRAL examined the rules of interpretation that the national courts apply to interpret the terms and provisions of the NYC. A questionnaire was circulated to the state parties to the NYC and replies were received from 108 states out of 152 states. One of the survey questions was as follows:

¹⁰⁰See the "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" UNCITRAL document (2008) A/CN.9/656, page 8 Para 2.

¹⁰¹ Frederic Gelin and Fabien Gelin, 'From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives' (2013) published in *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (1stedn Huntington, New York 2013) 261, see also Jacob WF Sundberg, *A Uniform Interpretation of Uniform Law* (Almqvist and Wiksell 1966) at 224, Schreuer C.H., 'The Interpretation of Treaties by Domestic Courts' (1971) 45 *The British Yearbook of International Law*, at 255-257, IM Sinclair, 'The Principles of Treaty Interpretation and Their Application by the English Courts' (1963) 12 *International and Comparative Law Quarterly*, at 530-543

¹⁰² UNCITRAL document No. A/CN.9/656 for 2008, page 11 Para 35-40.

“Generally, what rules of interpretation would the courts apply in interpreting the Convention and/or the implementing legislation?”¹⁰³

The answers differed from country to country. Some states referred to the literal meaning of the provisions of the NYC, others referred to the preparatory work of the NYC, and others referred to the purpose and object of the Convention. By contrast, a wide number of states referred to the domestic rules of interpretation other than those utilised for the interpretation of international treaties.¹⁰⁴

3.4.3 The incorporation of the interpretation criterion in arbitration laws

In 2006 UNCITRAL added an interpretation clause to the ML to encourage states to add this clause to their arbitration law.¹⁰⁵ The interpretation clause states that: “In the interpretation of this Law, regard is to be had to its international origin and to the *need to promote uniformity in its application* and the observance of good faith”.¹⁰⁶ The explanatory note of this amendment emphasises that this article (interpretation clause) is designed to facilitate interpretation by reference to its ‘international origin’ and aims to promote a ‘uniform application’ of the ML.¹⁰⁷ The interpretation clause that was added to the ML also seeks to encourage the national courts of the NYC state parties to take into account the advantage of harmonious interpretation and uniform application in their decisions on the REFAA.¹⁰⁸

¹⁰³ Ibid

¹⁰⁴Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) United Nations, Treaty Series, vol. 1155, p. 331, articles 31-33.

¹⁰⁵Resolution adopted by the General Assembly: UNCITRAL documents A/RES/61/33 for 2006, Sixty-first session, agenda item (77).

¹⁰⁶ UNCITRAL Model Law 1985 as amended in 2006, article 2A stated that:

- (1) “In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith”
- (2) “Questions concerning matters governed by this Law, which are not expressly, settled in it are to be settled in conformity with the general principles on which this Law is based.”

¹⁰⁷ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 page 23. This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI-1985, United Nations publication, Sales No. E.87.V.4).

¹⁰⁸ See (n105). The resolution noted “in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, is particularly timely”. Page 1.

The best example of the implications of not having interpretation criteria included within the text of the NYC might be the case of France. Although the French constitution considers the international convention as self-executing, it has issued a larger domestic text (Code of Civil Procedure) that indirectly incorporates similar provisions to the NYC (without any reference to the NYC).¹⁰⁹ France often refers to Article VII (1) of the NYC as an excuse to refer to its national arbitration law and argues that the enforcement of annulled arbitral awards does not violate the spirit of the NYC despite the presence of Article V (1)(e) of the NYC. Assuming that the NYC included an interpretation clause such as Article 2A of ML, or that the French arbitration law includes the same interpretation clause, would the French courts be legally able to interpret Article VII (1) as an excuse to enforce the annulled arbitral award? As in the *Dallah* case that discussed in chapter two, assume that the UK Arbitration Act includes a provision that obliges the English court to take into account the purpose of uniformity in its decisions on the REFAA, will the English court (enforcing court) expand its authority to examine an issue (arbitral tribunal jurisdiction) that became final according to the law of the place of arbitration (France).

However, in the presence of an interpretation clause the national courts are at least obliged to refer to the purpose and spirit of the NYC, and to take into account the advantage of uniform application in their decisions on the REFAA. A similar problem is also found in the GCC states, where the REFAA occurred at the domestic level through domestic law, which is not a problem in itself. The problem, as will be shown in chapter nine, is the fact that neither the NYC nor its internationally accepted features such as narrow interpretation of the grounds for refusal, pro-enforcement bias and exclusive grounds for refusal appear in the wording of the court judgments. This is discussed in detail in chapter nine of this thesis.

It might be valuable here to mention the unique position taken by the Canadian Arbitration Act.¹¹⁰ This new act has inserted Article 2A of the ML into the Canadian arbitration law. Through this, the act obliged the national courts to interpret the arbitration law, taking into consideration the international nature of this law. The important point is that the Canadian

¹⁰⁹French Constitution 1958, article 55: “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.”

¹¹⁰Canada Commercial Arbitration Act as amended in 2013, Article 4(1)(a): “This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”

legislature added a clause about the way in which the court should interpret the provisions of the Canadian Arbitration Law in embodying the NYC provisions. This clause filled the gap between the arbitration law and the NYC in Canada in terms of the interpretation approach that should be followed by the Canadian national courts. It is highly recommended that the state parties to the NYC adopt this position, given that in today's practice the NYC operates in most states through domestic legislation.¹¹¹

3.5 Summary

One of the core benefits of arbitration is that it is insured by an international and domestic framework of law, which provides a significant degree of harmonisation, allowing it to function in a coherent manner across state boundaries.¹¹² Besides the presence of this widely accepted international legislative framework, and the many national arbitration laws that in most cases are consistent with the NYC provisions, it would be useful if the NYC was interpreted and applied harmoniously by the national courts of its state parties. This would avoid the legal disharmony that might lead to a sense of injustice, that could result in weakening the efficiency of the NYC.

This chapter discussed an example of where the local standards superseded the international standards that regulate international arbitration. This example is related to the emerging notion of the recognition and enforcement of annulled arbitral awards under the scheme of the NYC. The chapter determined that some texts and provisions of the NYC seem to be unclear on the question of recognition and enforcement of arbitral awards annulled by the country of origin. Although Article V (1)(e) of the NYC is clear about the refusal of enforcement if the country of origin has annulled the arbitral award, there remains discretionary power under the use of the verb *may* in the opening line of Article V (1) to enforce the arbitral award despite the presence of this ground for refusal.

Therefore, this thesis suggests separating Article 36 (1)(a)(v) of the ML (that corresponds to section (e) of Article V (1) of the NYC) from the rest of the grounds for refusal, and incorporating it under mandatory language. It might be accepted that the literal reading of section (e) of Article V (1) (notwithstanding the use of the verb *may* in the opening line of

¹¹¹ UNCITRAL Report on the survey relating to the legislative implementation of the Convention (2208), See (n105).

¹¹² David Holloway and others, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell, London 2012) at 580.

Article V) is not suggesting an open-text legal rule that would permit the courts to exercise their discretionary power, such as the rest of the grounds for refusal. Therefore, it seems very reasonable to incorporate section (e) of Article V (1) of the NYC under the mandatory language that would direct the national courts to refuse enforcement of an arbitral award that was annulled by the court of the seat. This is to avoid the use of discretion that might affect the structural integrity of arbitration or result in legal disharmony in the implementation of the NYC. If the arbitral award that was annulled by the court of the seat is enforceable in other countries, then the party would try to enforce the annulled arbitral award from country to country until he/she found a court that accepted the enforcement of the annulled arbitral award. The party would refrain from doing this if the annulled award was not open to enforcement in any other state as suggested by Article V (1)(e) of the NYC.

It is recommended for the state parties of the NYC to add an interpretation criterion to the domestic law (arbitration law) that regulates the REFAA. This interpretation criterion, such as Article 2A of the ML, may direct the national courts to take into account the ‘international standards’ and uniform application in their court decisions on the REFAA. The best interpretation criterion in this regard is Article 2A of the ML.

The next part of this thesis examines the case study of the GCC states. In this part of the analysis the GCC states have shown an extensive application of local standards, either in their arbitration laws or court decisions on the REFAA. Despite the adoption of the NYC by all GCC states there are a series of inherent legal problems that undermine the very purpose of arbitration. Some of the GCC states show difficulty in accepting the NYC as a principal treaty that regulates the REFAA. The next chapter discusses the historical background information on the very concept of arbitration in the GCC states. This historical information still affects some arbitration laws of the GCC states, and has become problematic in terms of accepting the legal framework governing international arbitration despite the adoption of the NYC.

Part II: Case study of the Arab Gulf States

Chapter Four: The Historical Development of Arbitration in the GCC States and a General Review of the Implementation of the New York Convention in the GCC states

4.1 Introduction

This chapter seeks to provide background information about the historical development of arbitration in the GCC states.¹ This historical information still affects the arbitration laws of Qatar, the United Arab Emirates (UAE) and the Kingdom of Saudi Arabia (KSA), and it has affected the implementation of New York Convention² (NYC) in these three states. The discussion starts from examining old history (the seventh century and before) until the adoption of the NYC by the GCC states, which occurred from 1978-2006.³

In the last three decades, within the formation of modern legal systems, arbitration has become recognised in the national laws of the GCC states. However, even prior to this period the concept of arbitration as a means of dispute resolution existed and was practised in the GCC states. The historical development of arbitration in the GCC states can be categorised into four stages. The first is arbitration in old history, the second is arbitration in Islamic law, the third is arbitration in contemporary history, and the fourth is arbitration in the modern legal systems. The chapter reveals how the first challenge to the implementation of the NYC in the GCC states is the implementation of the NYC in the states of Qatar, UAE, and the KSA. This is necessary because the arbitration laws of these countries are outdated and facilitate overlaps and violations to the provisions of the NYC. Oman and Bahrain have modernised their arbitration laws and brought them into line with the Model Law on International Commercial Arbitration⁴ (ML). Kuwait has also given special treatment to the implementation of the NYC in its legal system, which will also be discussed in this chapter.

¹The GCC states were introduced in chapter one of this thesis.

²“Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739.”

³Kuwait 1978, Kingdom of Saudi Arabia 1994, Kingdom of Bahrain 1988, Oman 1997, Qatar 2002, United Arab Emirates 2006. See UNCITRAL official website.

⁴UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006. General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006).

4.2 The history of arbitration in the GCC states

Before the coming of Islam in the seventh century, the community of the GCC states was within one region called the Arabian Peninsula.⁵ There were no borders or even a state, as would be understood under modern concepts.⁶ People were generally nomadic, and the area consisted of tribes, sub-tribes, and families.⁷ Parentage was the significant element in the structure of this society, and the law was derived largely through tribal customs.⁸ The Arabs had neither a formal government nor kings with the authority to implement the laws; there were only tribesmen and tribal customs. However, each tribe had a chief (sheikh) who was responsible for the administration of tribal affairs.⁹ At this stage, Arabs were able to settle their disputes by going to either the tribesmen or to a wise man.¹⁰ The person chosen to settle a dispute was called a *Hakam* (arbitrator). During this period, the Arabs were aware of arbitration and a number of famous people were renowned for their skills as successful arbitrators; they came from the upper class of Arabian tribes.¹¹

One of the commentators observed that:

“As a result of not having religions or laws to govern their lives, pagan Arabs used to have arbitrators to settle their disputes. So when they have a conflict regarding blood, water, grazing or inheritance they used to appoint an arbitrator who carries the characters of honour, honesty, older age and wisdom”.¹²

⁵ Jawad Ali, *History of Arab before Islam* (3rd edn, Dar Elmalayeen, Lebanon 1970) at 3 Arabic.

⁶ Khaldoun Al-Naqeeb, *Society and State in the Gulf and Arab Peninsula* (4th edn, Routledge, United States 2012) 6-24.

⁷ Jawad Ali, (n 5) at 3-8 Arabic.

⁸ John Glubb, *The Empire of the Arabs* (Hodder and Stoughton, United Kingdom 1963) at 15.

⁹ Ahmed Alsuwaidi, 'Development of the Legal Systems of the Gulf Arab States' (1993) 8:4 Arab Law Quarterly 289-301 at 290.

¹⁰ Jalal El-Ahdab and Abdul Hamid El-Ahdab, *Arbitration With the Arab Countries* (3rd edn, Kluwer Law International, Netherlands 2011) at 5-6.

¹¹ Essam Alsheikh, 'Distinction between the Concepts Mediation, Conciliation, *Sulh*, and Arbitration in Sharia Law' (2011) 25:4 Arab Law Quarterly 367-400 at 368.

¹² Abdulrahman Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Ashgate Publishing, Ltd 2013) at 32.

A very well-known case of arbitration in the old history of the GCC states is known as the *black stone* story.¹³ This arbitration case occurred in the early seventh century and is the most cited case in the historical literature on arbitration in the GCC states.¹⁴ The case in summary concerns a dispute that occurred between the tribes of Mecca (a city in Saudi Arabia).¹⁵ The Meccan tribes decided to renew and rebuild the Ka'abh.¹⁶ Disputes arose about who would have the honour to reset the black stone in the Ka'abh wall and a fight nearly broke out. The tribes (dispute parties) then agreed that the first man who would enter the gates of the Mosque (where the Ka'abh is located) the following morning would be the person to decide the dispute (arbitrator). The man was Mohammed, a few years prior to becoming a prophet. The disputing parties asked him to arbitrate the dispute and he accepted the request to become an arbitrator. He placed the black stone on the top of a piece of cloth and each of the disputing parties (leader of each tribe) held one side of the cloth, and carried the black stone to its place. Mohammed then picked up the black stone in his hand and placed it on the Ka'abh wall.

This case is the most famous in the old history of Arabia, including the GCC states. It shows the acceptance of arbitration as the principal method of dispute resolution. Therefore, before the coming of Islam in the seventh century, arbitration had special features. First, arbitration was the main method for dispute resolution. This can be traced back to the lack of a concept of state in the region, including a supreme authority or any formal way to settle disputes. Second, arbitration agreements were simple and spontaneous and had no requirement that the agreement should be in writing. This can be evidenced from the case of the *black stone* where the disputing parties orally agreed to submit the dispute to arbitration and Mohammed (the arbitrator) accepted this. They also orally agreed on the subject matter of the dispute, and the place of arbitration. Third, the outcome of the arbitration (arbitral award) was not legally binding. The enforcement of the arbitral award was based on moral and tribal customs. Fourth, the arbitration procedures were rudimentary and based on customs. The core

¹³ The Black Stone of Mecca, or Kaaba Stone, is a Muslim relic, which according to Islamic tradition dates back to the time of Adam and Eve. It is the eastern cornerstone of the Kaaba, the ancient sacred stone building towards which Muslims pray, in the centre of the Grand Mosque in Mecca, Saudi Arabia.

¹⁴ Abdel Malek Bin Hasham, *Al Sirah Al Nabawiya (The Prophetic Bibliography)* (Arabic ed, 1st edn, Mecca Printing Press 1971) Arabic 123-124, El.Ahdab, (n10) at 7.

¹⁵ Mecca is a name of city in the KSA.

¹⁶ The *K'abh* is the first house built for the worship of God (Allah) by Prophet Abraham and his son Prophet Samuel. *K'abah* is a small shrine located in the centre of the Great Mosque in Mecca city and considered by all Muslims to be the most sacred spot on Earth.

difference between arbitration in old history and the contemporary concept of arbitration is that the outcome of the arbitration was not legally binding, and the procedures were based on customs. Additionally, enforcement relied on the moral authority of the parties. Therefore, compared with today's arbitration practices, it seems that arbitration in old Arab history was more akin to the contemporary concept of conciliation or mediation.

4.3 Arbitration in Islamic law

After the coming of Islam in the seventh century, Islamic law was the main source of law in all GCC states. This era extended until the GCC states became recognised as independent nation states within the United Nations in the early 1970s when modern legal systems were established.¹⁷ Arbitration as a means of dispute resolution is recognised in Islamic law, as will be seen in the following paragraphs. It is also important to note at the beginning of this discussion that Islamic law currently affects every aspect of the KSA arbitration law that will be analysed in chapter seven of this thesis. For example, the arbitration agreement should not violate the rules of Islamic law, and the chosen laws and rules governing the process of arbitration should not violate the rules of Islamic law. In addition, Islamic public policy is also part of all GCC legal systems and might affect the recognition and enforcement of foreign arbitral awards (REFAA) under the NYC. Therefore, the examination of arbitration from the perspective of Islamic law is important in this discussion.

Islam is originally an Arabic word. The literal meaning of Islam in Arabic means 'surrender' or 'submission'.¹⁸ However, it derives from the original word *salam*. From this original word, one can also derive the words 'peace' and 'safety'.¹⁹ Islam is not just a religion in the limited sense of being interested solely in salvation in the hereafter; rather, it is a religion that organises one's life completely.²⁰ Islam has a set of objectives and standards, including objectives and standards for all aspects of human life such as religion, society, law, politics, and economics.²¹ The totality of Islamic law is known as Sharia,²² an Arabic word that in the

¹⁷ Nathan Brown, *The rule of law in the Arab world: courts in Egypt and the Gulf* (CUP, Cambridge 1997) at 129.

¹⁸ John Esposito, *The Oxford Dictionary of Islam* (1st edn, OUP, Oxford 2003) at 146.

¹⁹ *Ibid* at 147.

²⁰ Bernard Weiss, *The Spirit of Islamic Law* (University of Georgia Press, United States 2006) at 4.

²¹ Wael Hallaq, *An Introduction to Islamic Law* (1st edn, CUP, Cambridge 2009) at 23.

literal context means ‘the way’ or the ‘path’.²³ It has been defined in a religious context as being about the path that God has shaped for human beings to follow in their life.²⁴ Muslims believe ‘Sharia’ is a law revealed from God to humanity. In this sense, Sharia is not a body of law created by human law-making; rather, it is a divine law that cannot be changed or amended, though it is able to be developed and can exist in all eras.²⁵ Sharia law has primary and secondary sources.²⁶ The primary sources are those revealed from God to the Prophet Mohammed. This revelation is codified in the holy *Quran* (Muslim bible) and the *Sunnah* (prophet statements and acts). The secondary sources are more evidently human in origin, and are based on the mental efforts of Islamic juristic expertise, aimed at finding solutions to the emerging issues that had not arisen during the Prophet’s life.²⁷ In the following section, a clarification will be made about these sources and how they recognise arbitration.

4.3.1 Arbitration in the holy Quran²⁸

Quran is an Arabic word literally meaning ‘the Reading’.²⁹ The Quran is the sacred book of Islam and includes God’s words that outline Muslim life by offering a general approach.³⁰ All Muslims believe the Quran was revealed from God to the Prophet by the angel Gabriel 1,400 years ago.³¹ As it was revealed, word for word, others wrote it down on pieces of leather, bits of pottery, palm-leaf stems, and even bones. It was a written word from the beginning, in rich profusion (more than 6,000 verses and 114 chapters) and it said itself, in the very beginning

²² Patrick Glenn, *Legal Traditions of the World* (4th edn, OUP, Oxford 2010) at 184.

²³ John Esposito, (n18) at 246.

²⁴ Mohammed Kamali, *Sharia’ah Law: An Introduction* (Oneworld Publications, Oxford 2008) at 7.

²⁵ Ibid.

²⁶ Ibid at 14.

²⁷ Patrick Glenn, (n 22) at 186.

²⁸ A reference has been in this chapter and chapter seven to the verses of Quran as the primary source of law in Sharia. The text of Quran is available in an English version at <<http://www.clearquran.com/>> Accessed June 2015.

²⁹ John Esposito, (n18) at 202.

³⁰ Wael Hallaq, (n21) at 8.

³¹ Patrick Glenn, (n 22) at 182.

that the Lord was ‘teaching by the pen’.³² There is not a great deal of law in it according to most scholars, with it containing some 500-600 odd verses (mandatory and non-mandatory rules). The remainder of the verses concern general approaches to success in life and survival in the hereafter.³³ Despite this, the Quran is an inspiration, a source, and a constitution for secular laws in Islamic countries, such as the KSA. Arbitration has been accepted as a method of dispute resolution in the words of the Quran.

The Quran provides a broad view of and acceptance of arbitration *as a consensual* method of dispute resolution.³⁴ There is one verse in the Quran that established the basis of arbitration in Sharia law. This verse is commonly cited in the literature on arbitration in Sharia law in a way that legalises the concept of the contractual nature of arbitration under Sharia law. The verse is as follows:

“If you fear a breach between the two (husband and wife), appoint an arbiter from his family and an arbiter from her family. If they wish to reconcile, God will bring them together. God is Knowledgeable, Expert.”³⁵

This verse limits the reference to arbitration as a method of dispute resolution for marital disputes only.³⁶ Wife and husband, in this verse, are given the option to arbitrate with the non-compulsory language *if they wish to reconcile*, whereas arbitration in current practice can be applied for in many different types of disputes, increasingly international commercial disputes. However, contemporary Sharia law jurists refer to this verse (as will be seen in the next section) as a first and main source that legalises the modern contractual nature of arbitration under Sharia law. As mentioned above, the Quran offers a general approach and the Sharia jurists can compare the issues covered in the Quran with the emerging issues not covered in the Quran such as arbitration in commercial and civil activities. The comparative approach is accepted as a secondary source of Sharia law (deductive analogy), as will be seen in the next section.

³² Ibid.

³³ Mohammed Kamali, (n 24) at 5.

³⁴ El-Ahdab, (n 10) at 6-14, Qadri Mahmoud, *Arbitration in Sharia law* (Dar Alsomiai , KSA 2009) at 2/Arabic, Hamad Al-Humaidhi, ‘Arbitration in the Arab–Islamic World’ (2015) 29:1 Arab Law Quarterly 92-99 at 93.

³⁵ The Qur’an, chapter four, verse no.35.

³⁶ El-Ahdab, (n 10) at 8.

Therefore, accepting the contractual nature of arbitration for marital disputes through the words of the Quran has led to the general acceptance of the contractual nature of arbitration in Sharia law; the above verse expressly mentions that a wife and husband (dispute parties) are free to refer (freedom of contract) the dispute to a third person (arbitrator). This might reflect the modern understanding of the contractual nature of arbitration. In addition, the Quran does not include other mandatory provisions prohibiting parties to resolve their disputes by mutual consent; however, these are subject to them not violating the rules of Sharia or Sharia public policy that is explained in detail in chapter eight of this thesis.

In the present day, the issue of marital disputes falls within the exclusive jurisdiction of the national courts in all GCC states, including the KSA. Sharia law found its strict application in all GCC states in personal matters such as marriage, divorce, and inheritance issues. For example, if a dispute arises between a wife and husband, the judge in national courts is obliged first to refer the disputing parties to ‘arbitration’ by asking them to appoint two arbitrators, one from the wife’s family and the other from the husband’s family without a need for a written arbitration agreement. If the arbitrators fail to *reconcile* the dispute between the wife and husband, the judge should determine the dispute. It seems that the current practice of GCC family courts suggests a type of conciliation rather than a modern understanding of arbitration.

However, the above verse is the first practical implementation of arbitration in Sharia law.³⁷ Therefore, after the coming of Islam in the seventh century, arbitration was well known in the GCC states as the principal method of dispute resolution for marital disputes, which was then extended to cover different types of dispute such as commercial disputes through the second primary source of Sharia law, *Sunnah*.

4.3.2 Arbitration in *Sunnah*

Sunnah is the second primary source of Sharia law and can be defined as ‘all that is narrated’ from the Prophet Mohammed in the form of acts, expressions, and implicit approvals of the Prophet.³⁸ Although the Quran is God’s word, Muslims believe that the Sunnah is the

³⁷ El-Ahdab, (n10) at 11.

³⁸ Wael Hallaq, (n 21) at 16.

inspiration from God but that the Prophet commits the words and actions.³⁹ The most cited act of the Prophet that accepted arbitration under Sharia law is the story of the *black stone* where the Prophet acted as the arbitrator.⁴⁰ After the death of the Prophet, Sharia law developed by explicit sources that were more evidently human in origin, commonly known today as the secondary sources of Sharia law.⁴¹

The secondary sources are also part of the Sunnah and are based on the Arabic term *Ijtihad*.⁴² *Ijtihad* is a mental effort on the part of scholars with juristic expertise, aimed at finding solutions to emerging problems and issues.⁴³ For example, the question of the scope of arbitration remains open for theoretical debate under Islamic jurisprudence.⁴⁴ According to the literature of Sharia law, *Ijtihad* take two forms, *Ijma'a* (consensus) and *Qiyas* (analogy).⁴⁵ Both were created and developed by Islamic jurisprudence after the Prophet Mohammed's death, and they should not go against the words and spirit of the primary sources of the Quran and Sunnah.⁴⁶

Qiyas is an Arabic word that literally means deductive analogy.⁴⁷ In the context of Sharia law, it means that if any issue arises which is not covered in the Quran or Sunnah, a comparison with similar issues that are covered in the Quran or Sunnah, or even a logical reasoning that is not against the spirit of Quran and Sunnah, can be made.⁴⁸ The best example explaining *Qiyas* is the concept of the contractual nature of arbitration in the words of the Quran quoted above. This verse has been extended by reference to the deductive analogy, in which all Sharia

³⁹ Ibid.

⁴⁰ See (section 4.2).

⁴¹ Patrick Glenn, (n 22) at 186.

⁴² Hisham Ramadan and Ali Khan, *Contemporary Ijtihad: Limits and Controversies* (Edinburgh University Press Ltd 2011) at 1.

⁴³ Patrick Glenn, (n 22) at 202.

⁴⁴ El-Ahdab, (n10) at 8.

⁴⁵ Patrick Glenn, (n 22) at 186-187.

⁴⁶ Hisham Ramadan and Ali Khan, (n 42) at 1-2.

⁴⁷ John Esposito, (n18) at 193.

⁴⁸ Hans Visser, *Islamic Finance: Principles and Practice* (1st edn, Edward Elgar, United Kingdom 2010) at12.

schools of thought accepted the contractual nature of modern arbitration.⁴⁹ The second secondary source is *Ijma'a*, an Arabic term that literally means 'consensus'.⁵⁰ In the context of Sharia law, it means the unanimous agreement of the *four* main schools of thought in Sharia law on matters that do not have explicit mentions in the Quran or *Sunnah*.⁵¹ However, all secondary sources are based on *Ijtihad*, as defined above, so one might conclude that *Ijtihad* is an independent opinion by qualified jurists that lead to the development of Sharia law after the death of the Prophet.

There are four major schools of jurisprudence that are well recognised in the literature of Sharia law, and have existed since the first century of Islam.⁵² They are the *Hanbali* School, the *Hanafi* School, the *Shafi'i* School, and the *Maliki* School.⁵³ These were schools of law in a doctrinal sense with their teaching institutionalised in particular law colleges. Their teaching was, and still is, the primary source of law in the tradition. In addition, most contemporary Sharia law scholars and researchers follow the thought of these four schools to interpret any emerging issues, such as issues of modern arbitration that cover different types of disputes, including civil and commercial activities or the issue of Islamic finance, and many other issues that had not emerged during the Prophet's life.

4.3.3 Modern arbitration in the view of Sharia law

The agreement to arbitrate in Sharia law is a contract with all its characteristics.⁵⁴ Sharia contract law is examined in detail in chapter seven as the KSA arbitration law subjected arbitration agreements to not violate Sharia law.⁵⁵ All Sharia schools of jurisprudence knew arbitration and examined it in the light of the Quran and Sunnah. In addition, the judicial nature of arbitration is recognised by the unanimous agreement of Sharia schools of jurisprudence. This is because of the many verses in the Quran and Sunnah that obliged the

⁴⁹ El-Ahdab, (n10) at 10.

⁵⁰ John Esposito, (n18) at 101.

⁵¹ Hisham Ramadan and Ali Khan, (n 42) at 1-2.

⁵² Patrick Glenn, (n 22) at 207.

⁵³ Ibid, Frank Vogel and others, *The Islamic School of Law: Evolution, Devolution, and Progress* (Harvard University Press, United States 2005).

⁵⁴ El-Ahdab, (n10) at 7.

⁵⁵ Chapter seven (section 7.3).

judge or any person appointed to resolve the dispute to act fairly and impartially.⁵⁶ This is also analysed in detail in chapter seven as the KSA arbitration law subjected the arbitration process to not violate the Sharia law perspective as to what constitutes a lack of due process.⁵⁷ Consequently, the contractual and judicial nature of arbitration was never challenged in Sharia law.⁵⁸

There are some different lines of thought in Sharia law jurisprudence on the very purpose of arbitration. The most significant differences between the Sharia schools of thought relate to the very concept and purpose of arbitration.⁵⁹ There are two main views in this regard. The *Hanafi* and *Shafi'i* schools view arbitration as a form of conciliation, similar to mediation, and close to equity arbitration (amiable composition), where decisions are not binding on the parties.⁶⁰ The arbitration parties in this opinion can have recourse to the state courts to determine the substance of the dispute by the judge appointed by the state. This opinion is based literally on the above-cited verse of the Quran regarding the dispute between husband and wife. The verse said that *if they wish to reconcile*. The second view also refers to the same verse but with a different interpretation. The *Maliki* and *Hanbali* schools treat arbitral decisions as having the same binding force as judicial decisions.⁶¹ They argue that if one is authorised to determine the dispute, and make a judgment with binding characters, then the state shall respect this determination even if this person is not qualified as a judge. This opinion also refers to the case of *black stone* discussed earlier (section 4.2), where the Prophet acted as an arbitrator and the dispute parties agreed on the binding effect of the judgment made by the arbitrator.

The different lines of thought are presented as based in the texts of the KSA arbitration law, which considers the arbitral award as a binding decision, similar in that sense to national

⁵⁶ Qadri Mahmoud, *Arbitration in Sharia law* (Dar Alsomiai , KSA 2009) at 209/Arabic.

⁵⁷ Chapter seven (section 7.5).

⁵⁸ El-Ahdab, (n10) at 8.

⁵⁹ Ibid.

⁶⁰ Qadri Mahmoud, (n56) at 63/Arabic.

⁶¹ Ibid at 65.

courts' decisions.⁶² However, there are numerous other opinions in this respect provided by contemporary jurists of the four schools of thought. Each opinion relates ultimately to one of the two concepts mentioned above. The KSA's arbitration law has adopted the opinion that arbitration is binding by law, similar to the modern understanding of arbitration. There are some other issues related to the Sharia jurisprudence's opinions on arbitration, which have affected the articulation of the KSA arbitration law. For example, the composition of the arbitral tribunal, and the concept of foreign arbitral awards in Sharia law have also affected the articulation of the KSA arbitration law, as will be seen in chapter seven. It can be argued that Sharia law does not prohibit the adoption and application of the modern-day practice of international arbitration as long as it follows some fundamental rules of Sharia law. This is because all GCC states, including the KSA, have recognised the modern concept of arbitration through the adoption of the NYC and the issuance of arbitration laws.⁶³

It should be noted here that the KSA arbitration law is the only arbitration law in the GCC states that gives effect to Sharia law. None of the current arbitration laws of the rest of the GCC states make reference to Sharia law. However, Sharia public policy is still part of all legal systems in the GCC states, and this might affect the REFAA under the NYC in the GCC states. The influence of Sharia law in the current GCC legal systems is explained in more detail in section 4.5.1.

4.4 Early international arbitration cases in the GCC states

This era concerned the period from 1950-1970 when arbitration was not yet recognised in the GCC laws. Sharia law was the main source of law at that time. The first appearance of the modern concept of arbitration as a method for dispute resolution for international commercial disputes was in this period. A number of arbitration cases concerned disputes regarding the oil extraction contracts between foreign parties and the *Sheikhs* of the tribes, basically the current royal families of the GCC states. Although this era played a significant role in developing the concept of modern arbitration, it created a feeling of reluctance to recognise arbitration in the GCC national laws.⁶⁴

⁶² KSA arbitration law 2012, Article (52) states, "Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable."

⁶³ See section 4.5.

⁶⁴ Reza Mohtashami, 'Banishing the Ghost of Lord Asquith's Award: A Resurgence of Arbitration in the Middle East' (2014) 1:1 BCDR International Arbitration Review 121-124.

In the case of *Sheikh of Abu Dhabi v. Petroleum Development*,⁶⁵ the arbitrator disqualified the Abu Dhabi law (Sharia law at that time) from being the proper law governing the dispute.⁶⁶ After the disqualification of the Abu Dhabi law, the arbitrator applied the *lex mercatoria*.⁶⁷ A similar approach was applied in another case, *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. v. Ras Al Khaimah National Oil Co.*⁶⁸

A disqualification of the laws of the pre-GCC states also appears in the case of *Ruler of Qatar v. International Marine Oil Co. Ltd.*,⁶⁹ where the arbitrator dismissed the Qatari law and confirmed that the Qatari law was not qualified or capable of regulating and interpreting this contract.⁷⁰ Again, in *Saudi Arabia v Arab American Oil Co. (ARAMCO)*,⁷¹ the arbitrator dismissed the KSA law and stated that the KSA law must be complemented by the customs and practices of the oil extraction contracts.⁷² One of the most important cases regarding arbitration development in the region that might have drawn the attention of the GCC states towards the importance of the NYC was the case of *Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners*.⁷³ In this case, the government of Kuwait won the arbitration case and sought enforcement in England. In 1984,

⁶⁵ *Sheikh of Abu Dhabi v. Petroleum Development* (1952) Published in 1 ICLQ, at 247

⁶⁶ Lord Asquith expressed an opinion that was heavily criticised by many practitioners in the GCC region when he noted the following:

“This is a contract made in Abu Dhabi and wholly to be performed in that State. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the *Qur’an*; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.”

For further details see Reza Mohtashami, ‘Banishing the Ghost of Lord Asquith’s Award: A Resurgence of Arbitration in the Middle East’ (2014) 1:1 BCDR International Arbitration Review 121-124.

⁶⁷ *Ibid.*

⁶⁸ Similar approach has followed in the case of *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. v. Ras Al Khaimah National Oil Co* [1984] 3 WLR 1023 England and Wales Court of Appeal.

⁶⁹ *Ruler of Qatar v. International Marine Oil Company Ltd* (1953) published in 20 International Law Reports 534.

⁷⁰ *Ibid.*

⁷¹ *Saudi Arabia v. Arabian American Oil Company*, (1963) 27 International Law Report at 117.

⁷² *Ibid.*

⁷³ *Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners* [1984] 426 House of Lord England and Wales.

the arbitral awards were enforced in England pursuant to the NYC.⁷⁴ This case had a positive effect in terms the GCC states recognising the effectiveness of the NYC. After this case, the GCC states gradually acceded to the NYC, with the exception of Kuwait which acceded earlier in 1978. Another early arbitration case that grasped the attention of the GCC states as to the importance of international arbitration as a method of dispute resolution in the domain of international commerce was the case of the *American Independent Oil Company (Aminoil) v Kuwait Government*.⁷⁵ In this case, the arbitral tribunal for the first time applied the Kuwaiti law and issued an award in favour of a Kuwaiti party.

Before the GCC states gained independence in the early 1970s, they were suspicious of international commercial arbitration. This suspicion might have begun following the outcomes of the above cases. They generally perceived arbitration as being biased in favour of foreign interests.⁷⁶ In support of this view, in most of the above cases, the arbitrator failed to apply GCC national laws (Sharia law) to the arbitration disputes. There was a general feeling that arbitration was biased in favour of foreign interests. For example in 1963, the KSA – after it was unsuccessful in the *Aramco* case⁷⁷ – issued a Royal Decree forbidding any state agencies in the KSA to refer to arbitration without the approval of the KSA cabinet.⁷⁸ Despite this criticism, these cases have had an impact on the recognition of arbitration in the GCC laws.

4.5 The recognition of arbitration in the GCC laws

In line with the emergence of the GCC states as United Nations members (between 1960-1971), many initiatives were taken by policymakers to establish a modern legal system.⁷⁹

⁷⁴ibid

⁷⁵*American Independent Oil Company (Aminoil) v Kuwait Government* (1984) published in 66 International Law Report, at 518. This case also cited in Alan Redfern, ‘The Arbitration between the Government of Kuwait and Aminoil’ (1984) 55 British Year Book of International Law 65.

⁷⁶Nasser Al-Zayed, ‘Commercial Arbitration in the Gulf States: An Overview’ (2010) 2:1 International Journal of Arab Arbitration 37-49 at 38. Reza Mohtashami, ‘Banishing the Ghost of Lord Asquith’s Award: A Resurgence of Arbitration in the Middle East’ (2014) 1:1 BCDR International Arbitration Review 121-124. Hassan Radhi, ‘Observation on the Practices of International Commercial Arbitration in the Arab States’ (2015) 26 Journal of Arbitration and Gulf Laws 31-33 Arabic.

⁷⁷See (n71)

⁷⁸ Saudi Arabia Royal Decree No. 58/1963.

⁷⁹Ahmed Alsuwaidi, (n9) at 292.

Within this period of time, the GCC states were heavily influenced by the Egyptian legal system.⁸⁰ The court structure, codes, legal principles, and method of interpretation were all borrowed from the Egyptian legal system, the major civil legal tradition in the Arab world which itself was based on the French legal system.⁸¹ By the first half of the twentieth century, the first Egyptian Civil Code was translated from French into Arabic (Egyptian) by one of the contemporary legal scholars in the Arab world.⁸² This code came into force in Egypt in October 1949.⁸³ In the following years, within the formation of the GCC states, they gradually adopted this code and many other codes.⁸⁴

However, this Egyptian Code of Civil Procedure contained some provisions regulating arbitration which failed to differentiate between national and international arbitration. In addition, it contained provisions regulating the REFAA and foreign judgments, without a distinction between these two different types of foreign orders. The arbitration laws of Qatar and the UAE *still* regulate arbitration according to these outdated provisions that are not based on the NYC or the ML, though they have adopted the NYC. This position has resulted in some instances in the failure of the UAE and Qatari national courts to fulfil the state commitment to implementing the NYC for the REFAA. A detailed analysis of this issue will be conducted in the next two chapters.

4.5.1 The influence of Sharia law on the GCC legal systems

Sharia law found its strict application only in the KSA. As a general rule, the effect of Sharia law on the GCC legal systems is limited and uncertain,⁸⁵ with the exception of the KSA. The

⁸⁰ Ibid, Nathan Brown, (n17) at 60 and 129.

⁸¹ Ibid at 61.

⁸² “Abdull-Razzaq Ahmad al-Sanhuri 1895-1971 is a leading Egyptian jurist in modern Arab legislation and the principle architect of the present Civil Codes of the GCC States. As a major figure of the intersection of traditional Islamic culture with modernity, Al-Sanhuri has left an indelible mark on contemporary Arab societies. Besides his pioneering work in law making and codification and its far-reaching consequences, al-Sanhuri’s colossal efforts extended to the critical explication and justification of legal precepts, resulting in decisive contributions to Modern Arab and Islamic Jurisprudence.” For further details, see Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law* (Brill, Netherlands 2007).

⁸³ The former Egypt Code of Civil Procedures, Law No (77) for 1949.

⁸⁴ Nathan Brown, (n17) at 67.

⁸⁵ Ian Edge, ‘The Middle East: Legal System or Legal Vacuum’ (1995) 1 Middle East Commercial Law Review 127.

legal system of the KSA has basically been formed under the umbrella of Sharia law.⁸⁶ Secular laws, or laws that have been imported from the international community such as the NYC, have to be amended to fall in line with Sharia law. For example, the new KSA Arbitration Law has been subjected to the provisions of Sharia law in all its aspects.⁸⁷ With the rest of the GCC states, the influence of Sharia law on GCC legal systems is clearly apparent in the domain of public law, such as the texts of the constitutions and regional treaties.⁸⁸ It also appears in the law governing family matters, such as marital disputes, divorce, and inheritance disputes. The domain of private law (civil and commercial activities) is, however, highly affected by the western model based on the civil law tradition, which in some cases violates the principles of Sharia law.⁸⁹

For example, in Bahrain, Oman, Kuwait, Qatar, and the UAE, the constitution provides that Sharia law is one of the principal sources of law.⁹⁰ In the KSA, there is no formal constitution and the KSA 'Constitution' exists as the Basic Law of Government.⁹¹ Such a law provides that Sharia law is the state constitution and the only source of law in the KSA.⁹² Thus, the exact influence of Sharia law on the GCC legal systems might not be very clear, except in the KSA where Sharia law forms the state constitution. Sharia public policy has blocked the REFAA in the KSA in more than one case. In the rest of the GCC states, there are some observations that must be taken into account by the arbitration parties to avoid refusal on the grounds of Sharia public policy. This is analysed in detail in chapter eight of this thesis where

⁸⁶ Abdullah Alshikh, *Codification of Islamic Law in Saudi Arabia: A Potential Problem, Or Part of the Solution Toward Building a Nation of Laws?* (1st edn, Harvard Law School 2007).

⁸⁷ KSA Arbitration law 2012, article (2) states "Without prejudice to provisions of *Islamic Sharia* and international conventions to which the Kingdom is a party, the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom or is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration be subject to the provisions of this Law".

⁸⁸ There are only two regional treaties in the GCC states related to international arbitration. Both of these treaties include a provision that considers any violation of Islamic law as a ground for refusing enforcement.

⁸⁹ Mary Ayad, 'Harmonization of Custom, General Principles of Law, and Islamic Law in Oil Concessions' (2012) 29:5 *Journal of International Arbitration* 477-518 at 478.

⁹⁰ The constitution of Bahrain 2002 article (2), the constitution of UAE 1971 article (7), The constitution of Qatar 2003, article (1). The constitution of Oman 1996, article (2).

⁹¹The Basic Law of Government 1992, adopted by Royal Order No: A/90 for 1992.

⁹²The Basic Law of Government 1992, article (1): "The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet (PBUH). Arabic is the language of the Kingdom. The City of Riyadh is the capital."

the role of Sharia public policy in relation to arbitration in the GCC states will be examined in detail.

4.6 The adoption of the NYC by the GCC states⁹³

As mentioned above, in the last three decades the hesitation towards arbitration in the GCC states has gradually vanished. This era has witnessed two important aspects related to arbitration practice in the GCC states: First, the GCC states recognised arbitration as a method for dispute resolution in their national laws. Second, GCC states ratified the NYC and two other regional arbitration treaties.⁹⁴ After the GCC states were recognised as independent states, they started to build infrastructures and open financial and investment markets.⁹⁵ This economic movement led to the issuance of many national laws, including arbitration laws. In addition, the adoption of the NYC was one of the main pillars that indicated the recognition of international arbitration as a dispute resolution mechanism. The following pages review the position of Bahrain, Kuwait, and Oman in their implementation of the NYC, which have not presented serious difficulties compared with the rest of the GCC states.

4.6.1 Kingdom of Bahrain

Bahrain is one of the most up-to-date states in the GCC in terms of the legislative framework governing arbitration. A new law was issued in July 2015 which regulates all arbitration taking place in Bahrain, either domestic or international, and also regulates the REFAA.⁹⁶ This law adopted the ML and replaced the previous law that regulated international arbitration in Bahrain.⁹⁷ Even the former Bahraini arbitration law had not posed a serious challenge to

⁹³Kuwait 1978, Kingdom of Saudi Arabia 1994, Kingdom of Bahrain 1988, Oman 1997, Qatar 2002, United Arab of Emirates 2006. See UNCITRAL official website.

⁹⁴ “Convention on the Execution of Judgments, Delegations and Judicial Notifications (adopted by Gulf Cooperation Council in 16 December 1995, entered into force 17 March 1996), The Inter Arab Convention on Judicial Co-operation Known as ‘Riyadh Convention’ (adopted by League of Arab States, resolution No.1 for 1983, entered into force 30 October 1985)”.

⁹⁵Martin Hvidt, ‘Economic Diversification in GCC Countries: Past Record and Future Trends’ (2013) The London School of Economics and Political Science.

⁹⁶Bahrain Arbitration Law 2015, Law No (9) for 2015 promulgates Bahrain arbitration law. Published in official Gazette No. 3217 July 2015.

⁹⁷International Commercial Arbitration Act 1994, Law No. (9) for 1994, Published in Bahrain Official Gazette No. 2125 for 1994.

the implementation of the NYC as it was also based on the ML.⁹⁸ However, the Bahraini legislature has issued a new arbitration law because the former international arbitration law was not regulating domestic arbitration, and thus the new law is now based on the ML and regulates domestic and international arbitration.⁹⁹

There are limited numbers of recorded cases where the foreign arbitral awards sought recognition and enforcement through the Bahraini national courts.¹⁰⁰ Although one might still need to better understand how the Bahraini courts interpret the validity of the arbitration agreement, and the grounds for challenging the arbitral awards, this thesis, as suggested by its title, is limited to analysing the challenges in implementing the NYC in the GCC states, in which the Bahraini position did not suggest a serious challenge. This is because it has a modern arbitration law that incorporates most of the arbitration principles discussed in chapter two, and the Bahraini national courts have enforced a number of foreign arbitral awards according to their arbitration law that indirectly incorporates the provisions of the NYC. Some reference will be made to the Bahraini courts' decisions on the REFAA in chapter nine where the level of familiarity of the GCC judicial jurisprudence on the NYC is examined in detail.

4.6.2 Oman

After the adoption of the NYC in 1997, the Omani Legislature issued a new arbitration law taking into account the NYC and ML.¹⁰¹ The Omani Law of Arbitration in Civil and Commercial Disputes (OLACCD) governs domestic and international arbitration. This act (OLACCD) indirectly incorporates the provisions of the NYC and is based on the original

⁹⁸See UNCITRAL official website. Bahrain has adopted the ML in 1994.

⁹⁹ The former arbitration law that regulates domestic arbitration in Bahrain was similar to the former Egypt Code of Civil Procedure. Bahrain Code of Civil Procedures, Law No.12 for 1972 (chapter seven: arbitration). This chapter is now repealed by the new arbitration law 2015, which regulates domestic and international arbitration. Law No (9) for 2015 promulgates Bahrain arbitration law. Published in official Gazette No. 3217 July 2015.

¹⁰⁰This is due to my visit to the Bahraini national courts, since there is no venue to get access to the court practice in the GCC states such as online databases or journals that specialize in publishing court practices. This research has found only three cases that reflect the Bahrain Court's attitude regarding the implementation of the NYC. *Party v party* [2012] 1470 Bahrain High Civil Court- Chamber 3, *Saudi Establishment v. Bahraini Limited Liability Company* (2012) Appeal No. 746 for 2010, published in Year Book for Commercial Arbitration YBCA, Vol XXXVIII for 2013, page 574. See also *party v. party* [2012] Appeal No. 101 for 2010 Bahrain Court of Cassation. For further details see Abdulmawla Taha, 'Extent of Recognition by the Bahraini Court of Cassation of the GCC Commercial Arbitration Centres Arbitral Awards' (2014) 1 BCDR International Arbitration Review 17. (Arabic). Hassan Ali Radhi, 'International Arbitration and Enforcement of Arbitration Awards in Bahrain' (2014) 1 BCDR International Arbitration Review 29.

¹⁰¹ The Oman Act of the Arbitration in the Commercial and Civil Disputes, No. 47 for 1997, as amended by legislative Decree No. (3) for 2007.

version of the ML with slight changes.¹⁰² The act applies as the seat law when arbitration takes place in Oman, either domestic or international and also regulates the REFAA. However, there is only one published court decision where the Omani court has fulfilled the state commitment under the NYC.¹⁰³ Therefore, the legal position of Oman is not suggested to present a serious challenge to the implementation of the NYC.

4.6.3 Kuwait

The Kuwaiti arbitration law is part of the Code of Civil Procedure (arbitration law, 173-188 and 199-203).¹⁰⁴ This law is not based on the NYC or ML and it breaches the key principles of international commercial arbitration discussed in chapter two.¹⁰⁵ However, after the adoption of the NYC the Kuwaiti legislature has not abolished this law or issued a new arbitration law, despite many calls and demands to enact a new arbitration law that is consistent with the legal framework governing the arbitration and also consistent with the NYC.¹⁰⁶ However, after Kuwait ratified the NYC, it issued a dedicated legal instrument called the ‘NYC implementing decree’¹⁰⁷ that incorporated the NYC in its schedule without any changes being made, and gave the NYC the force of law in the Kuwaiti legal system.¹⁰⁸ The Kuwaiti national court fulfilled its commitment under the NYC and applied the NYC implementing decree to a number of foreign arbitral awards.¹⁰⁹

¹⁰² In 1997 Oman has adopted UNCITRAL Model Law and incorporated its provisions in domestic legislation. See UNICTRAL official website.

¹⁰³ *Party v Party* (2011) Cassation No. 280 for 2010, Oman Supreme Court. Published in ‘BCDR International Arbitration Review’ (2014) volume 1, issue 1, at 149-158. See also Alastair Hirts, ‘The Recognition and Enforcement of Foreign Arbitral Awards in the Sultanate of Oman’ (2014) 1 BCDR International Arbitration at 61.

¹⁰⁴ The Kuwait Civil and Commercial Procedures Act, No (38) for 1980, as amended by Law No (38) for 2007, provisions (173-188 and 199-203).

¹⁰⁵ Dalal Al Houti, ‘Arbitration in Kuwait: Time for Reform?’ (2015) April Law Update - Issued by Altamimi and Co Legal Firm.

¹⁰⁶ Ibid, Rashid AlAnezi, ‘Enforcement of Foreign Arbitral Awards in Kuwait’ (2014) 1:1 BCDR International Arbitration Review 85-94.

¹⁰⁷ Legislative Decree No. (10) of 1978, Decree is a tool granted to president of Kuwait to issue the domestic laws. Kuwaiti Constitution 1962, article (71) stated that “The Amir concludes treaties by decree and transmits them immediately to the National Assembly with the appropriate statement. A treaty has the force of law after it is signed, ratified, and published in the Official Gazette.”

¹⁰⁸ Ibid, Kuwaiti Constitution 1962, article (71).

¹⁰⁹ *Party v. party* [1988] Appeal No.78 for 1988, Kuwaiti Court of Cassation, see also *Party v Party* [1987] Appeal No.166 for 1987, Kuwaiti Court of Cassation, *Party v party* [1997] Appeal No.80 for 1997, Kuwaiti

Qatar and the UAE followed the same position as Kuwait, and issued a ‘NYC implementing decree’ that gives the NYC the force of law in their legal systems. However, the difference is that Qatar and the UAE, in a number of cases that will be discussed in detail in the next two chapters, neglected the state adoption of the NYC, and invoked their old arbitration laws as a justification to not apply the NYC. This situation create a feeling of uncertainty as to the applicability of the NYC to the REFAA in the states of Qatar and UAE, which is not the case in Kuwait. Some reference will be made to the Kuwaiti courts’ decisions on the REFAA in chapter nine in a discussion surrounding the level of familiarity of the GCC judicial jurisprudence concerning the NYC.

4.7 Summary

Arbitration in the GCC states has passed through four historical stages. The first stage is the old period of history (the seventh century and before). In this era, arbitration was the principal method of dispute resolution and was similar to the modern concept of modern conciliation or mediation. The second stage is related to arbitration under Sharia law. After the coming of Islam (seventh century onwards), the concept of contractual arbitration was recognised in Sharia law as a dispute resolution mechanism for limited types of dispute, which was then developed by the Sharia jurisprudence to cover different types of disputes. Arbitration in the view of Sharia law still plays a role in the KSA arbitration law, and it affected the articulation of the KSA arbitration law as will be seen in chapter seven. In addition, Sharia public policy might have a role in the GCC legal systems and could affect the REFAA under the NYC.¹¹⁰

The third stage concerns the first appearance of international arbitration as a method of dispute resolution in the GCC states. This stage was between the 1950s and 1960s and even before arbitration became recognised in the GCC laws. The fourth stage concerns the period between 1970 to the present time. In this stage, the GCC states (except the KSA) have established modern legal systems, which were inspired by the Egyptian legal system (civil legal traditions), and recognised arbitration in their national laws without being subjected to Sharia law. Bahrain and Oman have modernised their arbitration laws to be in line with the ML and NYC. The arbitration laws in Qatar and the UAE are still in their old form, and violate most of the major arbitration principles discussed in chapter two of this thesis. In

Court of Cassation, *Party v. party* [2004] Appeal No.1202 for 2004, Kuwaiti Court of Cassation. See also Rashid AlAnezi, ‘Enforcement of Foreign Arbitral Awards in Kuwait’ (2014) 1 BCDR International Arbitration Review 85.

¹¹⁰ See chapters seven and eight.

addition, a number of recent court decisions in the UAE and Qatari courts neglected the state adoption of the NYC, and applied their old arbitration laws where the arbitral award was foreign and sought recognition and enforcement pursuant to the NYC. In addition, the KSA arbitration law is subjected to not violate Sharia law in all aspects of the arbitration process. Taking this background context into consideration, the next section of this thesis will focus on critically analysing the implementation of the NYC in these three states in separate chapters (chapters five, six, and seven).

Chapter Five: The Implementation of the 1958 New York Convention in Qatar

5.1 Introduction

The previous chapters have outlined the legal framework and essential principles of the operation of arbitration as an effective method of dispute resolution in international trade, and explored the various problems that can arise in relation to the implementation of New York Convention¹ (NYC) either internationally or in the GCC states. In this chapter, and the following two, this thesis will examine in depth how the NYC has been implemented in the states of Qatar, United Arab of Emirates (UAE) and Kingdom of Saudi Arabia (KSA). The arbitration laws of these three states are still affected by the heritage of the past and show difficulty in accepting arbitration principles, despite the adoption of the NYC. The chapters will achieve this goal primarily by analysing the key aspects of the arbitration process and comparing the legal situation in these three states with the law laid out in the NYC and the Model Law on International Commercial Arbitration² (ML). What these chapters reveal are distinct variations between the arbitration laws of these three states and international law. The problems that follow will be analysed in more detail in later chapters. At this point, the thesis applies techniques of legal doctrine to test local law, and some local standards established by the national courts in their decisions on the foreign arbitral awards. In later chapters (eight and nine) the thesis follows up the importance of these findings with evidence obtained from interviews with practitioners and judges from the GCC states.

This chapter examines the legal position in Qatar, which ratified the NYC in 2002³, and seeks to critically analyse the implementation of the NYC in the Qatari legal system. This chapter and the following two will investigate the key points of arbitration law discussed in chapter

¹ “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739.”

² “UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006, General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006).”

³ UNCITRAL official website.

two and will make a comparison between the legal positions of the states of Qatar, UAE and KSA which are as follows:

- 1) The overlap between the domestic law that regulates the recognition and enforcement of the foreign arbitral awards (REFAA), and how this result in failure to implement the NYC to the REFAA in a number of cases.
- 2) The validity of the arbitration agreement under the arbitration laws of these three states compared with NYC, ML, and international best practices.
- 3) How the national courts and the arbitration laws of these three states regulate the principle of separability of the arbitration agreement and the principles of competence-competence.
- 4) How the arbitration laws of these three states regulate the principle of party autonomy in terms of choosing the law and rules governing the arbitration process compared with the NYC, ML and international best practices.
- 5) The position of arbitration law in these three countries in relation to the finality of the arbitral award, and the challenges against the arbitral awards provided by the Qatari, UAE, and KSA arbitration laws compared with Article V of the NYC.
- 6) Chapters five, six and seven also discuss the local standards established by the national courts of these three states in relation to the REFAA.

This chapter presents the finding that the Qatari arbitration law is in drastic need of reform to bring it into line with the international legal framework developed by the NYC and ML. It arrives at this conclusion, as a result of a number of stark findings. In particular, the current position suggests an overlap between the NYC and the Qatari arbitration law which both regulates the REFAA. The Qatari national courts provide a strict consideration of the issues related to fairness and due process as a public policy ground for refusal. The foreign arbitral award has to be issued under the name of supreme authority of Qatar (president of Qatar) to be enforceable. The arbitral award may be subject to annulment in its merit. The Qatari judiciary has a lack of familiarity with international commercial arbitration generally and with the NYC in particular.

5.2 Inconsistencies deriving from the overlapping enactments on arbitration in Qatar

Article one of the NYC contains three sections that establish the scope of application of the NYC, which was discussed in detail in chapter two.⁴ In summary, the NYC covers two types of arbitral awards; foreign and non-domestic arbitral awards. The foreign arbitral award is an award issued in one state, which seeks recognition and enforcement in another state. The second category of award covered by the NYC is the non-domestic arbitral awards. A non-domestic award is defined as the arbitral award made in one country, which seeks recognition and enforcement in the same country where it has been issued. The NYC grants the states parties the right to decide which awards are non-domestic according to its arbitration laws. The ML stipulated the situation where the award should be deemed as international or non-domestic. This, of course, has achieved a wide degree of harmonisation in this respect and particularly between the states that adopted ML as a national arbitration law.

Unfortunately, the Qatari arbitration law does not define when the arbitral award is considered non-domestic or international. It only differentiates between arbitral awards issued in Qatar and arbitral awards issued outside Qatar. Qatar's arbitration law forms part of the Code of Civil Procedure (CCP) provisions 190–210 and 379–383.⁵ These provisions are recognised as Qatari arbitration law, and are composed of twenty-six provisions that provide for major differences compared with the ML and NYC. Articles 190-210 of the Qatari arbitration law regulate all arbitration taking place in Qatar such as the arbitration agreement, arbitration process, recognition and enforcement of arbitral award *issued in Qatar*.

Qatar ratified the NYC in 2002. However, after this ratification, the Qatari legislature did not amend the arbitration law despite many calls to do so.⁶ The only initiative taken by the Qatari legislature was the issuance of a new legal instrument called the 'NYC implementing decree'.⁷ This law implements the provisions of the NYC in their entirety without any

⁴ Chapter two (section (2.4)).

⁵ Qatari Code of Civil Procedures, Law No. 13 for 1990 as amended by Law No (13) for 2005. A copy of the Qatar arbitration law is available in English version at <http://www.almeezan.qa/en> Accessed May 2015. Official website operated by the Qatar Ministry of Justice.

⁶ Seem Maleh, 'Is It Time to Amend the Articles Regulating Arbitration in Qatar?' [2011] Kluwer Arbitration Blog.

⁷ Qatar legislative decree No (29) for 2003 on implementing the provisions of the NYC. English version available at <http://www.almeezan.qa/en> Accessed May 2015. Official website operated by the Qatar Ministry of

alterations, and it has the force of law in the Qatari legal system.⁸ Therefore, at the present time there are two domestic laws regulating the REFAA in the Qatari legal system. The first is the ‘NYC implementing decree’. The second is the Qatari arbitration law.

The foreign arbitral award that is issued outside Qatar is subject to the Articles 379-383 of Qatari arbitration law. These provisions are specified to regulating the recognition and enforcement of foreign judgments and foreign arbitral award in the Qatari legal system. Article 381 of the Qatari arbitration law expressly provides that Articles 379 and 380 pertaining to the enforcement of foreign judgments *shall apply* to the enforcement of foreign arbitral awards.⁹ However, Article 380 lists the events by which the court may refuse the enforcement request *by its own motion*, which is also not consistent with the provisions of Article V of the NYC.¹⁰ Importantly, Article 383 of the Qatari arbitration law states that:

“Rules provided for in the preceding Articles [379–382] should not prejudice rules and regulations provided for in *conventions signed* or to be signed between Qatar and other countries in this respect”.

This provision indicates that the *foreign* arbitral award should be recognised and enforced in Qatar according to the NYC, which Qatar signed and ratified. In a number of cases that will be analysed in the next section, the Qatari courts have ignored the state adoption of the NYC,

Justice. A decree is a tool granted to the Emir of Qatar (president) by the Qatari Constitution to perform the powers granted to him by the State Constitution to issue legislation after it has been approved by the legislative authority in Qatar (parliament). Qatar Constitution 2004, articles (24), (67) and (76).

⁸ NYC implementing decree No (29) for 2003: Article (1) stated that: “The accession of Qatar to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, as annexed to this Decree is hereby ratified. Consequently, in accordance with Article 24 of the Amended Provisional Constitution, this Convention shall have the force of law”.

⁹ Qatari arbitration law 1990, article (381) states “The provisions of the preceding two Articles shall apply to the arbitration decisions passed in a foreign country. Arbitration decisions shall be passed on a matter which may be decided on by arbitration according to the laws of the State of Qatar.”

¹⁰ *ibid*, Article (380) states that: “Execution may not be ordered unless the following is verified

1. The courts verification of the tribunal’s jurisdiction.
2. Verification that the parties were duly summoned and presented in the proceedings (lack of due process).
3. The judgment or award has become final according to the law of the court that made it.
4. The award does not contradict any previous judgment of the Qatari courts or the rules of the Qatari public order and good moral”.

and have also ignored the above-quoted provision (383), and controversially set aside arbitral awards on their merits based on Articles 205-206-207 of the Qatari arbitration law.¹¹

5.2.1 The case of *ITIIC v. DynCorp* (2008)

The case of the *International Trading and Industrial Investment Company (ITIIC) v. DynCorp Aerospace Technology (DynCorp)*¹² shows the undesirable attitude of the Qatari courts regarding the implementation of the NYC. ITIIC obtained an award from a tribunal seated in France under the auspices of the International Chamber of Commerce (ICC). Subsequent proceedings were commenced sequentially in Qatar, the United States (US), and France to enforce and set aside the arbitral award. The proceedings ended as a result of the failure of the Qatari courts to treat the award in accordance with the NYC. Furthermore, the Qatari Court of Cassation reviewed the merits of the award, and controversially set aside the award in its merits. However, the ITIIC/award creditor succeeded in the enforcement in the US¹³ and the award debtor/DynCorp failed to set aside the award in France (seat jurisdiction).¹⁴

The facts of this case can be summarised as follows. DynCorp is an American company providing security services. It entered into an agency agreement with ITIIC (a Qatari company). The contract was concluded in *July* 1998 pursuant to which ITIIC was appointed as DynCorp's service agent with a mandate to establish and operate a licensed branch in Qatar (the subject of the contract). The contract: 1) included a clause designating Qatari law as the applicable law to the substance of any dispute arising from the contract; 2) included an arbitration clause providing for disputes to be settled under the ICC Arbitration Rules, with no mention of an arbitral seat; 3) was signed in both Arabic and English, and the parties agreed that the Arabic version would *prevail*; 4) included a termination clause, that is:

¹¹Reza Mohtashami and Merry, 'The (Non)-Application of the New York Convention by the Qatari Courts: *ITIIC v. DynCorp*' (2012) 29:4 *Journal of International Arbitration* at 429-436, Minas Khatchadourian, 'Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards' [2013] *Kluwer Arbitration Blog*. Minas Khatchadourian, 'The Application of the 1958 New York Convention in Qatar' (2014) 1:1 *BCDR International Arbitration* 49-60.

¹²*International Trading and Industrial Investment Company v. DynCorp Aerospace Technology* [2006] 1013 Qatar Court of First Instance, [2006] 631 Qatar Court of Appeal, [2008] 33 Qatar Court of Cassation.

¹³*International Trading and Industrial Investment Company v. DynCorp Aerospace Technology* [2011] 763 F. Supp. 2d 12, US District Court, District of Columbia.

¹⁴*International Trading and Industrial Investment Company v. DynCorp Aerospace Technology* [2010] 09/17405 Paris Court of Appeal.

“This Agreement shall be for a period of *sixty months* from the date of signature and shall continue thereafter unless and until terminated by either party giving to the other not less than 90 (Ninety) days’ prior notice expiring on or at any time after the first anniversary of the date hereof ...”

In September 2001, DynCorp issued a letter of termination pursuant to the termination clause. DynCorp deemed the contract to be terminated as of December 2001, which was ninety days later. ITIIC disagreed, alleging that on its terms the contract would end in July 2003 at the earliest. In 2003, ITIIC filed a request for arbitration with the ICC in France. ITIIC alleged that DynCorp’s self-termination of the contract was wrongful and claimed outstanding payments plus interest from December 2001 until July 2003. The Terms of Reference, signed by both parties, designated France as the place of this arbitration according to the ICC Arbitration Rules. In May 2006, the sole arbitrator (appointed by the ICC Court) issued the final award in which he upheld ITIIC’s claim for breach of contract and awarded almost USD 1.1 million plus interest of 5% as of the date of the award, along with costs of USD 40,000, including ICC and arbitrator fees.

ITIIC initiated proceedings to enforce the award against DynCorp’s assets in Qatar pursuant to the NYC implementing decree. DynCorp challenged the enforcement request pursuant to Article (207) of the Qatari arbitration law and tried to set aside the arbitral award, alleging that the award suffered from a procedural defect.¹⁵ DynCorp argued that the ICC Secretariat and Sole Arbitrator had granted ITIIC multiple extensions of the deadline to pay its share of the advance on costs, contrary to Articles 4 and 30 of the ICC Rules.

DynCorp’s reliance on Article 207 of the Qatari arbitration law explains how the different standards for reviewing awards under the NYC and the Qatari arbitration law result in confusion in practice.¹⁶ However, it is thought that DynCorp relied on Article 207 because it provided more restrictive grounds to set aside an award than those provided by the NYC

¹⁵Qatari arbitration law 1990, Article (207): “Every interested party may request nullity of the arbitral award of the arbitrators in the following cases”: (4): “If the arbitral award is invalid or the procedures affected the validity of award”.

¹⁶This has confirmed in the other case in the later decision of the Qatar Court of Cassation. See *ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit, Published in YBCA (2014), volume XXXIX at 480. This case is discussed in section (5.2.3).

implementing decree as will be seen through the analysis in this chapter. The Qatari Court of First Instance dismissed DynCorp's challenges. DynCorp appealed this judgment and changed the grounds of challenge.¹⁷ It challenged the enforcement request pursuant to provision (205) of the Qatari arbitration law, which provides room to appeal the award on a mistake of fact similar to the court judgment.

However, before the Qatari Court of Appeal, DynCorp argued that the Arabic version of the contract, which the parties agreed to be the prevailing version, did not provide that the arbitral award would be final and binding. On this basis, DynCorp argued that the award was still not binding and was open for appeal on a mistake of fact pursuant to provision 205 of the Qatari arbitration law.¹⁸ The Court of Appeal dismissed this challenge and upheld the award after excluding the sum of interest. The issue of the 'interest' within the arbitral award is a topic that relates to Islamic legal traditions (see chapters seven and eight of this thesis for a detailed analysis and discussion).¹⁹

However, DynCorp then appealed this judgment on the same ground (Article 205). The Court of Cassation controversially accepted DynCorp's challenge and reviewed the merits of the arbitral award, leading to the arbitral award being annulled on its merits.²⁰ This judgement is also another angle that reflects how the overlap between the NYC provisions and Qatari arbitration law confused the Qatari judiciaries.²¹ In addition, in this judgment the Qatari Court ignored the ICC Arbitration Rules (procedural rules chosen by parties) and law of the seat (lex arbitri: France) to investigate the procedural defect raised by DynCorp that the award is not final and not binding. Moreover, the Qatari Court of Cassation in this case was an enforcing court; therefore, the competence of the Qatari Court of Cassation to set aside the

¹⁷*International Trading and Industrial Investment Company v. DynCorp Aerospace Technology* [2006] 631 Court of Appeal.

¹⁸See (section 5.4.1).

¹⁹Muhammad Billah, 'The Prohibition of Riba 'interest' and the Use of Hiyal 'trick' by Islamic Banks to Overcome the Prohibition' (2014) 28:4 Arab Law Quarterly 392-408. The issue of 'interest' has blocked the REFAA in KSA pursuant to the public policy ground for refusal. It also has received special treatment in the GCC legislations. All these issues have been analysed and discussed in chapter eight of this thesis where the public policy of the GCC states is examined in detail.

²⁰*International Trading and Industrial Investment Company v. DynCorp Aerospace* [2008] 33 Qatari Court of Cassation.

²¹Reza Mohtashami and Merry (n11), Minas Khatchadourian, (n11) at 52.

award was questionable. All these issues are examined in detail within the analysis of the Qatari arbitration law in the rest of the chapter.

The DynCorp case is not the only case where the Qatari court has failed to implement the NYC to the REFAA. Between 2012 and 2014, the Qatari courts controversially *annulled* and refused the recognition and enforcement of a number of foreign arbitral awards.²² The Qatari courts in these cases provided the same sort of reference to the Qatari arbitration law provided in the DynCorp case and also ignored Article (383) of the Qatari arbitration law that gives the NYC primacy to the REFAA in Qatar. All these cases are examined in detail through the analysis in this chapter where Qatari arbitration law is examined.

- **The failure to implement the NYC**

The first criticism of the Qatari courts in the above cases is the non-application of the ‘NYC implementing decree’ to the REFAA.²³ For example, the Qatari Court of Cassation in the above cases did not refer to the provisions of ‘NYC implementing decree’ or even refer to Article (383) of Qatari arbitration law explained in the above discussion, which provides the possibility of accommodating the overlap between the Qatari arbitration law and NYC. The adoption of the NYC without amending or abolishing the Qatari arbitration law has hence resulted in confusion in practice. The present research suggests a possible accommodation of both the Qatari arbitration law and NYC implementing decree. Pursuant to Article III of the NYC, which states that:

“Each Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure* of the territory where the award is relied upon”.

The Qatari arbitration law should apply to the extent that it does not conflict with the NYC implementing decree, which applies to the REFAA in Qatar. In the case of a conflict between the Qatari arbitration law on the one hand, and the NYC implementing decree on the other

²² Reza Mohtashami and Merry, (n11) 432, Minas Khatchadourian, (n11), *Party v party* [2013] 2216 /2013 Qatar Court of First Instance, *Party v party* [2012] 64 Qatari Court of Cassation, *ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatari Court of Cassation, Second Civil Circuit. These cases have been highlighted in the YBCA (2014), volume XXXIX at 480. See also Sultan Alabdulla, ‘The Legal Nature of Arbitration Awards and the Question of Whether Omitting the Name of the Supreme Authority in the Country from the Award Is a Fundamental Flaw Which Justifies Invalidation’ (2014) 1 BCDR International Arbitration Review 29–38 (Arabic).

²³Reza Mohtashami and Merry, (n11) 432.

hand, priority should be given to the NYC implementing decree, on the basis that the new law repeals the old law in the situation where both laws regulate on the same issue.²⁴

Relevant to the accommodation of this overlap is also the *lex specialis* principle as a generally recognised principle of law and particularly upheld in this context by the Egyptian Court of Cassation. In *El Nasr Company for Fertilizers & Chemical Industries (SEMADCO) v. John Brown Deutsche Engineering*, the Cairo Court of Cassation noted that:

“The term “rules of procedure” mentioned in the NYC is not limited to the Code of Procedure but includes all laws organizing the proceedings such as the *Arbitration Law which is a procedural law falling under the term “rules of procedure”*. Given that the provisions of the Code of Procedure provide for more onerous conditions than those provided by the provisions of the Egyptian Arbitration Law, the latter should apply to the enforcement of foreign arbitral awards...”²⁵

It is argued by this thesis that the lack of developed arbitration law based on or inspired by the ML and NYC could be one of the main reasons why the Qatari Courts have failed to fulfil the state commitment to the NYC. A lack of well-developed arbitration law may create a legal vacuum and cause confusion for the litigants and national courts. Such inconsistency does not help the legal regime to regulate the REFAA, despite the adoption of the NYC.

The next part of the analysis will engage in analysing how Qatari arbitration law regulates the arbitration agreement and arbitral awards, as they are the central topics that are regulated by the provisions of the NYC as explained in detail in chapter two of this thesis. Despite the adoption of the NYC, the Qatari arbitration law show difficulties in accepting the essential principles to the operation of arbitration as an effective form of dispute resolution that was discussed in chapter two of this thesis. Therefore, the next analysis seeks to unpack the problems that might face the REFAA in Qatar.

²⁴John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) at 28.

²⁵*El Nasr Company for Fertilizers & Chemical Industries (SEMADCO) v. John Brown Deutsche Engineering* [2005] 966/73 Egypt Court of Cassation, see also *Egyptian Saudi Hotels Company v. Kurt and Daves Corporation* [1990] 2994/57 Egypt Court of Cassation.

5.3 The validity of the arbitration agreement in Qatar

An arbitration agreement, like any other agreement, operates under the umbrella of contract law and this agreement must meet tests of formal and substantive validity to be able to be recognised and enforced under the law, otherwise it will just be a statement of intent which may be morally binding on the parties but without legal effect.²⁶ The validity of the arbitration agreement is regulated under Article 190 of Qatari arbitration law.²⁷ This article is the only provision in Qatari arbitration law that explains the requirement of having a valid arbitration agreement, and will be examined in detail in this section.

The articulation of Article 190 of the Qatari arbitration law was inspired by the heritage of the past, and is mainly based on the former Egyptian arbitration law and Sharia law.²⁸ The articulation of this provision provides stricter conditions regarding the validity of arbitration agreements to those provided by Article II of the NYC. Article II of the NYC requires three conditions that should be met by the arbitration agreement to be recognised and enforced by national courts.²⁹ First, there should be an existing written agreement; second, there must be a “defined legal relationship”; third, “the subject matter of the dispute must be capable of settlement by arbitration”. However, Article 190 of Qatari arbitration law puts forward four core conditions that should be met by the arbitration parties in order to have a valid arbitration agreement. First, the arbitration dispute should be specified in the arbitration clause or submission agreement. Second, the parties must have the legal capacity to enter into the arbitration agreement. Third, the agreement must be in writing without identifying the required form of writing. Fourth, it should be possible to resolve the subject matter of the

²⁶Michael Hoellering, ‘International Arbitration Agreements: A Look Behind The Scenes’ (1998) 53:4 *Dispute Resolution Journal* 64-70 at 65.

²⁷Qatari arbitration law 1990, Article (190) states that: “The parties to a contract may agree on arbitration in a specific dispute. They may also agree on arbitration in all disputes that arise out of implementing a specific contract. No agreement for arbitration shall be valid unless evidenced in writing. The subject of the dispute shall be specified in the terms of the referral or during the hearing of the lawsuit even if the arbitrators were authorized to act as conciliators, otherwise the arbitration shall be null and void. Arbitration shall not be permissible in matters in which conciliation is not permissible. An arbitration agreement may be made only by the parties that have legally capacity.”

²⁸Chapter four (section 4.5).

²⁹Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, Oxford 2007) at 109.

dispute through arbitration. The subject matter that cannot be arbitrated in Qatar will be examined in chapter eight where the public policy of the GCC states will be studied in detail.

5.3.1 Formal validity of the arbitration agreement

Article 190 of the Qatari arbitration law requires the arbitration agreement to be in writing, but does not identify the form and the means of the writing.³⁰ It states that: “No agreement for arbitration shall be valid *unless evidenced* in writing”. Hence, the article exclude any other means of proof for the arbitration agreement, whether via affidavits, witness statement or oaths. Accordingly, such exclusivity, albeit targeting the proof of the arbitration agreement, may lead in fact to the consideration that the written form is required for the validity of the arbitration agreement, since there is no other possible way to prove it.

A noteworthy difference between Article 190 of the Qatari arbitration law and the correspondent provision in the ML is that Qatar law requires the arbitration agreement to be in writing, failing that it will be void, whereas the ML only requires the arbitration agreement to be made in writing. Hence, in Qatar arbitration law the written requirement is in principle not met in circumstances where there is an exchange of statements of claim and defence in which one of the parties pleads in its submission the existence of an arbitration agreement and the other party does not object to its existence, circumstances expressly contemplated as meeting the ML requirements.³¹

The position of the Qatari arbitration law regarding the form of the writing is even stricter than the position of the NYC Article II (2) as explained in detail in chapter two (section 2.2). Article 190 of Qatari arbitration law does not explain how the form of the writing should be interpreted. Therefore, the question of whether the national courts would accept modern electronic means of written agreements such as electronic communication (as was the case in Article 7 of the ML) is still open. As explained in chapter two, courts in many countries have decided that when considering the phrase ‘agreement in writing’ as set out within the NYC, they should give it a broad interpretation in light of Article 7 of the ML. However, countries

³⁰Qatar arbitration law 1990, article 190.

³¹UNCITRAL Model Law 1985 as amended in 2006, Article 7(5): “Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other”.

that have not adopted the ML, or who do not have a modern arbitration law that defines the form of the ‘written agreement’, such as Qatar, are not obliged to interpret Article II (2) by reference to the ML. It also may be useful to mention here that Qatar has issued a domestic law to regulate electronic transactions and to define the means of writing in electronic transactions.³² It is still questionable whether the Qatari courts will accept written arbitration agreements that are produced electronically, such as e-contracts. It seems that as the Qatari legislature issued a law regulating electronic transactions such as electronic means of offer and acceptance, electronic means of writing and electronic signatures, then the arbitration parties should make reference to this law to avoid uncertainty.

5.3.2 Material validity of the arbitration agreement

Article 190 of the Qatari arbitration law states that:

“...The subject of the dispute *shall be specified* in the terms of the referral or *during* the hearing of the lawsuit *even* if the arbitrators were *authorized to act as conciliators*, otherwise the arbitration shall be *null and void*...”

The above quoted provision differs from Article II (1) of the NYC and adds additional requirements to the validity of the arbitration agreement than those imposed by the NYC. Article II of the NYC requires that the subject matter of the disputes shall be capable of being resolved by arbitration without further requirement. Within every legal system, there are certain matters that are considered fundamental to the public policy of the state, and thus cannot be resolved by arbitration.³³ However, in Qatari arbitration law, the determination of the subject matter of the dispute in the arbitration clause or submission agreement is compulsory; otherwise, the arbitration agreement shall be null and void. However, such a determination might be difficult to achieve, particularly in arbitration clauses where the arbitration parties agreed in advance to refer any dispute to arbitration before the specific

³²Legislative Decree No. (16) of 2010 on the Promulgation of the Electronic Commerce and Transactions Law. Article 2 of this law states that: “The provisions of this Law apply to transactions between parties who agree to conduct transactions using electronic communications”.

³³Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn Kluwer Law International, Netherlands 2001) at 768, Loukas Mistelis and others, *Comparative International Commercial Arbitration* (1st edn, Kluwer Law International, Netherlands 2003) at para 9-35, Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP, Oxford 2009) at 655.

dispute arose. The requirement that the arbitration clause should determine the dispute is related to the concept of contract and its clauses in Sharia law. The issue in general is related to the uncertainty of the parties' rights and obligations in their contractual relations.³⁴ Therefore, the validity of the arbitration clause in Sharia law is debatable, as in the arbitration clause the parties agreed to refer the dispute to arbitration before the dispute arose. This issue will be examined in detail in chapter seven, in relation to the Saudi arbitration law questioning the validity of the arbitration agreement in terms of it not violating Sharia law.³⁵

However, Article 190 also allows parties to determine the dispute during the arbitration proceedings. This could suggest that the Qatari legislature sought to validate arbitration clauses that do not clearly determine the dispute. This interpretation has yet to be tested by case law. Although Article II of the NYC does not require that the subject matter of the dispute shall be determined in the arbitration clause, it is important to note that the arbitrator or arbitral tribunal shall not go beyond the scope of the arbitration agreement. This is to avoid setting aside the arbitral award or refusing its enforcement by the national courts under Article V (1)(c) of the NYC. The scope of the arbitration agreement depends on the wording of the arbitration clause. Some clauses provide for inclusive scope in the sense that the arbitration clauses extend to cover all types of disputes arising from the underlying contracts including the claims in tort. Some arbitration clauses provide for exclusive disputes arising from the underlying contract.³⁶ In all such cases, the form of words used in the arbitration agreement will be important.

In addition, Article 190 makes an unnecessary reference to the following phrase: "Even if the arbitrators were authorised to act as conciliators". This reference may be traced back to the *theoretical* debate relating to the views of the Sharia law jurisprudence on modern arbitration or arbitration by law; this was discussed in detail in chapter four (section 4.3.3). The Sharia jurisprudential schools have different lines of thought relating to the very concept and purpose

³⁴Nadhirah Nordin and others, 'contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Say?' (2014) 10:15 Journal of Asian Social Science 37-47, Reyadh Seyadi, 'Legal Aspect of Islamic Finance' (2015) 29:3 Arab Law Quarterly at 285-295.

³⁵See chapter seven (section 7.3.5).

³⁶Redfern and others, (n 33) at 106-108.

of arbitration.³⁷ Some scholars consider arbitration as being similar to conciliation and others consider arbitration as being legally binding, which is similar to the modern concept of arbitration. However, although Article 190 may suggest uncertainty, it is nevertheless essential to determine the subject matter of the dispute either in the arbitration clause (if possible) or during the arbitration proceedings to avoid the arbitration agreement having invalidity.

- **The parties' capacity to enter into the arbitration agreement**

As a general principle, parties to a contract or an agreement must have legal capacity to enter into such a contract. Thus, the contract will be invalid if one of the parties is under some incapacity. The same is also true with regard to an arbitration agreement. The NYC hence include this ground and entitles the court to refuse recognition and enforcement of arbitral award if the party opposing the award can prove that a party to the arbitration agreement was under some incapacity.³⁸ The capacity of the party to enter the arbitration agreement varies from state to state. For example, the party may have the capacity to enter into the arbitration agreement according to the law of his nationality, or his domicile, or his habitual residence and not have capacity according to the law of the place of arbitration.

Article 190 of the Qatari arbitration law also requires the parties to have the capacity to conclude the arbitration agreement.³⁹ The NYC and ML also require the same condition to be met. Qatari contract law defines the capacity of a natural person as follows:

“Any person who attains the age of majority and is in possession of his mental faculties shall have full legal capacity to perform legal acts, unless guardianship or custody of his property is decided to be continued or unless such person is incapacitated”.⁴⁰

³⁷Jalal el-Ahdab and Abdul Hamid El Ahdab, *Arbitration With the Arab Countries* (3rd edn, Kluwer Law International, Netherlands 2011) at 8.

³⁸Chapter two (section 2.4.1)

³⁹Qatari arbitration law 1990, article (190) states that: “... An arbitration agreement may be made only by the parties that have legally capacity”.

⁴⁰Qatar Civil Code 2004, Law no (22) for 2004 promulgating the Civil Code, article (49). English version available at <http://www.almeezan.qa/en> Accessed May 2015. Official website operated by the Qatar Ministry of Justice.

Unlike the incapacity of natural person⁴¹ or private corporations⁴², the issue of incapacity of a state, public agencies or state-owned enterprises to enter into arbitration agreements is a typical problem that occurs frequently in international transactions.⁴³ The essential question that needs to be determined in this respect is whether a State, or a state agency, has the capacity to agree to refer a dispute to arbitration in Qatar? Qatari contract law provides that the state and government bodies and municipalities have a legal personality and may therefore exercise the rights of individuals *except* when limited by law.⁴⁴ Therefore, it is generally understood that government entities or state-owned enterprises are free to enter into arbitration agreements so long as there are no statutory restrictions preventing them from doing so. Thus, any foreign or national Qatari party who wishes to enter into an arbitration agreement with Qatari public entities or state-owned enterprises should ensure that there are no restrictions; otherwise, any prior permission should be sought from the Qatari government.

- **Uncertainty in relation to the applicable law governing the capacity question**

The drafters of the NYC left open the question of which exact law is applicable to the party's capacity to enter the arbitration agreement.⁴⁵ The NYC states that 'under the law applicable to them', the ML is still not specific as to which law governs the capacity question.⁴⁶ However, the prevailing view under the scheme of the NYC and ML is to examine the capacity question by reference to the personal law of the party or the law of the place of domicile or habitual

⁴¹Ibid, Articles (39-52). "The age of majority for a natural person in Qatar is eighteen years of age.⁴¹ Minors, persons of unsound mind, persons without legal capacity such as bankrupt persons, or persons deprived of their civil rights as a result of criminal convictions for certain crimes are also considered as having a lack of legal capacity under Qatari law."

⁴²Ibid, Article (54) "Private enterprises are recognised in Qatar as legal persons if they meet the following conditions: They have a separate patrimonium, a separate domicile located at their head office, their own nationality, and finally the presence of a natural person that expresses the will of such a legal person".

⁴³Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International, Netherlands 1981) at 278, Di Pietro, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron 2001) at 138.

⁴⁴Qatar Civil Code 2004, article (53).

⁴⁵Redfern and others, (n33) at 95, Berg, (n 43) at 276, Emmanuel Gaillard and others, *International Commercial Arbitration* (Kluwer Law International, Netherlands 1999) at 454.

⁴⁶UNCITRAL ML, article 34(2)(a)(i) stated that: "a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State".

residence of the party concerned.⁴⁷ In the case of a legal person, capacity issues are determined by reference to the law of the place of incorporation.⁴⁸

The Qatari arbitration law is silent about the law governing the capacity question, unlike the NYC and ML that makes reference to the law applicable to the parties to govern the capacity question. Also relevant in this context is Article 207 of the Qatari arbitration law that lists the instances to set aside the arbitral awards, and include the lack of capacity, however, it does not mention under which law the Qatari court shall examine the capacity question.⁴⁹ If it was to be decided according to the conflict of laws rules of Qatar, Article 11 of the Qatari Civil Code states that:

“The status and legal capacity of natural persons are governed by the law of the country to which they belong by reason of *their nationality*”.⁵⁰

This provision is clear and is applicable to all natural persons, including foreigners, as the law does not provide specific provisions for foreigners. In the absence of a specific nationality, the question arises as to what law the court shall apply to examine the capacity question? The Qatari Civil Code is silent about this issue, but does include some rules that indicate the meaning of domicile,⁵¹ which *may* become applicable to the capacity question in line with prevailing view under the NYC and ML. Therefore, in the *absence of a specific nationality*, the Qatari court *might* refer to the law of the party’s domicile (habitual residence) to examine the capacity question. This law may be Qatari law if this person has a business in Qatar and the arbitration agreement or the REFAA is related to that business.

⁴⁷Tweeddale, (n29) at 127.

⁴⁸Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (1st edn, OUP, Oxford 2007) at 646. Redfern and others (n33) at 95, Tweeddale (n 29) at 127.

⁴⁹Qatar Arbitration law 1990, article 207 (2): “An arbitration agreement may be made only by the parties that are legally entitled to dispose of the disputed rights.”

⁵⁰Qatar Civil Code 2004, article (11).

⁵¹*Ibid*, Article 41 states, “the domicile of a person is his place of *habitual residence*. Such person may have more than one domicile simultaneously”. Furthermore, Article 42 of the Qatari Civil Code states “the place where a person exercises a trade or profession *shall* be considered his domicile in connection with such trade or profession”.⁵¹

However, the Qatari Civil Code is certain about the law governing the capacity of the *legal* person, either foreign or national, in that it has to be the law of the place of incorporation (headquarters). This is subject to the legal person not having conducted their *main activities* in Qatar. In this case, even if the actual headquarters are outside Qatar, Qatari law shall nevertheless apply to the capacity question.⁵² It seems that the Qatari Civil Code does not provide difficulties regarding the law that governs the capacity question. However, it is recommended that a provision is included in the Qatari arbitration law that explains clearly which law governs the party capacity.

5.4 The lack of clear recognition of the separability of the arbitration agreement

The principle of separability of the arbitration from the underlying contract was developed to enhance the effectiveness of arbitration as a preferred method of dispute resolution in international trade.⁵³ The principle of separability of the arbitration agreement from the underlying contract was introduced in chapter two (section 2.2.2). The doctrine of separability means that the arbitration clause is a separate agreement from the other terms of the contract; therefore it will be treated as an independent agreement from the underlying contract. This doctrine differentiates between the underlying contract that governs the parties' rights and obligations, and the arbitration agreement that governs the arbitration process. Schwebel noted that when the parties enter into a contract that includes an arbitration clause, they are in fact entering two contracts,⁵⁴ with each of these two contracts independent from the other and possibly governed by different laws.⁵⁵ The applicable laws to the main contract may have no connection with the applicable laws to the arbitration agreement.⁵⁶ The rationale behind the separability principle is that if the arbitration agreement is not considered a separate agreement, then the termination of the main contract will extend to the arbitration clause or arbitration agreement.⁵⁷

⁵²Ibid, article (12): "The legal status of foreign juristic persons, such as companies, associations and corporations, shall be subject to the law of the State where such juristic persons have established their respective headquarters. Where, however, a juristic person conducts its main activity in Qatar, even if its actual headquarters is outside Qatar, the Qatari law shall nevertheless apply".

⁵³Gaillard and others, (45) at 199.

⁵⁴Mistelis and others, (n33) at 102.

⁵⁵Stephen Schwebel, *International Arbitration: Three Salient Problems* (1st edn, CUP, Cambridge 1987) at 5.

⁵⁶Born, (n33) at 173.

⁵⁷Schwebel, (n55) at 5.

Unfortunately, Qatari arbitration law does not include explicit reference to the principle of separability of the arbitration agreement. Nevertheless, the Qatari Court of Appeal in a domestic arbitration case ruled that the arbitration clause has an autonomous nature that protects it from the possible nullity or termination of the main contract.⁵⁸ Therefore, it seems that the Qatari court accepted the principle of separability of the arbitration agreement from the underlying contract despite of the lack of explicit reference to it in the Qatari arbitration law.

However, the separability of the arbitration agreement does not completely deprive the national courts from considering the question of invalidity of the arbitration agreement.⁵⁹ The reasons for an underlying contract becoming void may also affect the validity of the arbitration agreement.⁶⁰ It is argued that the arbitration agreement may be held to be void if the reason of the nullifications of the underlying contract concern public policy elements, or the illegality of the underlying contract goes to the root of the arbitration agreement.⁶¹ There is also no uniform understanding between the national courts to the extent of limitation of the principle of separability of the arbitration agreement.⁶²

In terms of comparison, for example, in the *Fiona Trust*⁶³ case that is discussed in chapter two, the English courts confirmed the principles of separability of the arbitration agreement from the underlying contract, and held that the arbitrators, not the courts, should determine the question of validity of the underlying contract *unless* the invalidity of the underlying contract was directed at the arbitration clause in particular. In this case, the English courts ruled that the arbitration clause was valid and wide enough to encompass the fraud and

⁵⁸Appeal No 170 for 1996, see also Appeal No. 1550 for 2001. Cases cited in El-Ahdab, (n37) at 578.

⁵⁹UNCITRAL Model Law 1985 as amended in 2006, article (16), See also William Park, 'Determining Arbitral Jurisdiction of Tasks Between Court and Arbitrators' (1997) 8 American Review of International Arbitration at 133.

⁶⁰Tweeddale (n29) at 127.

⁶¹Ibid at 125.

⁶²Redfern and others, (n33) at 119.

⁶³*Fiona Trust and Holding Corporation and others v Privalov and others* [2007] UKHL 40. See also the case of *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd and others* [1993] QB 701.

bribery claims.⁶⁴ There is a lack of published case law from the Qatari courts that would explain when the nullity of underlying contract extends to the arbitration clause. This question remains to be tested in practice by the Qatari courts.

5.5 The lack of recognition of the competence-competence principle

The principle of competence-competence is explained in chapters two. This principle refers to the authority of the arbitration tribunal to determine and rule in its own jurisdiction to hear the dispute.⁶⁵ It means that if the arbitration parties have gone directly to the arbitration tribunal, and raised the jurisdictional issue before the tribunal, the arbitrators have the power to decide independently whether they possess jurisdiction or not.⁶⁶ Even if the parties raise the jurisdictional challenge before the national court at the beginning of arbitration, or during the arbitration process, the court may reject the suit and refer the parties to the arbitral tribunal to determine the jurisdictional question.⁶⁷ The advantage of this principle in the arbitration process is that the tribunal has the independent power to rule on its jurisdiction, which makes the role of arbitration effective as a dispute resolution mechanism.

Unfortunately, Qatari arbitration law does not recognise the principle of competence-competence, either explicitly or implicitly. Therefore, if the Qatari arbitration law qualifies as the *lex arbitri* for arbitration taking place in Qatar, and there is a dispute regarding the validity of the arbitration agreement or arbitral tribunal jurisdiction, the arbitral tribunal may not rule independently on its jurisdiction. Article 192 of Qatari arbitration law is the only close provision that might be relevant to the jurisdictional question.

Article 192 of Qatari arbitration law provides that:

“The arbitration clause deemed that the litigants waive their rights to have recourse to the court having initially the competent jurisdiction to examine the dispute. *If a dispute arises*

⁶⁴Ibid.

⁶⁵Mistelis and others, (n33) at 332.

⁶⁶Antonias Dimolista, ‘Separability and Kompetenz-kompetenze’ in ICCA Congress Series No. 9, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer, 1999) at 217-228.

⁶⁷Tweeddale, (n29) at 123.

in respect of the execution of a contract that contains an arbitration clause, and one of its parties brings an action before the competent court, *the other party may hold to the arbitration clause as an objection to the non-acceptance of the action*".⁶⁸

Pursuant to this article if a dispute arises concerning the performance of a contract containing an arbitration clause and if one of the parties refers to the court originally having jurisdiction, the other party may request that this claim be held inadmissible due to the existence of an arbitration clause. Concerning claims of inadmissibility, Article 70 of the Qatari CCP provides that such a claim must be raised in the first submission filed with the court before any other claim or defence, otherwise such right shall extinguish.⁶⁹ Therefore, it is recommended to make sure such claim is submitted in the very first submission and during the first hearing. Article 192 of the Qatari arbitration law lacks clarity as to whether, if the underlying contract is null and void, will the arbitration clause survive and still be valid?

The principle of competence-competence is not without limits and may be subject to the control of the national courts, particularly the courts of the place of arbitration as discussed in detail in chapter two. There is no uniform understanding in which stage of arbitration the court can interfere regarding the jurisdictional question. The *Dallah*⁷⁰ case suggests that, because of the local standards established by English courts, that even if the arbitration took place abroad and the question of the arbitral tribunal jurisdiction became final *according to the law of the place of arbitration*, the English court (enforcing court) had jurisdiction to examine the question of the arbitral tribunal jurisdiction.⁷¹ This position might be critical and correlates with some reservations of the Common Law jurisdictions on the principle of competence-competence that might be seen as not being supportive to the arbitration.⁷²

⁶⁸Qatari arbitration law 1990, article (192).

⁶⁹Qatari Code of Civil Procedure 1990, Article (70) states that: "The defense of lack of jurisdiction, or defense of invalidity of summons and all other defenses pertaining to procedures shall be raised together prior to any application or defense in a lawsuit or the defense of non-acceptance, *otherwise* the defense's right in respect of these non-inclusive defenses *shall lapse*. The appellant's right to claim these defenses shall lapse if they are not included in the petition of appeal."

⁷⁰*Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46.

⁷¹*Ibid*, page 42, Para 98.

⁷²Chapter two (section 2.2.2).

Therefore, it is highly recommended to the Qatari legislature to make clear reference to the principle of separability and competence-competence in its arbitration law. These two principles are regulated by Article 16 of the ML and have been adopted by most modern national arbitration laws.⁷³ The following section will examine how the Qatari arbitration law regulates one of the most significant features of arbitration, that is the party autonomy in choosing the law and rules that govern the arbitration process. Despite the adoption of the NYC by Qatar, it seems that Qatari arbitration law is lacking in several aspects on this point and provides uncertainty in understanding the operation of the NYC in the Qatari legal system.

5.6 The importance of party autonomy in relation to the different governing laws in arbitration

The principle of party autonomy is one of the key features of international arbitration. It has been described as the “cornerstone of modern arbitration”.⁷⁴ Party autonomy in the arbitration process is reflected in the party’s right to choose the place of arbitration and the party’s freedom to choose the law and rules governing the arbitration process. The NYC and ML and most modern arbitration legislation permit the freedom of the parties to choose the place of arbitration, the law governing the arbitration agreement, the merits of the dispute and the law governing the arbitral procedure. However, despite the adoption of NYC, Qatari arbitration law does not pay much attention to the choice of laws and rules, and provides a different approach to the applicable law issue in arbitration. The discussion in this section is also relevant to the arbitration law of UAE that will be discussed in the next chapter. The UAE arbitration law provides a similar position to Qatar in this point with slight differences that will be discussed in the next chapter.

The problem of Qatari and UAE arbitration law regarding the question of the choice of laws in arbitration is that it results in uncertainty as the law is silent in some aspects, and in another aspects provides a different approach than the approach adopted by the NYC and ML discussed in detail in chapter two. This situation leaves the question of the party autonomy to make the choice of laws operate in a sphere of vagueness and uncertainty.

⁷³UNCITRAL ML 1985 as amended in 2006 article 16(1).

⁷⁴*DiagnosticalInc v Centerchem Inc* (1998) 44 New South Wales Law Review at 312-342.

Therefore, the discussion in this section will be involved with the conflict of laws rules, as it is the only source of law in Qatar that gives answer to the choice of laws question in the Qatari legal system. This might provide a better understanding of the possible relevant laws that would govern the arbitration agreement, and merits of the dispute and whether the parties' choice will be recognised or not. This is to avoid the possible nullity of the arbitral award if the parties' choice did not match the some mandatory conflict of laws rules.⁷⁵

5.6.1 Conflict of laws rules and their relation to the arbitration practices in Qatar⁷⁶

Although most modern arbitration legislation, arbitration rules and international treaties recognise the principle of party autonomy, i.e. the parties may expressly choose a law or laws to govern the arbitration, the principle exists because a country's national law permits it.⁷⁷ The question is raised that if the country's national arbitration law is silent on this question (party autonomy) how can the parties or the arbitral tribunal determine the laws and rules that govern the arbitration agreement or the merits of the dispute? As argued by Tweeddale⁷⁸ and Moss,⁷⁹ it may be impossible in some instances to avoid issues relating to the conflict of laws rules in international commercial arbitration.

Conflict of laws rules operate to deal with situations in which a case has a legal elements from more than one jurisdiction, and operates to determine which national law governs the solution of the various problems involved in the case.⁸⁰ Most, if not all, legal systems contain a set of rules that serve to indicate what law is relevant to govern the contract either in terms of formal or substantive validity.⁸¹ These types of rules are called conflict of laws rules or private international law rules. These rules become important when the contract contains a

⁷⁵Tweeddale, (n29) at 205.

⁷⁶Giuditta Moss 'International Arbitration and the Quest for the Applicable Law' (2008) 8:3 Global Jurist Article 2, 1-42 at1.

⁷⁷Tweeddale, (n29) at 201.

⁷⁸ *ibid.*

⁷⁹Giuditta Moss (n76) at1.

⁸⁰Goode and others, (n48) at 57.

⁸¹Redfern and others, (n33) at 233.

number of foreign elements, such as the parties come from different states, or the contract is concluded and performed in two different countries, or the subject matter of the contract contains many different foreign elements. The relevant conflict rules generally select particular criteria that serve to link or connect the contract in question with a given system of law.⁸²

The question that arises is if the arbitration law of the forum state is silent, and no mention is made of the parties' right to make a choice, as is the case with Qatar and UAE, how can the arbitration parties make the proper choice? And how shall the arbitral tribunal determine the most relevant law in the absence of the parties' choice? Another difficult question is whether the conflict of laws rules provided by the Qatari and UAE legal systems apply to the arbitration agreements or not. In addition, in the GCC states there is no regional regulation such as Rome I Regulation on the Law Applicable to Contractual Obligations clearly excludes the question of the applicable law to the arbitration agreement from being determined by the conflict of law rules.⁸³ The only rules that regulate the possible relevant laws to the contractual relations is the conflict of laws rules that are part of the Civil Codes in all GCC states (except the KSA). In addition, there is a lack of published case law in the states of Qatar and UAE (after the adoption of the NYC 2002-2006) regarding whether the national courts will refer to the rules of conflict of laws that are applicable to all contractual relations or whether the courts will give special treatment to the arbitration agreement as, for example, Rome I does.

5.6.2 Uncertainty in relation to the law governing the validity of the arbitration agreement

The law governing the validity of the arbitration agreement refers to the law that determines the formal and substantive validity of the arbitration agreement. For example, it might relate to determining the validity of mutual consent, common intentions, form of writing, form of signature, and might also relate to substantive issues, such as the legality of the whole arbitration agreement or arbitrability question. The Qatari arbitration law is silent about the

⁸²Ibid.

⁸³Regulation (Europe Council) No 593/2008 of the European Parliament and of the Council of June 2008 on the law applicable to contractual obligations (Rome I), article 1 (e). Published in Official Journal of the European Union L177/6.

law governing the validity of arbitration agreements. Even at the stage of recognition and enforcement of an arbitral award, the law is silent about the law governing the validity of the arbitration agreement.⁸⁴ However, as Qatar is a NYC state party, it is not clear whether the Qatari courts will refer to the law chosen by the parties or the law of the place of arbitration (as in Article V (1)(a) of the NYC) because of the lack of published case law addressing this issue.

In countries that have adopted the ML, the validity of the arbitration agreement is determined by the law chosen by the parties, and in the absence of such choice, the law of the place of arbitration applies. The other approach in the absence of such choice is that the validity of the arbitration agreement may be determined by the conflict of laws rules of the place of arbitration.⁸⁵ In most cases, this approach will result in the arbitration agreement being governed either by the proper law of the contract or the law of the place of arbitration. The problem in relation to the Qatari position is that the Qatari arbitration law is silent, and whether the arbitration parties were allowed to make a choice or not is not clear. At the same time, Qatar has adopted the NYC and issued a dedicated law called ‘NYC implementing decree’ that includes a provision mirrored in Article V (1)(a) of the NYC. This means that in principle, the parties’ choice must be recognised if there is a challenge regarding the validity of the arbitration agreement. This argument remains to be tested by the Qatari court practices.

However, in the light of the overlap between the NYC provisions and Qatari arbitration law, if it is assumed that international arbitration is taking place in Qatar, or that a foreign arbitral award is seeking recognition and enforcement through the Qatari courts, and there is a challenge before the courts regarding the validity of arbitration agreement, then two questions can be raised. First, under which law will the Qatari court examine the validity of the arbitration agreement? Second, will the parties’ choice of law be recognised or not? To answer this question, a reference to the Qatari conflict of laws rules becomes important to avoid any unpredictable results that might lead to the arbitral award being nullified, given that the Qatari conflict of laws rules are the only relevant rules in the Qatari legal system concerning this situation.

⁸⁴Qatari arbitration law 1990, article (207): “If the award was rendered in the absence of an arbitration agreement, or on the basis of a void or extinct arbitration agreement, or where the award exceeded the scope of the arbitration agreement or violated one of the rules of public policy or good morals.”

⁸⁵Tweeddale, (n29) at 216-224.

Article 29 of the Qatari Civil Code that is the relevant conflict of laws rule states that:

“The *form of contracts* shall be governed by the law of jurisdiction of the country *where such contracts are concluded* or the law governing the contract in its *substantive provisions*, the law of the *domicile* of the contracting parties, or their common national law, may also apply”.⁸⁶

The validity of the arbitration agreement seems to be governed by the law of the place where the arbitration agreement was concluded or the proper law of the contract or the law of the parties’ domicile. This provision clearly provides for three options, which is unusual in conflict of law rules of this nature. The rationale behind choice of law rules (the conflict of law rules that provide for the determination of the applicable law to a certain legal category) is the possibility to identify the legal system that is most closely connected to the legal relation in order to justify its applicability. It seems that contrary to that usual pattern in choice of law rules, the referred Qatari provision provides for sequential options. The first is the law of the place where the arbitration agreement was concluded. The second is the ‘proper law’ of the contract, and the third is the law of the parties’ domicile.

The third option, “parties domicile”, is a very strange connecting factor, because the arbitration parties usually come from two different domiciles and therefore the connecting factor as such is pointing potentially to two different legal systems. The unsuitability of the connecting factors listed in this provision might be detrimental for the sake of generating certainty and predictability in the contractual relations in the domain of international commercial contracts. Having so many alternative connecting factors, as suggested by the above provision, adds complexity and opens the door to unpredictable results.

In the event of a challenge regarding the validity of an arbitration agreement it remains to be seen whether the Qatari courts will examine the validity of the arbitration agreement according to the law chosen by the parties or, failing any indication thereon, according to the law of the place of arbitration pursuant to Article V (1) (a) of the NYC, or whether the court

⁸⁶Qatari Civil Code 2004, article (29).

will refer to its own law and apply the above-discussed conflict of laws rules. The most likely assumption is that the Qatari court will refer to the Article V (1)(a) of the NYC. This is because the Qatari conflict of laws rules also provides that:

“The provisions of the preceding Articles [the conflict of law rules discussed in the above] shall apply only when no provisions to the contrary are included in a special law or in an *International Convention* in force in Qatar”.⁸⁷

As Qatar is an NYC party, then the first answer is that the validity of the arbitration agreement shall be determined according to the law chosen by parties, and in the absence of such choice, according to the law of the place of arbitration. However, the problem is that there is an overlap between the Qatari arbitration law and the NYC implementing decrees on this point, and there is no published case law that confirms the position taken by the national courts after Qatar adopted the NYC.

5.6.3 Law governing the merits of the dispute

The law that governs the merits of the arbitration dispute is discussed in detail in chapter two of this thesis. It is commonplace for the arbitration parties to select a system of national law or legal rules to determine the substances of the dispute. This autonomy is respected by most of the modern arbitration law and adopted by the ML.⁸⁸ The task of determining the applicable law to the merits of the dispute between the parties is significantly easier in the case where the parties have chosen the law or legal rules. In such a case, the general rule is that the arbitral tribunal must respect the parties’ choice and give effect to the chosen law. Matters are more difficult in the absence of the parties’ choice; in such case, it is left to arbitral tribunal to choose the applicable law. How should they do so?

Traditionally, and as stipulated by ML,⁸⁹ the arbitral tribunal (in the absence of choice) may apply the law determined by the conflict of laws rules ‘which is considered applicable’. In addition, if the *lex arbitri* does not allow the parties to choose the law applicable to the merits

⁸⁷Ibid, article (33).

⁸⁸UNCITRAL Model Law, article 28.1, See also UK Arbitration Act 1996, s46 (2).

⁸⁹Ibid.

of the dispute, then the arbitrator may ignore the choice made by parties, and refer to the appropriate conflict of law rules of the country of the place of arbitration to determine the relevant applicable law to the merits of the dispute.⁹⁰ This is to avoid an unpredictable decision that may result in the arbitral award being nullified.

The Qatari arbitration law contains one provision that expressly grants parties the freedom to choose the applicable law governing the merits of the dispute. Article 198 of the Qatari arbitration law states that:

“...If the parties agreed to hold the arbitration in Qatar, the laws of the State of Qatar shall be applicable to all elements of the dispute, unless otherwise agreed by the parties”.

This provision only relates to arbitration taking place in Qatar. The Qatari arbitration law does not include any other provision that especially refers to the seat of arbitration in a way similar to Article 20 of the ML.⁹¹ However, if the arbitration takes place in Qatar, then Qatari law is necessarily the law that is applicable to the merits of the dispute, unless the parties agree otherwise. In the absence of choice, the arbitral tribunal is *obliged* to refer to the Qatari law and cannot make any other choices.

Article 198 of the Qatari arbitration law does not clarify whether, in the event of the arbitration parties choosing a different ‘applicable law to the merits’ than the Qatari law, the arbitral tribunal has to apply the chosen law directly or whether it has to initially refer to the rules of conflict of laws of the chosen ‘applicable law to the merits’ in order to determine the possible relevant ‘applicable law to the merits’ of the dispute. The ML provides that the arbitral tribunal is not obliged to refer to the rules of conflict of laws of the chosen ‘applicable law to the merits’ of the dispute.⁹²

⁹⁰Tweeddale, (n29) at 201.

⁹¹ML 1985 as amended in 2006; article 20(1) states that “the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.”

⁹²Ibid, article (28) (1) stated that: “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.”

Article 198 is also not clear whether in the *absence of choice* the arbitral tribunal should refer to the Qatari law directly as ‘applicable law to the merits’ or whether it should initially refer to the Qatari conflict of laws rules to determine the possible relevant ‘applicable law to the merits’. In the case of the arbitral tribunal referring to the Qatari rules of conflict laws, then the following rule results applicable:

Article 27 of the Qatari Civil Code 2004, that is the relevant conflict of laws rule, provides that:

*“The substance of contractual obligations shall be governed by the law of the jurisdiction of the domicile common to the contracting parties. If the domicile of one party is different from that of the other party, the law of jurisdiction where the contract is concluded shall be applied, unless the contracting parties agree otherwise or the circumstances indicate that another law is intended to be applied”.*⁹³

According to this provision, the law of the common domicile of the arbitration parties will be the ‘applicable law to the merits’ if both parties are domiciled in the same country. If both parties have different domiciles then the law of the place where the arbitration agreement was concluded will be classified as the ‘applicable law to the merits’, unless the parties provide a different choice. However, the Qatari Civil Code defines the term ‘domicile’ in terms of the place where the person exercises a business being considered his domicile in connection with said business.⁹⁴ It seems that the parties’ freedom to choose the ‘applicable law to the merits’ is permitted only if both arbitration parties are domiciled in different jurisdictions. If there is no choice, then the law of the country where the arbitration agreement was concluded will be the ‘applicable law to the merits’.

However, in the case where the court finds that a foreign law should govern the validity of the arbitration agreement or the merits of the dispute, the application of this foreign law is subject

⁹³Qatari Civil Code 2004, article (27).

⁹⁴Ibid, article (42): “The place where a person exercises a trade or profession shall be considered his domicile in connection with such trade or profession”.

to it not violating the public policy of Qatar.⁹⁵ Article 198 of the Qatari arbitration law is also silent about whether the parties are free to choose any ‘rules of law’ to govern the merit of the disputes, such as *lex mercatorum* or international treaties or model laws.

5.6.4 Uncertainty in relation to the law governing the arbitration proceedings

One of the important features of arbitration that distinguishes it from litigation in national courts is the parties’ freedom to choose the procedural rules that regulate the process of arbitration. The courts proceedings are normally rigid procedures and cannot be adjusted depending on the circumstances of the parties. The law that governs the arbitration process is explained in detail in chapter two of this thesis. In summary, the arbitration parties are allowed to choose any procedural rules to govern the arbitration process subject to the mandatory rules of the arbitration law of the seat (*lex arbitri*). There are many procedural issues, such as composition of the arbitral tribunal, the conduct of hearings, evidence gathering, and many other matters found in the chosen arbitration rules or *lex arbitri*.

Article V (1)(d) of the NYC provides that the court may be denied recognition or enforcement if the arbitral award suffers from procedural irregularities. Therefore, the arbitral tribunal must conduct the arbitration in accordance with the procedural rules chosen by parties, subject to the mandatory rules of *lex arbitri* as explained in chapter two section (2.3.3). If it fails to do so, the arbitral award may be set aside or refused recognition and enforcement.

Despite the adoption of the NYC in Qatar, the Qatari arbitration law do not include explicit reference to the parties’ freedom to choose any rules or laws governing the arbitral procedure such as institutional arbitration rules. The only implicit reference is found in part one of Article 198, which states that:

“Arbitrators shall issue their decision *without being subject* to the procedures pertaining to pleadings stipulated in this Law (Code of Civil Procedure), *save for the provisions* of this Part (arbitration chapter)”.

⁹⁵Ibid, article (38) stated that: “The provisions of a foreign law applicable by virtue of the preceding Articles shall not be applied if they conflict with the public order or morals in Qatar. In such event, the Qatari law shall apply.”

The Qatari arbitration law refers most arbitral procedures (i.e. tribunal compositions, hearings, evidence, form of awards) to the parties' agreement, subject to the mandatory provisions of the Qatari arbitration law. Thus, if the arbitration takes place in Qatar, the parties may agree on the arbitration procedure. However, the grounds to set aside the arbitral award that are listed in Article (207) of the Qatari arbitration law does not mention under which law the Qatari Court shall examine the procedural challenge.⁹⁶ Indeed, it does not provide for explicit reference that the Qatari court shall examine the procedural challenges according to the procedural rules chosen by parties as did in Article V (1)(d) of the NYC. This situation provides uncertainty surrounding the operation of the Article V (1)(d) in Qatar legal system. It even confused the Qatari judiciary in the *DynCorp* case discussed in section (5.2.1) where the Qatari Court neglected the procedural rules chosen by parties to examine a procedural defect. A deeper analysis of the Qatari Court's position in this case is important.

- **A different angle in the case of *DynCorp***

In the *ITIIC v. DynCorp* case, the arbitration took place in France under the ICC Arbitration Rules. Before the Qatari Courts, *DynCorp* alleged that the Arabic version of the arbitration agreement had not explicitly stated that the award was 'final and binding'. The ICC Arbitration Rules considered that "every award shall be binding on the parties, and *shall be deemed to have waived* their right to any form of recourse insofar as such waiver can validly be made".⁹⁷ The French arbitration law (*lex arbitri*) considered that the arbitral award was final and binding, and allowed the parties to waive their right of challenge (non-mandatory provision).⁹⁸ Controversially, the Qatari court in *DynCorp* case did not refer to the ICC Arbitration Rules chosen by the parties or the French arbitration law (*lex arbitri*) to examine whether or not they provided for an award becoming final and binding once it had been issued. The Qatari courts controversially referred to the Qatari arbitration law to investigate this procedural defect.

⁹⁶Qatari arbitration law 1990, article 207 (4): "If the arbitral award is invalid or the procedures affected the validity of award"

⁹⁷ICC Arbitration Rules 2012 article 34 (6): "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made".

⁹⁸France Arbitration Law as amended in 2011: Article (1522): "By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside."

The Qatari Court of Cassation referred to provision 205 of the Qatari arbitration law, which considers the arbitral award as being open to appeal on its merits unless the parties agreed otherwise.⁹⁹ Since the arbitration agreement *did not explicitly* mention that awards are final once they have been issued, the Qatari Court of Cassation considered that the award was not final and that it was still open to appeal. The position of the Qatari Court of Cassation in this case might reflect the limited knowledge on international arbitration standards, such as the review of procedural challenges, which should be examined under the chosen procedural law. In addition, this provision (205) is applicable only to arbitration take place in Qatar and not to the REFAA as explained in detail in the above discussion (section 5.2).

The attitudes of the US courts and the Qatari courts will now be compared as both were enforcing courts in DynCorp case.¹⁰⁰ The US District Court (District of Columbia), where the ITIIC/award creditor initiated proceedings to enforce the arbitral award in the US, rejected the argument brought by DynCorp that the Arabic version of the arbitration clause had not explicitly stated that any awards were ‘final and binding’. The D.C. Court relied upon Article 28(6) of the ICC Arbitration Rules 2008. This article mirrored Article 34(6) in the amended version of the ICC Rules 2012. Article 28(6) of the ICC Arbitration Rules stated that:

“Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”.

The US Court continued that while the prevailing Arabic version of the contract did not specify that an arbitration award was ‘final and binding’, this was expressly incorporated in the ICC Arbitration Rules: Article 28(6) contained a waiver of the parties’ right of appeal.¹⁰¹ Therefore, as such a waiver is permissible under the French arbitration law (*lex arbitri*), the arbitral award should be deemed final and binding according to the procedural arbitration rules chosen by the parties. The court continued that the Qatari laws were chosen by the

⁹⁹See section 5.7.1.

¹⁰⁰*International Trading and Industrial Investment Company v. DynCorp Aerospace Technology* [2011] 763 F. Supp. 2d 12, US District Court, District of Columbia.

¹⁰¹*Ibid*, at 12. Case available at <http://www.newyorkconvention1958.org/> accessed 20 July 2015.

parties to govern the merit of the dispute, and not the procedural rules of arbitration or the seat law of this arbitration.¹⁰²

Article V (1)(d) of the NYC respects party autonomy and obliges the national courts to refer to the rules and laws chosen by parties to investigate procedural challenges. For example, the US Court in *ITIIC v. DynCorp* made reference first to the ICC rules and then to the French arbitration law (*lex arbitri*) to examine whether or not the party is allowed under the French arbitration law to waive the right to challenge the award. By contrast, the Qatari Court of Cassation controversially referred to the Qatari arbitration law to examine this matter. However, the Qatari court in this case has a role as a NYC party to refer to the procedural rules chosen by parties (that is, the ICC Arbitration Rules) to investigate any ‘procedural defect’. It is not accepted under the NYC that the enforcing court (the Qatari court in the above-analysed cases) makes reference to its own arbitration law in order to investigate a procedural challenge in situations where the parties chose the ICC Arbitration Rules to govern the arbitration procedures. The Qatari Court of Cassation in this case went further and set aside the award instead of refusing its enforcement. This raises the question as to whether the Qatari Court of Cassation is competent to set aside the foreign arbitral award under the scheme of the NYC and ML.

- **The competent court to set aside the arbitral award under the NYC**

In the case of *ITIIC v. DynCorp*, Qatar was not the place of arbitration, nor was the Qatari arbitration law the *lex arbitri*. The Qatari court in this case also annulled the award in time it was not the seat jurisdiction. Generally, although the Qatari court had the right to refuse enforcement under Article V of the NYC, it might not have the right to set aside the award, as it was not the ‘competent court’ to set aside the award in this case. This is clearly stated in Article V (1)(e) of the NYC and was discussed in detail in chapter three.

The US court affirmed that the annulment of the award by the Qatari courts has no legal effect under Article V (1)(e) of the NYC.¹⁰³ One of the allegations presented by DynCorp before the US courts is that the Qatari courts previously annulled the arbitral award, and therefore the

¹⁰²Ibid at 11.

¹⁰³*International Trading and Industrial Investment Company v. DynCorp Aerospace Technology* [2011] 763 F. Supp. 2d 12, US District Court, District of Columbia, Page 9-11.

enforcement in the US should be rejected under Article V (1)(e) of the NYC. The US court dismissed this challenge and noted that the only competent court that was empowered to annul the award was the French court in which the arbitration took place and where the award was issued.¹⁰⁴

Based on the above, the Qatari court in the DynCorp case would be the ‘competent authority’ to set aside the award only if the arbitration took place in Qatar and the award creditor/ITIIC brought the arbitral award seeking recognition and enforcement before the Qatari courts. However, as this arbitration took place in Paris under the ICC Arbitration Rules, the only competent authority to set aside the award was the French court pursuant to Article V (1)(e) of the NYC.

5.7 Challenges against arbitral awards in Qatar’s legal system

Finally, this last section discusses how Qatari arbitration law regulates one of the important topics in international commercial arbitration, that is, the finality and easy enforceability of the arbitral awards worldwide. In current practice, the provisions of Article V of the NYC and Articles 34–36 of the ML provide the internationally recognised grounds of recourse against arbitral awards. The provisions of Article V of the NYC have been explained in detail in chapter two of this thesis.

However, each jurisdiction has its own arbitration laws that determine when and on what grounds an arbitral award may be challenged. The trend in modern arbitration law is to limit the grounds under which national courts can review arbitral awards to those listed in Article V of the NYC. However, the extent of these challenges may vary from state to state, although a high degree of harmonisation has been achieved because of Article V of the NYC and Articles 34–36 of the ML that were discussed in detail in chapter two. Not every arbitration law has taken this relaxed approach to the review of arbitral awards. For example, despite the adoption of the NYC in Qatar, its arbitration law was controversially allowed to challenge the arbitral award on its merits similar to the court decision. The UK arbitration act also allows a challenge to the arbitral award in a question of law.¹⁰⁵

¹⁰⁴Ibid at 11.

¹⁰⁵UK Arbitration Act 1996, article 69.

Permitting an arbitral award to be extensively reviewed by the national courts would undermine the whole purpose of the arbitration.¹⁰⁶ The Qatari arbitration law controversially sets out ambiguous conditions and time restraints in respect of the number of instances when a party might challenge a final arbitral award. The following section will discuss all types of these challenges. The inconsistency between the Qatari arbitration law and Article V of the NYC provide no help in understanding the grounds to set aside the arbitral award or challenge its enforcement request in the Qatari legal system.

5.7.1 Arbitral awards subject to appeal on questions of fact and points of law

Article 205 of the Qatari arbitration law states that:

“Awards of the arbitrators may be appealed in accordance with the *relevant rules of appeal of judgments* issued by the court initially competent to consider the dispute within fifteen days from the filing of the original copy of the arbitral award with the Registry of the court. Notwithstanding the aforementioned, the award shall not be appealable if the arbitrators were authorised to conciliate the dispute or if they acted as such in the appeal *or if the parties expressly waived their rights to file an appeal*”.

Article 205 allows arbitral award appeals to be made based on a mistake of fact or point of law, similar to the court judgment by reference to the law of the forum in relation to the appeal of judgments,¹⁰⁷ unless the parties otherwise agreed. Appeals on questions of fact allow the national court to ascertain whether or not a certain incident occurred, and whether this incident is proved or not; generally matters of fact relate to evaluating the evidence and the extent of its consistency with the facts of the case.¹⁰⁸ Allowing such an appeal would certainly deprive arbitration of one of its fundamental features as it permits a review of the merit of arbitral awards. It is internationally-accepted that the arbitral award is not open to review on its merit before the national courts.¹⁰⁹ The finality of the arbitral award on the merits

¹⁰⁶Tweeddale, (n29) at 372.

¹⁰⁷Qatari Code of Civil Procedures 1990, article (163-177). These provisions regulate the judgment appeal.

¹⁰⁸Aron Broches, ‘Recourse against the Award: Enforcement of the Award, UNCITRAL Project for a Model Law on International Commercial Arbitration’ (1984) 2 ICCA Congress Series 201-227 at 208.

¹⁰⁹Berg, (n43) at 265, ML page 34.

of the dispute is one of the significant features of arbitration that is recognised by most modern arbitration laws and the ML,¹¹⁰ and by most major arbitration rules.¹¹¹ The reason for the adoption of this trend is the desire of the international community to promote the finality of the arbitral award and activate the principle of the party's autonomy in choosing arbitration rather than litigation in national courts. As the arbitral award in Qatar is subject to appeal similar to the court judgement, as suggested by the above quoted provision, the question raised is what is the benefit of adopting the NYC, or even, what is the benefit in referring the case to arbitration?

Article 205 of the Qatari arbitration law also provides the opportunity to appeal the arbitral award similar to the court judgement; this means that the arbitral award is also open to appeal on a point of law. An appeal on a point of law, or *manifest disregard of the law*, is different from an appeal on a question of fact. It allows the court to investigate whether or not the arbitrator has correctly applied the law to the facts of the dispute.¹¹² Tweeddale has noted that even legal systems that allow awards to be appealed on a point of law, such as the UK Arbitration Act, allow such an appeal only if it is proven that the arbitral tribunal understood and correctly stated the law, and then proceeded to ignore it.¹¹³ The principal justification for allowing an appeal based on a question of law is that this type of appeal may relate to the public interest.¹¹⁴ Supporters of this position have argued that the application of the law by the arbitral tribunal will not result in different or opposite findings.

By contrast, allowing the party to appeal the arbitral award based on a question of fact, as is permissible in the Qatari arbitration law, only serves the interest of the parties (award debtor) and does not serve any general interest, such as the public interest.¹¹⁵ Despite the general view that allowing an appeal based on a point of law may be a matter of public interest, countries that have adopted this position have faced many criticisms; for example, see in particular the

¹¹⁰ML, article 35(1).

¹¹¹ICC Arbitration Rules 2012, article 2(v) and 34(6), UNCITRAL Arbitration Rules 2010, article 34(2).

¹¹²Tweeddale, (n29) at 389.

¹¹³Ibid at 391.

¹¹⁴UK Arbitration Act 1996, section 69(3)(c)(ii), which provides that "the question of law is one of general public importance and the decision of the tribunal is at least open to serious doubt".

¹¹⁵Tweeddale, (n29) at 606.

many criticisms facing the UK Arbitration Act (1996).¹¹⁶ Neither the NYC nor ML is allowed to appeal an award based on a question of fact or point of law, as was explained earlier in chapter two.

However, the Qatari arbitration law does not only allow arbitral award appeals to be based on questions of fact or questions of law, it also controversially allows the party to request the court to reconsider the claim that was resolved by arbitration, similar to the court judgment that became final with the binding force of *res judicata*. It seems that the Qatari arbitration law does not differentiate between the arbitral award and court judgment in this point.

5.7.2 *Res judicata* and pleas to reconsider the claim

Article 206 of the Qatari arbitration law states that:

“With exception to paragraphs five and six in the aforementioned Article 178 [article 178 stipulates the instances in which the judgement becomes *res judicata* and might be challenged], *it shall be permissible* to appeal awards of arbitrators in an appeal to reconsider the claim with the applicable rules pertaining to court judgments. The appeal shall be filed with the court that has jurisdiction to hear the dispute”.

Res judicata means that the matter that has been adjudicated by national courts may not be allowed to be heard again by the court.¹¹⁷ The doctrine of *res judicata* is a principle of universal jurisprudence, forming part of the legal systems of many countries.¹¹⁸ An author has noted that it might be assumed that the need for finality of judgment is recognised by many, if not by all, systems of law.¹¹⁹ Another author noted that the adjudicative process would fail to serve its social and economic functions if it did not have *res judicata*.¹²⁰ However, this doctrine was developed for litigants in national courts to ensure that the court judgment is

¹¹⁶Hew Dunds, ‘Appeals on Questions of Law: Section 69 Revitalised’ (2003) 69:3 Arbitration 172-179, Michael O’Reilly, ‘Appeal from Arbitral Awards: Should Section 69 Be Repealed?’ (2003) 69:1 Arbitration at 1-9.

¹¹⁷Yuval Sinai, ‘Reconsidering Res Judicata: A Comparative Perspective’ (2011) 21 Duke Journal of Comparative and International Law at 353-400, at 353.

¹¹⁸Donald Lange, *The doctrine of Res Judicata in Canada* (2edn, Butterworths 2004) at 4-10.

¹¹⁹Eliahu Harnon, ‘Res Judicata and Identity of Actions Law and Rationale’ (1966) 1 Israel Law Review at 539.

¹²⁰Fleming James and others, *Civil Procedure* (5edn, Foundation Press 2001) at 673.

final and that the dispute cannot be litigated again. The legal systems vary from one state to another in terms of the scope of the full implementation of the principle of *res judicata*.¹²¹ Some legal systems allow the parties to ask the court to reconsider the claim even though the judgment was final and not open to appeal in classical forms of appeal.

Controversially, the Qatari arbitration law provides the parties with the right to ask the court to reconsider a claim that had already been resolved by the arbitral award similar to the court judgments that became *res judicata*. Therefore, the instances whereby the final court judgments can be challenged according to Article 178 of the Qatar CCP are also relevant to the grounds by which the party may ask the court to challenge an arbitral award.¹²² However, Article 206 of the Qatari arbitration law is mandatory and cannot be waived by the parties' agreement. Allowing this type of recourse against arbitral awards will certainly prevent the arbitral award from being final and binding on its merit. Disagreement between the national courts and the arbitral award over its determination on the merits of the dispute is not a reason to set aside or refuse enforcement, as stipulated in Article V of the NYC. The merits of the dispute is settled by the arbitral tribunal on the nature of the dispute, appointed by parties at the arbitrators' expertise.

- **Challenging the arbitral award in its merits should be abolished**

As explained in the above, Articles 205–206 of the Qatari arbitration law provide for appealing arbitral awards on mistakes of fact and on points of law, and also expressly allow the court to reconsider the claims that have been settled by arbitration. For example, in the case of DynCorp, that was discussed in detail in section (5.2.1), the Qatari Court of Cassation neglected the state adoption of the NYC¹²³ and referred to its old arbitration law which provided room to appeal the arbitral award in its merit. This situation happens because of the

¹²¹Yuval Sinai, (n117) at 354.

¹²²Qatari Code of Civil Procedures 1990, article 178: "If the party or his attorney committed fraud that would affect the judgment

1. If the party admitted, after judgment, that there was forgery in documents on which the judgment was based or if he has forged them
2. If the judgment is based on a testimony that was proved as perjury
3. If the appellant has acquired, after issue of the judgment, documents conclusive in the lawsuit and the respondent has prevented their submission before the court
4. If the judgment ordered something that the parties did not request or ordered more than what was requested
5. If there is a contradiction in the judgment".

¹²³Reza Mohtashami and Merry, (n11) at 429-436.

overlap between the Qatari national laws that regulate the REFAA, which confused the Qatari judiciary as explained earlier. However, in the DynCorp case, the Court of Cassation reached its own determination on the merits of the dispute and issued a judgment in favour of DynCorp (annulling the award in its merits). The words of the Court of Cassation were as follows:

“The *Sole Arbitrator’s interpretation of the Contract* was held to be against the apparent meaning of the contract conditions and *proves misrepresentation of facts and error in the implementation of the law* which render it erroneous and required cancellation without a need to examine the remaining reasons for the appeal”.¹²⁴

The finality of the arbitral award on its merit has been confirmed by many commentators,¹²⁵ and supported by many court practices. For example, in the case of *President and General Secretary of a French Federation v American law firm (CUTNER and Associates)*¹²⁶, the French Court of Appeal refused the *fraud allegation* concerning the substance of the dispute, which required the court to consider the substance of the dispute. The judge in this case confirmed that the substance of the dispute was not open to appeal in the national court.¹²⁷

Similarly, the Canadian court in *Phesco Inc. v. Canac. Inc.*¹²⁸ noted that the award was open to appeal on its merits only before the arbitral tribunal. Furthermore, the German courts also granted enforcement in a case, holding that the court rejected the respondent’s third argument (that it could not review the granting of contractual penalty by the arbitral tribunal) since there can be no review of foreign arbitral awards on the merits.¹²⁹ The Egyptian Court of Cassation

¹²⁴*International Trading and Industrial Investment Company v. DynCorp Aerospace Technology* [2008] 33 Qatar Court of Cassation. Published in Minas Khatchadourian, (n11) at 55.

¹²⁵Gaillard and others, (n45) at 264, Mistelis and others (n33), at 678, Berg, (n43) at 269, Born, (n 33), at 1047, Redfern and others, (n33) at 638, Gaillard and others, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (1st edn, Cameron May 2008) at 615, Tweeddale, (n29) at 412.

¹²⁶*Fédération française d’études et de sports sous-marins v Société Cutner & Associates P.C.* [2010] 08/22780 Paris Court of Appel.

¹²⁷*Ibid.*

¹²⁸*Phesco Inc. v. Canac. Inc* [2000] J.E. 2000-2268, Canada Quebec Superior Court.

¹²⁹*Party v party* [2005] 8 Oberlandesgericht, Celle, 06/05 Higher Regional Court, Published in Yearbook of Commercial Arbitration XXXII (2007) at 322.

also confirmed this principle when it stated that: the judge may not, when ordering enforcement of arbitral awards, verify whether they are fair or correct on the merits.¹³⁰

In contrast, some national arbitration laws provide for the opportunity to appeal arbitral awards on a question of law. For example, the UK Arbitration Act 1996 allows the arbitration parties to appeal arbitral awards on a point of law, with the right to exclude this challenge by specific agreement.¹³¹ This right is restricted to appeals on a question of law,¹³² where the English and Welsh law applies to the merits of the dispute.¹³³ In contrast, the Qatari arbitration law provide this challenge (question of law) without the restriction that the Qatari law should be the ‘applicable law to the merits of the dispute’.

However, the position taken by the UK Arbitration Act and Qatari arbitration law in terms of allowing the arbitral award to be appealed on questions of law may be subject of criticism. The main criticism is that allowing arbitration parties to appeal arbitral awards on a question of law is against the party autonomy that is highly respected in arbitration practice.¹³⁴ Those who support section 69 of the UK Arbitration Act argue that this restriction is optional for the parties and that it has allowed the English law to develop.¹³⁵ However, section 69 may be seen as inconsistent with the provisions of the NYC and ML, and it has added an additional ground for refusal to those established by the NYC.¹³⁶ Article V of the NYC did not list appeals on a point of law as a ground to annul or refuse enforcement of an award.

¹³⁰*Egyptian Concrete Company & Hashem Ali Maher v. STC Finance & Ismail Ibrahim Mahmoud Thabet & Sabishi Trading and Contracting Company* [1996] 2660/59 Egypt Court of Cassation, See also Cairo Court of Appeal [2005] 29/91, Commercial appeal. Cited in Ahmed Abdullsadeq, *The General Reference For Arbitration in Egypt, Arab World and International* 851.

¹³¹UK Arbitration Act 1996 ss.69 (1) stated that: “Unless otherwise agreed by the parties, a party to arbitral proceedings may upon notice to the other parties and to the tribunal appeal to the court in a question of law arising out of an award made in the proceedings”.

¹³²UK Arbitration Act 1996, section (69) (1), the meaning of the question of law has been defined in section (82) (1).

¹³³A question of law under a foreign law is a question of fact under the law of England and Wales and cannot be the subject of an appeal under section 69 of the Arbitration Act 1996. See *Egmatra AG v Marco Trading Corp* [1999] 1 Lloyd’s Rep 862. See also *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd’s Rep 83.

¹³⁴O’Reilly, (116) at1-2.

¹³⁵Dunds, (116) at 3.

¹³⁶Tweeddale, (n29) at 390.

Nevertheless, the national courts may review an arbitral award to ascertain whether or not the alleged grounds for refusal listed in Article V are in existence.¹³⁷ Similarly, the court may have to go into the merits of the arbitral award in order to find out whether it violates public policy, as provided in Article V (2) of the NYC or to investigate whether or not the subject matter of the dispute is arbitrable according to its national laws.¹³⁸ Such a review would be limited to the extent that it does not interfere with the substance of an arbitrator's award.¹³⁹ Sanders noted that these reviews should be limited to the extent that they do not affect the outcome of the arbitral awards that are determined by an arbitral tribunal.¹⁴⁰ Thus, the review shall not involve investigation about the finding of the arbitral tribunal on the merits of the dispute, even if the court is in disagreement with this finding,¹⁴¹ as the Qatari Court of Cassation was in the case of *ITIIC v. DynCorp*.

5.7.3 Another grounds to set aside the arbitral award

The arbitral awards that are issued in Qatar are subject to other grounds of challenges further to those discussed in the above (Articles 205–206). Article 207 of the Qatari arbitration law provides for a number of grounds to set aside arbitral awards, which are also not consistent with Article V of the NYC. Article 207 refers to the invalidity of the arbitration agreement, procedural irregularities, lack of due process and public policy as grounds to challenge an arbitral award. This article does not explain under which law the court would examine the validity of the arbitration agreement or procedural defects in a similar way to Articles V (1)(a) and V (1)(d) of the NYC, as explained in detail in section (5.6).

The request for setting aside is submitted before the original court having jurisdiction over the dispute.¹⁴² The Qatari arbitration law does not determine a specific time limit for requesting the setting aside. It only provides that such a request be made according to the ordinary rules applicable by the court having jurisdiction. A request to set aside the arbitral award *shall stay*

¹³⁷William W. Park, 'Why Courts Review Arbitral Awards' (2001) at 1 Available at <http://www.williamwpark.com/publications.htm> accessed at May 2015.

¹³⁸Berg, (n43) at 265.

¹³⁹*Alcatel Space SA v Loral Space and Communication Ltd* [2002] 02 Civ. 2674 US District Court SD NY.

¹⁴⁰Cited in Berg, (n43), at 265.

¹⁴¹*ibid* at 269.

¹⁴²Qatar arbitration law 1990, article (208).

the enforcement, *unless* the court decides otherwise.¹⁴³ The court having jurisdiction over the request for setting aside *may either* uphold the award, or set aside the award totally or partially.¹⁴⁴ If the award is set aside totally or in part, the court will have the *discretion* either to refer the case back to the arbitrators so that they may rectify the violations contained in the award, or the court itself may also decide on the *merits* of the case if it holds that it has jurisdiction to do so.¹⁴⁵

However, there is case law evidence where the foreign arbitral awards have refused to enforce because of the extensive approach of domestic public policy. In these cases, the Qatari courts established new principles to the arbitration practices in Qatar.

- **The extensive approach to the public policy defence as a ground for refusal to the REFAA under the NYC- a common feature of the GCC jurisprudence**

Between 2012 and 2014, the Qatari courts controversially annulled and refused the recognition and enforcement of a number of arbitral awards (domestic and foreign).¹⁴⁶ The refusal of recognition and enforcement in these cases was based on the controversial consideration of Qatari public policy as a ground for refusal. The court considered that the issuance of the arbitral awards without mentioning the name of the Emir of Qatar (president of Qatar) violated Qatari public policy and therefore the enforcement was refused.¹⁴⁷ The Qatari courts in these cases also failed to implement the NYC implementing decree, and dismissed the claimant/award creditor's argument that the recognition and enforcement should be pursuant to the NYC as Qatar had ratified it.¹⁴⁸

¹⁴³Ibid, article (208) para 2.

¹⁴⁴Ibid, article (209).

¹⁴⁵Ibid, para (2).

¹⁴⁶*Party v party* [2013] 2216 /2013 Qatar Court of First Instance, *Party v party* [2012] Qatar Court of Cassation, Petition No. 64/2012, *ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit. These cases have been highlighted in the YBCA (2014), volume XXXIX at 480. See also Minas Khatchadourian, (n11).

¹⁴⁷Sultan Alabdulla, (n22), at 10.

¹⁴⁸Minas Khatchadourian (n11), at 10.

The first time that the Qatari courts refused the recognition and enforcement of an arbitral award on the basis that it should be issued under the name of the supreme authority of Qatar was in 2012.¹⁴⁹ The arbitration in this case was domestic and the Qatari arbitration law was the *lex arbitri*. Even though this court decision is out of the scope of this thesis, it is thought that the Qatari Court of Cassation provided an arguable interpretation of the Qatari arbitration law. Article 202 of the Qatar arbitration law is concerned with the form of the arbitral award. This article did not mention that the arbitral award should be issued under the name of the supreme authority of Qatar.¹⁵⁰ However, this decision and the following decisions show that the Qatari judiciary had a limited knowledge of arbitration. This decision affected the following court decisions where the awards were foreign and subject to the NYC.

In 2013, the Qatari Court of First Instance *annulled* and refused the enforcement of an arbitral award issued and seated in Paris under the auspices of the ICC Arbitration Rules.¹⁵¹ The award creditor submitted the award to the Qatari Court of First Instance, seeking recognition and enforcement pursuant to the NYC implementing decree. However, neither the ICC Arbitration Rules nor the French Arbitration Law were the *lex arbitri*, which was again neglected by the Qatari Court, provide that the award should be issued under the name of the supreme authority of the enforcing state, even though the Qatari arbitration law does not provide for this allegation. By analysing the rationale behind this judgment, one can find a very peculiar and unexpected interpretation.

- **The strict adherence to formalities under the Qatari approach**

The Qatari courts in the above cases referred to the Qatari Constitution and the Qatari CCP. The court made a hierarchical reference to Article 63 of the Qatari Constitution and then to

¹⁴⁹*Party v party* [2012] 64 Qatar Court of Cassation.

¹⁵⁰Article (202) of Qatari CCP states that “the arbitration decision shall be taken by a majority of the votes, after deliberation. The award shall be in writing and shall include, in particular, a copy of the arbitration document, brief statements of the parties and their documents, the reasons for the decision, the text of the decision, the place and date of its issuance and the signatures of the arbitrators”.

“If one or more arbitrators refuse to sign the decision, this refusal shall then be recorded. The decision shall be valid if signed by the majority of arbitrators”.

“The decision shall be considered as issued as from the date of signature of the arbitrators after the writing thereof even before its pronouncement or deposit”.

¹⁵¹*Party v party* [2013] 2216 Qatar Court of First Instance. Case published in BCDR International Arbitration Review volum 1, issue 1 at 143.

Article 69 of the Qatari CCP.¹⁵² These two provisions concern the form of court judgments and not arbitral awards. Article 63 of the Qatari Constitution states that: “The Judicial Authority shall be vested in courts of law as prescribed in this Constitution; and *court judgments* shall be pronounced in the name of the Emir”. It is clear from this text that it only refers to court judgments. In addition, the term ‘court’ is exclusively defined in Article 4 of the Law of Judicial Authority¹⁵³ and the courts consist of: 1) Court of First Instance; 2) Court of Appeal; 3) Court of Cassation. Therefore, Article 63 refers exclusively to the court judgments without taking into consideration any uncertainty that might arise. The court then referred to Article 69 of the Qatari CCP, which is the implementing provision of Article 63 of the Qatari Constitution. Provision 69 states that: “*Judgments* shall be delivered in the name of His Royal Highness, Emir (president) of the State of Qatar”.

However, some practitioners traced this confusion back to the Arabic text of Article 69 of the CCP, as this article mentions ‘judgment’ and not ‘court judgment’.¹⁵⁴ This argument seems to be inappropriate, as the court made a hierarchical reference to Article 63 of the Qatari Constitution, which concerns court judgments, and then referred to Article 69 of the Qatari CCP. This indicates that the Qatari court was aware of the purpose of Article 69 of the CCP, i.e. that it concerns court judgments only. Therefore, it is thought that the Qatari courts made an *obvious fault* by making reference to Article 69 of the Qatari CCP in a case concerning an arbitral award being rendered by the arbitrators and not a judgment rendered by the official court. This could be traced back to the unfamiliarity of the Qatari courts with arbitration generally and the NYC in particular. This case also raises concerns about the lack of distinction between domestic and international public policy that is well established in the domain of international commercial arbitration and is discussed in detail in chapter eight of this thesis. The question of whether an arbitral award, issued without mention of the name of the president of Qatar, violates the domestic public policy of Qatar is examined in chapter eight of this thesis.

¹⁵²Ibid.

¹⁵³The Law of Judicial Authority of Qatar, Law No. 10 for 2003.

¹⁵⁴Minas Khatchadourian, (n11) at 49.

5.7.4 Lack of differentiation between domestic and international arbitral awards

As discussed earlier in section (5.2) the Qatari arbitration law only differentiates between arbitral awards issued in Qatar and arbitral awards issued outside Qatar. Assuming that an international arbitration takes place in Qatar in the sense that it subjected to a certain arbitration rules and the dispute is international in nature. The question raised is how will the Qatari court deal with recognition and enforcement of this type of arbitral award? In this context the Qatari national courts established new principle to the arbitration practice in Qatar.

In the case of *ABC LLP v. Joint Venture RST and XYZ* (2014)¹⁵⁵ for the first time the Qatari Court of Cassation recognised the applicability of the NYC to the recognition and enforcement of a non-domestic arbitral award issued in Qatar. The court annulled the appealed judgment¹⁵⁶ and confirmed that the NYC implementing decree had repealed the old national rules in the Qatari arbitration law.¹⁵⁷ The facts of this case lie on a disagreement on payment terms. The dispute was between a joint venture contracting company composed of a Qatari partner and a foreign partner on the one hand, and a Qatari material supplier and sub-contractor ('the supplier') on the other hand. The sole arbitrator was appointed under the ICC Arbitration Rules to settle the dispute and the arbitration was seated in Qatar. The arbitral award was in favour of the supplier and was considered for enforcement through the Qatari courts pursuant to the NYC implementing decree. The award debtor filed an action of nullity, relying solely on the Qatari arbitration law Article 207.¹⁵⁸ The award debtor argued that the arbitral award breached Qatari public policy because it was not issued under the name of the

¹⁵⁵*ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit, Published in YBCA (2014), volume XXXIX at 480, *ABC LLP v. Joint Venture RST and XYZ* [2013] 826 Qatar Court of Appeal, Minas Khatchadourian, 'A Half-tone Application of the New York Convention by the Qatari Supreme Court' [2014] Kluwer Arbitration Blog. The detailed facts and court judgment is also published in BCDR International Arbitration Review, Volume 1 issue 1 at 143-148.

¹⁵⁶*ABC LLP v. Joint Venture RST and XYZ* [2013] 826 Qatar Court of Appeal.

¹⁵⁷In the words of judgment: "The purpose of the provisions of the first and second articles of the New York Convention, to which Qatar acceded under Amiri Decree No (29) of (2003), and which became effective as from 15-03-2003 as enforceable law in the State, The arbitral award in this case is not subject to the provisions of the Qatari arbitration law except with regarded to its enforcement procedural". The detailed facts and court judgment is also published in BCDR International Arbitration Review, Volume 1 issue 1 at 143-148, at 146.

¹⁵⁸Qatar arbitration law 1990, article (207): "If the arbitral award was rendered in the absence of an arbitration agreement, or on the basis of a void or extinct arbitration agreement, or where the award exceeded the scope of the arbitration agreement or *violated one of the rules of public policy or good morals*".

supreme authority of Qatar. The lower courts upheld this argument and annulled the arbitral award.¹⁵⁹ Furthermore, the Court of Appeal decided to refer the award back to the arbitrator to reformulate the arbitral award and add the name of the supreme authority of Qatar to the title of the arbitral decision.¹⁶⁰

Having brought the case before the Qatari Court of Cassation, the court annulled the decision of the lower courts and, for the first time, recognised the applicability of the NYC/implementing decree to a non-domestic award. The court *did not* enforce the arbitral award but it sent the case to be heard again before the Court of Appeal.¹⁶¹ The Court of Cassation upheld the argument that the ICC arbitral award was in fact an *international* arbitral award to which the NYC implementing decree should apply for recognition and enforcement purposes. It then found that the NYC did not require that the arbitral award must be rendered *like a court judgment* in the name of the president of the state. The Court of Cassation arrived at the conclusion that the arbitral award was *international* rather than a domestic arbitral award. Importantly, the court stated that:

“The Qatari law requirement that all decisions issued in Qatar be issued in the name of the Emir does not apply *to an ICC award rendered in Qatar* since the parties agreed in their contract that the arbitration be governed by the ICC Rules and that Qatari law applied to the merits of the dispute only”.¹⁶²

The Qatari Court of Cassation in this interpretation established a new principle for arbitration practice in Qatar. The court distinguished between domestic and international arbitration, and defined when the arbitral award falls within the scope of the NYC, which has not been defined in the Qatari arbitration law as explained earlier. The above quoted judgment suggests that if arbitration takes place in Qatar and is subjected to arbitration

¹⁵⁹*ABC LLP v. Joint Venture RST and XYZ* [2013] 826 Qatar Court of Appeal.

¹⁶⁰Qatari arbitration law 1990, article (209): “The court at which the request of an arbitration award is filed may either approve this award or order it wholly or partially. In the case of an order of the arbitration award, wholly or partially, the court may refer the case back to the arbitrators to correct faults in their award or rule in the dispute by itself if it deems fit. The judgment issued therein shall not be appealable by way of appeal. However, this judgment may be appealed in accordance with the relevant provisions in this Law”.

¹⁶¹Minas Khatchadourian, ‘A Half-tone Application of the New York Convention by the Qatari Supreme Court’ Kluwer Arbitration Blog.

¹⁶²*Party v party* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit.

rules other than the Qatari arbitration law, then it will be considered a non-domestic award, and the recognition and enforcement will be pursuant to the NYC implementing decree. However, if the domestic arbitration takes place in Qatar and is governed by Qatari arbitration law (*lex arbitri*), there is still uncertainty as to whether or not the court will require the award to be issued under the name of the Emir of Qatar. In addition, regarding the REFAA that were issued abroad and are seeking enforcement in Qatar, there is still uncertainty as to whether the courts will refer to the NYC implementing decree or the Qatari arbitration law. Even though this ruling leaves much to be desired, it can be seen as an ambitious judgment compared with the previous judgments of the Qatari courts. The Court of Cassation in this case sent a clear message that the previous rulings have wrongly applied the Qatari laws, including the NYC to which Qatar has adhered and which forms part of the domestic legislation through legislative decree No. 29 for 2003.

5.8 Summary and suggestions for law reform

The Qatari arbitration law is in drastic need of reform to bring it into line with the international legal framework developed by the NYC and ML. The Qatari authorities may need to review their current arbitration law and at least adopt the ML. Adopting the ML, as a benchmark for arbitration in Qatar, is likely to improve efficiency and effectiveness. The analysis in this chapter demonstrates how the Qatari arbitration law provides a limited definition of arbitration agreement, and undermines the finality of the award allowing challenges against the arbitral awards similar to the court judgments. The law also does not clearly recognise the principles of separability of the arbitration agreement and competence-competence. In addition, the law limits party autonomy in terms of choosing the laws and rules governing the arbitration agreement and merits of the dispute. Moreover, the grounds to set aside arbitral awards and the grounds to challenge the REFAA are not consistent with Article V of the NYC. This dissonance between Qatari law and the NYC matters because the longer the Qatari arbitration law remains outdated and riddled with black holes, the more difficult it will be for Qatar to attract global investments.

The following points can be made which offer potential areas of improvement to address the problems. The Qatari arbitration law should define when arbitration is to be deemed international. The current formulation does not differentiate between domestic and international arbitration. The best article to adopt in this regard is Article 1 (3) of the ML. In

addition, the Qatari legislature should amend Article 190 of the Qatari arbitration law to broaden the scope of the form of written arbitration agreements. Article 7 of the ML could be used to define arbitration agreement. It is essential that the Qatari arbitration law has sufficient flexibility with respect to formulating arbitration agreements. Moreover, the Qatari arbitration law should adopt the principle of separability of the arbitration agreement and the principle of ‘competence-competence’. Furthermore, the law should also make explicit reference to party autonomy in choosing the law and rules governing the arbitration agreement, merits of the dispute and arbitration process.

In addition, the Qatari arbitration law should limit the grounds to challenge arbitral awards to those listed in Article V of the NYC and Articles 34–36 of the ML. The Qatari legislature should abolish certain provisions (205–206) that allow awards to be appealed on mistakes of fact and which allow the claim to be reconsidered by the national courts. In addition, there is no need to differentiate between the grounds of challenging arbitral awards issued in Qatar and those issued outside Qatar. Both awards should be subject to the similar grounds of challenge that are listed in Article V of the NYC.

Moreover, the analysis has examined the position of the Qatari courts in implementing the NYC, and has shown the Qatari judiciary’s limited knowledge of the NYC. In most cases, the Qatari courts neglected the state adoption of the NYC. The Qatari judiciary’s lack of familiarity with the NYC is obvious in the cases that were analysed in this chapter. Even though the state of Qatar has acceded to the NYC, and issued the NYC implementing decree, it seems that the Qatar judiciary hampers the flow of international arbitration in Qatar. The first indication of this assumption is that the Qatari court has not referred to the NYC implementing decree, except in the last decision taken in the case of *ABC LLP v. Joint Venture RST and XYZ*. The second indication of the lack of familiarity is evident in the case of *ITIIC v. DynCorp*, where the Qatari court was the enforcing court and did not refer to the procedural rules chosen by parties to investigate a ‘procedural defect’. The third indication is that, in the same case, the Qatari court annulled the arbitral award when it was not a ‘competent court’ to do so. The fourth indication is that the Qatari courts, in a number of cases, refused to enforce the foreign arbitral award on the grounds that it was not issued under the name of the supreme authority of Qatar (president of Qatar).

In the light of the oscillating position of the Qatari courts, a few recommendations can be given. It is preferable for the parties wishing to arbitrate in Qatar (either in domestic or international disputes) to agree on Arbitration Rules other than those imposed by the Qatari arbitration law. This is to ensure the applicability of the NYC implementing decree to the recognition and enforcement of the arbitral award as established by the Qatari Court of Cassation.¹⁶³ The second recommendation for parties regards foreign awards that were issued outside Qatar and were seeking enforcement in Qatar. Although the last decision of the Qatari Court of Cassation suggests a slight change in practice, the arbitral award was non-domestic, and not a foreign arbitral award. Therefore, in order to avoid uncertainty, for any foreign arbitral award that is likely to be enforced in Qatar, it suggested that the formal endorsement (in the name of His Highness the Emir of Qatar) of the award should be requested from the arbitrators before its issuance. However, it is questionable whether arbitrators, given their duty to render an enforceable award, would accept such a request.

The next chapter examines the implementation of the NYC in the UAE that also proves problematic in accepting the NYC as a core treaty that regulates the REFAA in UAE.

¹⁶³*ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit, Published in YBCA (2014), volume XXXIX at 480.

Chapter Six: The Implementation of the 1958 New York Convention in the United Arab Emirates

6.1 Introduction

The previous chapter analysed the complicated legal framework that regulates the recognition and enforcement of foreign arbitral award (REFAA) in Qatar, and identified a number of inherent problems that undermine the promotion of the system of arbitration, and REFAA under the New York Convention¹ (NYC). This chapter seeks to critically analyse the implementation of the NYC in the United Arab Emirates (UAE). The UAE legislature provides a similarly complicated legal regime regulating the REFAA, with no further guidance to understand how the REFAA is regulated in the UAE domestic legal system. This chapter will provide a similar approach in terms of analysis as that used in the previous chapter in order to find out how the UAE arbitration law and UAE national courts regulate the REFAA. Therefore, in order to avoid repetition, this chapter makes many references to the previous chapter in relation to issues where the UAE provides a similar legal position to that of Qatar. This chapter will tackle the same issues as outlined in the introductory section of the previous chapter.

The UAE is composed of seven *emirates* (provinces).² Each emirate has its own laws and courts within the umbrella of the federation regime. The UAE ratified the NYC in 2006.³ The chapter first examines how the UAE arbitration law regulates the REFAA. In this point the UAE legislature provides a similar approach to Qatar by providing two domestic laws to regulate the REFAA, which resulted in the failure of the UAE/Dubai courts to implement the provisions of the NYC to the REFAA in a recent case.⁴

¹ “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739.”

² The emirates are Abu Dhabi (which serves as the capital), Ajman, Dubai, Fujairah, Ras al-Khaimah, Sharjah, and Umm al-Quwain. For more information about UAE see official government website <http://government.ae/en> accessed March 2015.

³ UNCITRAL official website.

⁴ *Construction Company International v Ministry of Irrigation of the Government of Sudan* [2013] 156 Dubai Court of Cassation. [2013] 40 Dubai Court of Appeal, [2012] 489 Court of First Instance. See also Habib Al Mulla and Gordon Blanke, ‘Recent Ruling of Dubai Court of Cassation on Enforcement of Foreign Arbitral Awards: Back to Square One It Is’ [2013] Kluwer Arbitration Blog.

The second part of this chapter will follow a similar structure to the previous chapter in terms of analysing how the UAE arbitration law regulate the arbitration agreement, principles of separability and competence-competence, party autonomy in choosing the laws and rules that regulates the arbitration agreement, merits of the dispute and arbitration proceedings. This part also examines the challenges against the arbitral award provided by the UAE arbitration law compared with the Article V of the NYC. The third part of this chapter analyses some local standards established by the UAE courts that have got on the way of a harmonious interpretation of the NYC by the UAE courts in their decisions on the REFAA.

The chapter concludes that the current position of the UAE suggests an overlap between the UAE national laws that regulate the REFAA. In addition, the UAE arbitration framework is deficient in several aspects and is in need of reform to bring it into line with the international legal framework developed by the NYC and Model Law on International Commercial Arbitration⁵ (ML). The UAE courts broadly interpret issues of unfairness and lack of due process as allowing the use of the public policy ground for refusal, which has prevented the REFAA in a number of cases in this country. Furthermore, the lack of court jurisdiction to hear the enforcement request constitutes a public policy ground for refusal. It is not enough that the award debtor has assets in UAE/Dubai for an arbitral award to be executed. The award debtor should have a permanent domicile or business branch in the UAE/Dubai in order to accept the enforcement request. These issues present themselves as problematic at the stage of REFAA in UAE. They are examined in turn in the following paragraphs.

6.2 Inconsistencies deriving from the overlapping enactments on arbitration in UAE

Similarly to the situation discussed in relation to the legal position in Qatar, the UAE legislature provides two domestic laws regulating the REFAA.⁶ In summary, the arbitration law of the UAE is part of the Federal Code of Civil Procedure (203–218 and 235–238).⁷ It

⁵ “UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006, General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006).”

⁶ Chapter five (section 5.2).

⁷ UAE Federal Civil Procedure Code, Law No. (11) of 1992, as amended by Law No. (10) for 2014. See also Saloni Kantaria, ‘The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law’ (2012) 15:2 International Arbitration Law Review 61-66.

consists of 20 articles, which are not based on the NYC, or ML.⁸ Despite the ratification of the NYC by UAE in 2006, the UAE legislature has not modernised its arbitration law despite many calls to do so.⁹ The only initiative taken by the UAE legislature was the issuance of a new federal domestic law called the ‘NYC implementing decree’ in which the NYC is attached as a schedule.¹⁰

However, the UAE courts are in a better position than the Qatari courts in implementing the provisions of the NYC to the REFAA as will be seen in the following case law analysis. Yet the overlap between UAE national laws that regulates the REFAA has recently affected the attitude of the UAE/Dubai courts in its decision on REFAA.¹¹ This situation creates an unnecessary degree of uncertainty to the applicability of the NYC to the REFAA in UAE/Dubai.

6.2.1 The positive attitude of the UAE courts after the accession to the NYC

After the UAE ratified the NYC in 2006, it issued Federal Decree No. 43 of 2006, which gave the NYC the force of law in the UAE legal system. There are not too many cases on the NYC from the UAE courts that are similar to the Qatari courts.¹² In the following paragraphs, there will be a brief discussion of two cases, one from the Dubai Court of Cassation and the other from the Abu Dhabi Court of Cassation. The Court of Cassations in these two cases nullified the lower courts’ decisions and enforced the foreign arbitral award according to the NYC. The lower courts relied on the provisions of the UAE arbitration law and neglected the state adoption of the NYC, which shows how the overlap between the UAE arbitration law and the NYC confused the UAE judiciaries.

⁸ A copy of the UAE arbitration law is available in English at the official website of the Dubai International Arbitration Centre <http://www.diac.ae/> Accessed June 2015.

⁹ John Gaffney and Dalal Al Houti, ‘Arbitration in the UAE: Aiming for Excellence’ [2014] Law Update - Issued by Altamimi and Co Legal Firm, May 2015.

¹⁰ UAE Federal legislative decree no (43) for 2006 on implementing the provisions of the NYC.

¹¹ Habib Al Mulla and Gordon Blanke, (n4).

¹² *Shipowners v. Charterers* [2010] Commercial Action 35/2010 Fujairah Court of First Instance, *Party v party* [2011] 531 Dubai Court of Appeal/ Commercial Appeal. These two cases are published in YBCA (2011) volume XXXVI at 353-356. *Explosive Alaveses SA (Spain) v. United Management Chile Limited* [2010] 679/2010 Abu Dhabi Court of Cassation, Published in BCDR Journal of International Arbitration (2014) Volume 1 issue 1 at 125-128. *Airmec Dubai v Maxtel International* [2012] 132/2012 Dubai Court of Cassation, Published in YBCA (2012) volume XXXVII at 309-311, *Party v Party* [2013] 1/2013 Dubai Court of Appeal.

In the case of *Explosive Alaveses SA (Spain) v. United Management Chile Limited*,¹³ the Abu Dhabi Court of Cassation annulled the decisions of the lower courts and referred the case back to the Court of Appeal for re-examination. The lower courts failed to implement the NYC to the REFAA issued in Paris according to the International Chamber of Commerce (ICC) Arbitration Rules.¹⁴ The refusal in the lower courts was based on the UAE arbitration law (235–238) for domestic public policy reasons. These provisions (235-238) regulate the recognition and enforcement of foreign judgements and foreign arbitral awards in the UAE. However, similarly to the Qatari legal position, Article (238) of the UAE arbitration law provides that:

“Rules provided for in the *preceding Articles* [235-237] do not prejudice rules and regulations provided for in *conventions signed* between the UAE and other countries in this respect.”

The articles referred to, Articles (235, 236, 237), regulate the recognition and enforcement of foreign judgments and foreign arbitral awards. However, Article 238 exempts the UAE courts from applying the provisions set out in Article 235¹⁵ when there are conflicts between these

¹³*Explosive Alaveses SA (Spain) v. United Management Chile Limited* [2010] 679/2010 Abu Dhabi Court of Cassation, The case also published in: Case comments, “Parties Not Indicated, Court of Cassation of Abu Dhabi, Commercial Challenge No. 679/2010, 16 June 2011” (2014) 6 International Journal of Arab Arbitration 43-46. See also, BCDR Journal of International Arbitration (2014) Volume 1 issue 1 at 125-128.

¹⁴*Explosive Alaveses SA (Spain) v. United Management Chile Limited* [2008] 410 Abu Dhabi commercial Court, [2010] 301 Abu Dhabi Court of Appeal.

¹⁵ UAE arbitration law 1992, Article (235) states that:

1. “Judgments and orders passed *in a foreign country* may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state.”
2. “Petition for execution order shall be filed before the Court of First Instance under which jurisdiction execution is sought under lawsuit filing standard procedures. Execution may not be ordered unless the following was verified:”
 - a. “State courts have no jurisdiction over the dispute on which the judgment or the order was passed and that the issuing foreign courts have such jurisdiction in accordance with the International Judicial Jurisdiction Rules decided in its applicable law.”
 - b. “Judgment or order was passed by the competent court according to the law of the country in which it was passed.”
 - c. “Adversaries in the lawsuit on which the foreign judgment was passed were summoned and duly represented.”
 - d. “Judgment or order had obtained the absolute degree in accordance with law of the issuing court.”
 - e. “It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order.”

provisions and any international treaty that the UAE has ratified such as the NYC. The lower courts in this case did not make reference to the Article (238), and thus refuse to enforce the arbitral award according to the Article 235 of the UAE arbitration law violating the provisions of the NYC.

In this case the respondent/award debtor argued that the arbitral award was contrary to a previous criminal judgment issued by a national court in Claim No. 3257 of 2005 (Abu Dhabi Court of Misdemeanours).¹⁶ This challenge was based on Article 235/2/e of the UAE arbitration law that allows the refusal of the REFAA and foreign judgments if there is a previous contradictory judgment.¹⁷ The lower courts arguably accepted this challenge and neglected the state adoption of the NYC and Article 238 of the UAE arbitration law that was discussed above.

The Court of Cassation, however, accepted the appellant's (award creditor) argument that the Court of Appeal failed to apply UAE domestic laws by not referring to the NYC implementing decree.¹⁸ The Court of Cassation also dismissed the award debtor's argument that the arbitral award was in conflict with a local criminal verdict issued in absentia against the appellant (on the basis of paragraph 2(e) of Article 235 of the UAE arbitration law). The Court of Cassation held that the challenge was inconsistent with the provisions of the NYC that were incorporated in the UAE legal system by Federal Legislative Decree No. 43 of 2006. The court also cited Article 238 of the UAE arbitration law that provides for superiority of the provisions of international conventions ratified by the UAE, notwithstanding the conditions of Article (235) of the UAE arbitration law. The court stated that:

“Having acceded to the New York Convention, the UAE must implement it as domestic law even if there is a *conflict between NYC and the UAE arbitration law*. By becoming party to the New York Convention, the UAE has agreed to recognise

Article (236): “Provisions of the preceding Article *shall apply to the arbitration decision* passed in foreign countries. Arbitration decisions must be passed on a matter which may be decided on by arbitration according to the law of the country and must be enforceable in the country it was passed in.”

¹⁶ “This criminal judgment fined the Petitioner/award creditor a sum of five thousand (UAE Dirham/currency) for contractual fraud because the petitioners supplied used spare parts instead supplying new ones. The Court ordered a stay of proceedings until the criminal verdict become final. The petitioner advanced the proceedings and submitted a certificate issued by the Public Prosecution confirming that the criminal case has been concluded due to lapse of time. On 2010 the Court found the Claim inadmissible.”

¹⁷ See (n15).

¹⁸ UAE Federal legislative decree no (43) for 2006 on implementing the provisions of the NYC.

foreign arbitral awards as binding and enforce them in accordance with the procedural rules applicable in the UAE and the requirements of Article V of the Convention”.¹⁹

The overlap between the UAE arbitration law (Articles 235) and the NYC implementing decree might explain this ruling well and the confusion in the Abu Dhabi lower courts. It is still not clear how the Abu Dhabi courts will deal with *non-domestic* arbitral awards issued in the UAE. This is because the UAE arbitration law did not differentiate between domestic and international arbitration, and the provisions provided in Article 238 of the UAE arbitration law is limited to foreign arbitral awards issued outside the UAE.²⁰ Therefore, the question of when arbitral awards are classified as non-domestic is not defined in the UAE arbitration law similar to the Qatari legal position.

In another case, the Dubai Court of Cassation confirmed the applicability of the NYC to the recognition and enforcement of foreign arbitral awards. In the case of *Airmec Dubai LLC v Maxtel International LLC*,²¹ the Dubai Court of Cassation recognised and enforced two foreign arbitral awards seated and issued in London.²² The arbitral awards were in favour of *Maxtel*. One arbitral award was on the merits of the dispute that included a sum of compensation and the other was on the costs and attorney’s fees.²³ *Maxtel* sought recognition and enforcement through the Dubai courts pursuant to the NYC. *Airmec* as the award debtor challenged the enforcement before the Dubai courts pursuant to the UAE arbitration law (Article 235). The Dubai courts dismissed all the challenges and confirmed the applicability of the NYC implementing decree to the REFAA.

¹⁹Case published in details in *The Principles and Judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 546/Arabic.

²⁰ UAE arbitration law regulates the REFAA and recognition and enforcement of foreign judgement in a separate chapter in the UAE Code of Civil Procedure. This chapter include four articles (235-238). Article 238 of the UAE arbitration is exempt from the provisions provided in articles (235,236,237) and does not extend to the provisions of the UAE arbitration law (203-218).

²¹*Airmec Dubai v Maxtel International* [2012] 132 Dubai Court of Cassation, [2010] 268 Court of First Instance, [2010] 126 Court of Appeal, this case have been published in *International Journal of Arab Arbitration* [2013] Volume (5) issue (1) at 52-60.

²²Case No. D-L 9001. Dubai International Financial Arbitration Centre (DIFC) and London Court of International Arbitration (LCIA), The DIFC-LCIA Arbitration Centre is founded on a strategic partnership between two institutions whose individual and complementary sets of strengths add great value to their association. <http://www.difcarbitration.com/> accessed May 2015.

²³The first award issued in 17-11-2009, and the second issued in 22-12-2009, which ordered *Airmec* to pay the sum of 1,885,920.35 of UAE Currency.

In this case, the Dubai Court of Cassation established a number of principles to be considered in a new era of the implementation of the NYC in Dubai.²⁴ The court confirmed that the grounds of refusal listed in Article V of the NYC implementing decree are the only grounds that may affect the REFAA issued abroad and seeking enforcement in Dubai. However, despite this case the Dubai Court of Cassation in the following case went back to square one and again referred to the old arbitration law, which led to the refusal of the REFAA issued in France.

6.2.2 The case of Construction Company International v. Ministry of Irrigation of the Government of Sudan (2013)²⁵

Despite a number of positive rulings, particularly the two above-discussed cases from the highest courts in Dubai and Abu Dhabi²⁶ which indicated that the UAE was on the right path to implementing the NYC to the REFAA, in *Construction Company International (CCI) v Ministry of Irrigation of the Government of Sudan (MOI)*, the Dubai Court of Cassation issued a controversial ruling upholding the lower courts' refusal to recognise and enforce a foreign arbitral award that was seated and issued in Paris under the ICC Arbitration Rules.²⁷ The refusal was based on the ground that the Dubai court does not have the competent jurisdiction to consider the enforcement request filed against a foreigner with no domicile or business address in Dubai, considering the international jurisdiction of the Dubai courts is part of the public policy of the UAE. This is a new principle established by the Dubai courts to the international arbitration practices in the UAE that will be discussed in detail in section (6.6.2).

The facts of this case can be summarised as follows. A construction contract was concluded between *Construction Company International (CCI) v Ministry of Irrigation of the*

²⁴Gordon Blanke and Habib Al Mulla, 'Dubai Court of Cassation confirms enforcement of foreign awards under New York Convention: The end of a beginning' (2013) Kluwer Arbitration Blog.

²⁵*Construction Company International v Ministry of Irrigation of the Government of Sudan* [2013] 156 Dubai Court of Cassation. [2013] 40 Dubai Court of Appeal, [2012] 489 Court of First Instance, Published in BCDR Journal of International Arbitration (2014) volume 1 issue 1 at 137-141. See also Gordon Blanke, "Enforcement of New York Convention Awards in the UAE: The Story Re-Told" (2013) 5 International Journal of Arab Arbitration 19-36. Habib Al Mulla and Gordon Blanke, (n4) 69.

²⁶*Airmec Dubai v Maxtel International* [2012] 132 Dubai Court of Cassation. *Explosive Alaveses SA (Spain) v. United Management Chile Limited* [2010] 679 Abu Dhabi Court of Cassation.

²⁷ See (n25).

Government of Sudan (MOI) in order to build a canal called Jonglei in the Republic of Sudan. The dispute had arisen in 1984 due to the construction of the canal being stopped because of the second Sudanese civil war. CCI requested the ICC in Paris to arbitrate the dispute pursuant to the arbitration clause in the underlying contract providing for arbitration in France under the ICC Arbitration Rules. On 13-07-1988, the ICC award was issued in favour of CCI and required the MOI to pay the amount of 37,412,943 euros.²⁸ Two agreements were concluded on 15-02-1992 and 27-07-2000 between the MOI and CCI to pay the amount of the said award in the form of instalments. However, the MOI abstained from paying such full compensation.

The arbitral award was recognised and enforced through the French courts (seat jurisdiction of this arbitration).²⁹ The execution judge in the French court issued a decision of forced execution and attachment of the defendant's accounts with the bank of *Union De Banques Arabes et Francaises* opened in the name of the Central Bank of Sudan. The minutes of the attachment order determined the rest of the debt and its interests were approved on 26-07-2011. The award creditor CCI made an application for the recognition and enforcement of the arbitral award over the MOI/award debtor's assets in Dubai.³⁰ On 30-12-2012, the Dubai Court of First Instance decided that *it lacked competent jurisdiction* to consider the enforcement request. This judgment was appealed by CCI before the Dubai Court of Appeal³¹ and the Dubai Court of Cassation, which both upheld the decision of the lower court.

- **The failure to implement the NYC**

In the above case the Dubai courts arguably referred to the UAE arbitration law (Articles 235–237) and Article 21 of the UAE Code of Civil Procedure (CCP).³² Article 21 of the UAE CCP is a mandatory provision that lists the instances where the UAE courts have jurisdiction to hear the merits of a dispute (in court litigation) against foreigners who do not have

²⁸ICC Case reference 5277/RP/BGD.

²⁹See (n25).

³⁰*Construction Company International v Ministry of Irrigation of the Government of Sudan* [2012] 489 Dubai Court of first instance.

³¹*Ibid*, [2013] 40 Dubai Court of Appeal.

³²These facts are published in BCDR Journal of International Arbitration (2014) volume 1 issue 1 at 137-141, at 139.

permanent domicile in the UAE.³³ Article 235(e) lists the grounds of refusal and provides for a leeway to non-recognition and non-enforcement when the foreign arbitral award violates the public policy of the UAE.³⁴

Reliance on Articles 21 and 235 is far from ideal for two main reasons. First, the mandatory provision of Article 21 of the UAE CCP regulates the court's jurisdiction to hear the merits of the dispute in court litigation against foreigners who do not have a domicile or business branch in the UAE. Second, the court paid less attention to provision 238 of the UAE arbitration law, which should give priority to the NYC provisions as explained earlier. It is also worth mentioning here the position adopted by Dubai Court of Cassation in another case, dated 2004, which ruled that:

“Article 238 indicates that the provisions of the *conventions* that were ratified by the state are due to apply regarding the recognition and enforcement of foreign decisions and foreign arbitral awards *even if the provisions of such a convention is in contrast with the provisions of the Code of Civil Procedure*”.³⁵

Therefore, according to this ruling, Article 21 of the UAE CCP that was relied upon in the case of *MOI v CCI* might not be applicable because of its contrast with the NYC. The NYC does not require that the award debtor should have a permanent domicile or business branch in the enforcing states in order to grant the enforcement order, as is required by Article 21 of

³³UAE CCP 1990, article (21): stated that: “The courts shall have jurisdiction to hear actions against a foreigner who does not have a domicile or place of residence in the State in the following circumstances:”

1 - if he has an elected domicile in the State

2 - if the action relates to property in the State or the inheritance of a national or an estate opened therein

3 - if the action relates to an obligation entered into or performed or that is stipulated to be performed in the State or to a contract intended to be notarised therein or to an event that occurred therein or to a bankruptcy declared in one of its courts

4 - if the action is brought by a wife having a domicile in the State against her husband who had a domicile therein

5 - if the action relates to the maintenance of one of the parents or a wife or person under a restriction or a minor or in connection with the guardianship of property or of a person if the applicant for the maintenance or the wife or the minor or the person under a restriction has a domicile in the State”

³⁴ See (n 15).

³⁵*Party v party* [2004] 5 Dubai Court of Cassation. Published at: *The Principles and Judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 401-406/Arabic.

the CCP. The added requirement for personal jurisdiction against the award debtor is not exclusive to the judicial practices of the UAE/Dubai and also finds its application in relation to REFAA under the NYC in the well-developed doctrine of personal jurisdiction in the United States (US) courts as will be discussed in detail in (section 6.6.2).

The following section examines how the UAE arbitration law regulates the arbitration agreement and arbitral award, as they are the core topics of the NYC provisions. The following analysis unpacks the problems that might affect the REFAA in the UAE. Despite the adoption of the NYC by the UAE, its arbitration law is similar to the Qatari arbitration law as it shows deficiencies in accepting the core principles of arbitration.

6.3 The validity of the arbitration agreement in UAE

The requirements of the validity of arbitration agreement under the NYC have been examined in detail in chapter two and also summarised in the previous chapter; therefore there is no need to repeat this discussion here.³⁶ The arbitration agreement is regulated under Article 203 of the UAE arbitration law. This article is the only provision in the UAE arbitration law that explains the requirements of valid arbitration agreements. The provision of this article is not based or inspired by the ML and even seems to provide for stricter conditions to the validity of arbitration agreements than those provided by Article II of the NYC. The articulation of this provision is similar to the position of Qatar and is inspired by the heritage of the past, mainly based on the former Egyptian arbitration law and Sharia law.³⁷

Article II (1) of the NYC requires three conditions that should be met by the arbitration agreement to be recognised and enforced by national courts.³⁸ There should be an agreement in writing; in relation to a ‘defined legal relationship’, and ‘the subject matter of the dispute must be capable of settlement by arbitration’. By contrast Article (203) of the UAE arbitration law provides for five conditions to the validity of arbitration agreements in the UAE. First, the

³⁶ Chapter five (section 5.3).

³⁷ This is explained in detail in the previous chapter (section 5.3).

³⁸ Keren Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, Oxford 2007) at 109.

arbitration dispute *shall* be specified in the arbitration *clause* or submission agreement.³⁹ This condition is similar to the Qatari arbitration law discussed in detail in the previous chapter (section 5.3.2). Therefore, an essential requirement for the validity of arbitration agreements in the UAE is to determine the subject matter of the dispute, either in the arbitration clause (if possible) or during the arbitration proceedings to avoid the invalidity of arbitration agreements. Second, the parties must have the legal capacity to enter into the arbitration agreement. Third, the agreement must be in writing. Fourth, the subject matter of the dispute should be able to be resolved through arbitration. How subject matters are dealt with that cannot be arbitrated in UAE will be examined in chapter eight where the public policy of the GCC states will be examined in detail. Fifth, the number of arbitrators should be determined in the arbitration agreement. The following section will analyse the formal and material validity of the arbitration agreement as established by the UAE arbitration law.

6.3.1 Formal validity of the arbitration agreement

Article 203(2) states that “no agreement for arbitration shall be valid unless evidenced in writing”. This requires the arbitration agreement to be in writing in order to be valid. Thus, an arbitration agreement cannot be proved by affidavit, witness statement or oath. The written form is not only required for evidence but also to ensure the validity of the arbitration agreement, which is similar to the position held in Qatari arbitration law. This article does not define the form of writing, as was the case in Article II (2) of the NYC and Article 7 of the ML that was discussed in detail in chapter two.

The question to be raised here is whether the UAE courts will accept an electronic form of writing such as an e-contract concluded by email or any other means of electronic communications? A hint in relation to this might have already be given by the Abu Dhabi and Dubai Courts of Cassation that have previously confirmed that the arbitration agreement is deemed to be in writing if its content is recorded in any form, or if it is included in a letter, telex or other means of written communication, or in emails according to the applicable rules governing electronic transactions.⁴⁰ This is a sign of modernisation that, as such, recognises

³⁹ UAE arbitration law 1992, article 203(3): “The subject of the dispute shall be specified in the terms of reference or during the hearing of the suit even if the arbitrators were authorized to act as amiable compositors; otherwise the arbitration shall be void”. See chapter five (section 5.3).

⁴⁰ Abu Dhabi Court of Cassation [2006] Appeal No. 891 Published in Journal of Arab Arbitration (2009) issue 1 at 516, See also UAE Federal Law no (1) for 2006 promulgate the law of Electronic Commercial Transactions.

the latest international trends in accepting the modern means of communications to the form of writing arbitration agreements. It is recommended to the UAE legislature to define the form of writing to include the modern means of communication, as it was in Article 7 of the ML. Leaving this question unanswered opens the doors to unpredictable interpretations and, of course, undermines the certainty and predictability for the arbitration parties who sought to arbitrate according to the UAE arbitration law.

The UAE arbitration law is also silent about the signature of the arbitration agreement. This raises the question of whether the arbitration clause contained in the arbitration agreement should be signed separately from the underlying contract. Or it is enough to have a signed contract that includes a written arbitration clause? The Dubai Court of Cassation has previously explained that if the underlying contract contains appendices, and the arbitration clause exists in these appendices, then the arbitration clause *shall also* be signed by both parties, along with those parties signing the contract itself.⁴¹ This ruling implicitly suggests two approaches. First, the arbitration clause needs to be signed separately if that clause is included in the main articulation of the contract. Second, if the arbitration clause is part of the terms of the main contract that is signed by both parties, there might be no need to sign the arbitration clause separately.

Article II (2) of the NYC requires that both parties must sign the arbitration agreement. It proves that:

“The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, *signed* by the parties or *contained in an exchange of letters or telegrams*.”

However, the formulation of the signature requirement was not very precise and provides room for divergence.⁴² For example, the literal reading of such an article suggests that the arbitration clause in a contract, or that the separate agreement to arbitrate shall be signed by both parties. The literal reading also suggests that the written requirement can be proved in an ‘exchange letters or telegrams’, potentially without signatures.⁴³ Therefore, there is no

⁴¹Dubai Court of Cassation [2005] appeal No. 174, Published at: *The Principles and Judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 122/Arabic.

⁴² Tweeddale, (n38) at 101.

⁴³ Landau, ‘The Requirement of a Written Form for an Arbitration Agreement: When Written Means ‘Oral’ (2002) 11 ICC Congress Serious at 19-81.

uniform understanding among the national courts whether the arbitration clause needs to be signed separately or if it is enough to sign the contract that contains an arbitration clause. In relation to the position suggested by the Dubai Court of Cassation in the case discussed above, it seems that the arbitration clause must be signed separately, even if an arbitration clause is included in the main articulation of the contract.

It may be noted however that the arbitral clause need not be specifically signed, and that signing the contract containing the clause as a whole might be sufficient.⁴⁴ On the other hand, although the party's signature for an arbitral clause would appear to be necessary according to the letter of the first limb of Article II (2) which mentioned *signed by parties* some national courts clearly concluded that an arbitral clause in a contract does not necessarily have to be signed independently by the parties to constitute an 'agreement in writing' pursuant to Article II (2) of the NYC.⁴⁵ These cases are discussed in chapter two of this thesis.⁴⁶ However, a number of courts adopted the view that the parties must sign both arbitral clauses in contracts and submission agreements if they are not part of an exchange of letters or telegrams in accordance with Article II (2) of the NYC.⁴⁷

6.3.2 Material validity of the arbitration agreement

Article 203 of the UAE arbitration law provides similar material requirements to the validity of the arbitration agreement that were discussed in detail in the previous chapter (5.3.2) where the legal position of the Qatari legal system was examined. However, the UAE arbitration law adds one another condition to those discussed in the previous chapter.

Article 203/1 of the UAE arbitration law adds uncertainty and states that:

“The parties to a contract... *Shall be referred to one or more arbitrators and...*”

The peculiarity in this provision is the referral to the number of arbitrators in the first provision of the UAE arbitration law. Therefore the question raised is whether the number of

⁴⁴Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* at 71.

⁴⁵*Sphere Drake Insurance PLC v. Marine Towing, Inc* [1994] U.S. Court of Appeals, Fifth Circuit United States, Case No. 93-3200.

⁴⁶Chapter two (section 2.2.1).

⁴⁷Albert Berg, 'Consolidated Commentary' (2003) XXVIII Year Book of Commercial Arbitration at 586.

arbitrators should be determined in the articulation of the arbitration clause or not? In a case concerning domestic arbitration, the Dubai Court of Cassation⁴⁸ accepted that the parties' agreement to refer the dispute to arbitration is sufficient to meet this condition, subject to not violating the mandatory provision related to the number of arbitrators (that there should be an odd number of arbitrators).⁴⁹ The Qatari arbitration law also requires the number of arbitrators to be odd.⁵⁰

However, it might be accepted that the judicial nature of the arbitration agreement requires the arbitral tribunal to be composed of an odd number, but this shall not violate the party autonomy in choosing the number of arbitrators. This might deprive the arbitration from one of its significant features compared with litigation in national courts which is the parties' freedom to select the arbitral tribunal including the number of arbitrators. The ML provides a balanced solution that takes into account the parties' freedom to determine the number of arbitrators, and failing such determination; the number of arbitrators shall be three.⁵¹

- **The parties' capacity to enter into the arbitration agreement**

The party capacity is an essential requirement to the validity of the arbitration agreement, and it forms one of the grounds of refusal listed in Article V of the NYC to set aside the arbitral award or refuse its enforcement. Article 203/4 of the UAE arbitration law requires the parties to have the capacity to enter into an arbitration agreement.⁵² The capacity of natural persons in UAE law is defined as follows:

“Every person who has reached the age of majority in possession of his mental powers and who has not been placed under a restriction shall be of full capacity to exercise his rights laid down in this law and the laws deriving from it”.⁵³

⁴⁸ Dubai Court of Cassation [2005] appeal No. 56, Published at: *The Principles and Judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 13/Arabic.

⁴⁹ UAE arbitration law 1992, article 206(2): “If there are more than one arbitrators, the number shall, at all times be odd.”

⁵⁰ Qatar arbitration law 1990, article 193: “If there is more than one arbitrator, the number shall, at all times, be an odd number”

⁵¹ ML, article (10).

⁵² UAE arbitration law 1992, article 203(4): ‘An arbitration agreement may be made only by the parties who are legally entitled to dispose of the disputed right’.

⁵³ UAE Federal Code of Civil Transaction 1985, law No. (5) for 1985, article 85(1).

The age of majority in UAE law is twenty-one years of age.⁵⁴ Legal persons such as private enterprises should meet the following conditions to be able to be recognised as a legal person:

“Separate financial liability, legal capacity within the limits laid down by the document establishing it, or as laid down by law, the right to bring proceedings, separate place of residence and the juristic persons must have a (natural) person to express their intentions”.⁵⁵

In one case, the Dubai Court of Cassation expressly stated that the arbitration agreement entered into by the agent without a *special* power of attorney would be null, whereby only the principal party may invoke the nullity of the arbitration agreement.⁵⁶

The UAE contract law provides that the state and government bodies and municipalities have a legal personality and may therefore exercise the rights of individuals *except* when limited by law.⁵⁷ Therefore, it is understandable that government entities or state-owned enterprises are free to enter into arbitration agreements so long as there are no statutory restrictions preventing them from doing so. Thus, any foreign or national UAE party who wishes to enter into an arbitration agreement with UAE public entities or state-owned enterprises should ensure that there are no restrictions; otherwise, any prior permission should be sought from the UAE government.

- **Uncertainty in relation to the applicable law governing the capacity question**

The capacity of the parties to enter into arbitration agreement is one of the grounds to set aside an arbitral award, but the UAE arbitration law is, similarly to Qatar, silent about which law governs the capacity question.⁵⁸ The question of which law governs the capacity question

⁵⁴ Ibid, article 85(2).

⁵⁵ Ibid, article (93).

⁵⁶ Dubai Court of Cassation [2004] Appeal No 209.

⁵⁷ UAE Civil Code 1985, article (92).

⁵⁸ UAE arbitration law 1992, article (216) stated that: The parties to a dispute may, at the time of consideration of the arbitrator’s award, request the nullification of the same in the following events: “Either party to the arbitration agreement was, at the time of the conclusion of this agreement, *under incapacity* or if the award

is not clear from the words of the NYC and ML, and the prevailing view under the scheme of the NYC and ML is to examine the capacity question under the personal law of the party (law of the person's nationalities or permanent domicile).⁵⁹ Therefore, in order to avoid repetition, the previous chapter (section 5.3.2) provides detailed discussion of this question, and it seems that the UAE legal system provides a slightly different position to the legal position provided in Qatar.

If it is assumed that an international arbitration agreement takes place in the UAE, or a foreign arbitral award seeks recognition and enforcement in the UAE and there is a challenge before the UAE courts regarding the capacity question, under which law should the UAE courts examine the capacity question? The UAE Civil Code provides that the law of the parties' nationalities governs the capacity of natural persons, while the capacity of a *legal* person, either foreign or national, governs by the law of the place of incorporation (headquarters). This is subject to the legal person not conducting *activities* in the UAE. In this context, even if its actual headquarters are outside the UAE, the UAE law shall nevertheless apply to the capacity question.⁶⁰

However, as explained in chapter two of this thesis the valid arbitration agreement does not merely serve to establish the obligations on the parties to arbitrate the dispute; rather the agreement to arbitrate is the source that defines the authority of the arbitral tribunal to resolve the dispute.⁶¹ This is because of the wide acceptance of the principles of separability of the arbitration agreement and competence of arbitral tribunal. The following section will examine how the UAE arbitration law regulates these two fundamental principles to the operation of arbitration that are accepted by the ML and most modern arbitration laws.

issued by arbitrators who not appointed according to the law, or if the award issued by arbitrator in the absence of others, or if the terms of reference was not specified the dispute.”

⁵⁹ Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP, Oxford 2009) at 96, Tweeddale, (n38) at 127.

⁶⁰ UAE Civil Code 1985, article 11:

1. “The law of the state of which a *person has the nationality shall apply* to the civil status and capacity of such person.”
2. “With regard to the *legal regulation of foreign juridical persons* including companies, associations, establishments and otherwise, the law of the state in which such bodies have their actual *main administrative center* shall apply thereto, and if such a body *carries on an activity* in the State of the United Arab Emirates, the national UAE law *shall apply*.”⁶⁰

⁶¹ Redfern and others, (n59) at 21.

6.4 The lack of recognition of the principles of separability and competence-competence under UAE law

The principles of separability of the arbitration agreement and the power of the arbitral tribunal to rule independently on its own jurisdiction (*competence-competence*) are explained in detail in chapter two. Unfortunately, these two important principles are not recognised in the UAE arbitration law, which is similar to the Qatari position discussed in detail in the previous chapter. However, there is one article in the UAE arbitration law that might be relevant to the operation of these two principles in the UAE legal system.

Article 203/5 of the UAE arbitration law provides that valid arbitration agreements deem that the litigants waive their right to recourse to the court.⁶² This is subject to the defendant at the *first hearing* asking the court to refer the case to arbitration pursuant to the arbitration clause, failing which the arbitration clause is *deemed to be cancelled*.⁶³ This provision explicitly suggests that the court is not obliged to refer the parties to arbitrate the dispute unless one of the parties raised the court jurisdiction issue at the first hearing. It also implies that if both parties agree to go to the court despite the arbitration agreement between them, and none of them challenges the jurisdiction of the court based on the arbitration agreement, the court *may* consider the claim, and the arbitration agreement shall be cancelled.⁶⁴ The lack of challenge of the jurisdiction of the court could be understood as a mutual agreement to litigate that has superseded the previous agreement to arbitrate.

However, the UAE arbitration law does not include any reference to the arbitral tribunal authority to rule independently in its jurisdiction. The UAE arbitration law includes a provision related to the right to challenge the arbitral tribunal on its jurisdiction after an award has been issued.⁶⁵ If there is a challenge during the arbitration proceedings, the arbitrator may

⁶² UAE arbitration law 1992, article 203 (5) stated that: “if the parties to a dispute agree to refer the dispute to arbitration, no suit may be filed before the courts. Notwithstanding the foregoing, if one of the parties files a suit, irrespective of the arbitration provision, and the other party does not object to such filing at the first hearing, the suit *may* be considered, and in such case, the arbitration provision *shall* be deemed cancelled.”

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ *ibid*, article 216 (1) (b): “If the award was issued by arbitrators who were not appointed in accordance with the law, or by only a number of the arbitrators who were not authorized to issue the award in the absence of the others, or if it was based on terms of reference in which the dispute was not specified, or if it was issued by a

not rule on its jurisdiction, and the court will have the primary role in determining the jurisdictional issue.⁶⁶ If the jurisdictional issue arose at the beginning of the arbitration then the above-explained provision (203/5) is the only relevant provision. There is a lack of published case law that would explain clearly the court position regarding the jurisdictional question. However, despite the UAE arbitration law not making explicit reference to the principle of separability of the arbitration agreement, the UAE courts have shown a positive attitude in accepting this principle.

6.4.1 The judicial recognition of the principle of separability

As explained in the above discussion, the UAE arbitration law does not include any provision that would explain the autonomy of the arbitration agreement, and the arbitral tribunal's right to rule initially in its own jurisdiction, as is the case in the Article 16 of the ML. The only relevant provision is Article 203/5 discussed above. However, in the case of the underlying contract being null and void, Article 203/5 of the UAE arbitration law is not clear as to whether the arbitration clause would survive and still be valid.⁶⁷ Nevertheless, the Dubai Court of Cassation in one case ruled that the arbitration clause would remain valid and give its effect regardless of the termination or nullity of the main contract, unless the nullification of the main contract affected the arbitration clause itself.⁶⁸ The Dubai ruling seems to accept the principle of separability of arbitration agreement but with limits. In terms of comparison, the England and Wales Court of Appeal explained when the nullification of the main contract might affect the validity of arbitration agreements in the case of *Soleimany v Soleimany*.⁶⁹ This case might reflect a similar approach provided by the UAE courts to the limitation of the separability of the arbitration agreement from the underlying contract. Therefore, the invalidity of the main contract for public policy reasons could lead to the invalidity of the arbitration agreement in UAE legal system.

person who is not competent to act as an arbitrator or by an arbitrator who does not satisfy the legal requirements.”

⁶⁶ Ibid, article 209 (2): “If, during the course of arbitration, a preliminary issue, which is outside the powers of the arbitrator... the arbitrator shall suspend the proceedings until a final judgement on the same has been passed”.

⁶⁷ ML, articles 16(1).

⁶⁸ *Party v party* [2008] 164 Dubai Court of Cassation, published at: *The Principles and Judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 221/Arabic.

⁶⁹ *Soleimany v Soleimany* [1998] 3WLR 811, [1999] 3All ER 847.

The following analysis will examine how the UAE arbitration law regulates one of the most important features of arbitration, that is the party autonomy to choose the law and rules that govern the arbitration process. Despite the adoption of the NYC by the UAE it seems that its arbitration law is lacking in several aspects in this point and results in uncertainty in understanding the operation of the NYC in UAE legal system.

6.5 The importance of party autonomy in relation to the different governing laws in arbitration

Unfortunately, despite the adoption of the NYC by the UAE, the UAE arbitration law limits the party autonomy in terms of choosing the law and rules governing the arbitration process. The conflict between the NYC provisions and UAE arbitration law in this point leave the question of the possible relevant laws to govern the arbitration process vague and uncertain, with no help in understanding the operation of the NYC in UAE. Therefore, it is important in this discussion to understand this limitation, and whether the court will recognise the parties' choices or not. In the following sections, a reference will be made to some conflict of laws rules due to the same justifications explained in the previous chapter (section 5.6.1).

6.5.1 Uncertainty in relation to the law governing the validity of the arbitration agreement

The UAE arbitration law does not include any provisions permitting the parties the right to choose the law governing the arbitration agreement. Even at the stage of the recognition and enforcement of the arbitral award, the law does not clarify under which law the court shall examine the validity of the arbitration agreement.⁷⁰ To give an example scenario, assume that the international arbitration takes place in the UAE and the parties agreed to use English law to govern the arbitration agreement, or that a foreign arbitral award sought recognition and enforcement through the UAE courts and there is a challenge regarding the validity of the arbitration agreement. The question to be raised here is will the court recognise the parties' choice and, failing any choice, proceed according to the law of the place of arbitration according to Article V (1)(a) of the NYC? This question remains an unanswered one as the UAE arbitration law is silent on this issue. There is a lack of published cases on this point

⁷⁰ UAE arbitration law 1992, article 16 (1)(a) state that "There is no arbitration agreement, or if the arbitration agreement was void, voidable or expired. If both parties did not agree on arbitration, therefore there is no arbitration agreement".

after the UAE adopted the NYC. Therefore, it is important to examine the possibilities regarding the most relevant law that would govern the validity of the arbitration agreement in UAE. The UAE conflict of laws rules provides a slightly different approach than the Qatari conflict of laws rules.

By examining the UAE conflict of laws rules, Article 19 of the UAE Civil Code 1985 provides that:

“The *form and the substance* of contractual obligations *shall* be governed by the law of the state in which the contracting parties *are both resident* if they are resident in the same state, but if they are resident in different states *the law of the state in which the contract was concluded* shall apply unless otherwise agreed by the parties, or it is apparent from the circumstances that the intention was that another law should apply”.⁷¹

This provision suggests mandatory and non-mandatory provisions. The mandatory provision is that if both parties to the arbitration agreement share the same domicile, then the law of this country shall be applied to examine the validity of the arbitration agreement. There is no possibility to make a choice. For example, if the arbitration agreement was concluded between two UAE domiciles, then the UAE laws will govern the validity of the arbitration agreement. This position may undermine the development of arbitration in UAE.

The term ‘domicile’ is defined in UAE law as the place where the person normally resides, or the place where the person exercises a trade or profession.⁷² Therefore, if, for example, two English parties are in residence in the UAE, or have a business in the UAE, the UAE law might be relevant to examine the validity of the arbitration agreement, and if they make a choice of another law, it might not be recognised. Reading the second part of the above-quoted article, if the parties of the arbitration agreement come from different domiciles (within the above meaning of domicile), such as one from the UAE and the other an English party, then they are allowed to make a choice. If there is no choice, then the law of the place

⁷¹UAE Civil Code 1985, article (19).

⁷² Ibid, article (81) states that: “A domicile is the place in which a person normally resides.” Article (82) stated that: “The place in which a person carries on a trade, profession or occupation shall be deemed to be a residence in connection with the administration of the business relating to such trade, profession or occupation.”

where the arbitration agreement was concluded will govern the validity of the arbitration agreement. This is possibly the law of the place of arbitration.

It seems that the UAE conflict of laws rules provides the possibility to choose the law governing the arbitration agreement only if the arbitration agreement contains two parties that come from different domiciles, and the arbitration agreement is not related to a business in the UAE. It is still questionable if, in a case where the *foreign* arbitral award sought recognition and enforcement in the UAE and there is a challenge regarding the validity of the arbitration agreement, whether the court would examine the validity question according to the law chosen by parties and, failing any choice, proceed according to the law of the place of arbitration pursuant to Article V (1)(a) of the NYC. Or would the court refer to the above-explained provisions (conflict of laws rules)?⁷³ This uncertainty arises because the UAE arbitration law is silent on this question, and at the same time, the UAE adopted the NYC that did not necessarily impose the need to follow any conflict of law rules in this regard. However, as the UAE is an NYC state party, one could assume that Article V (1)(a) of the NYC may be applied by the UAE national courts without a further need to examine the conflict of laws rules. This position is supported by the provision of Article 22 of the UAE Civil Code which provides that:

“The provisions of the foregoing Articles [the above-discussed rules of conflict of laws rules] shall not apply in cases where there is a contrary provision in a special law *or in an international convention in force in the State*”.

According to this provision, the UAE courts should examine the validity of arbitration agreements according to Article V (1)(a) of the NYC, bearing in mind that the above-quoted provision is applicable to non-domestic and foreign arbitral awards as they are governed by the NYC, in which the UAE is a state party. The problem is that the UAE arbitration law does not provide a definition of when the arbitration is deemed to be international or non-domestic. Therefore, non-domestic arbitral awards might fall within the scope of the rules of conflict of laws that were discussed above. There is a lack of published case law in this regard. It is also important to note that if it is determined that the foreign law should be applied to examine the

⁷³Chapter five (section 5.6.1).

validity of an arbitration agreement, then this is limited in order to not violate the public policy of the UAE.⁷⁴

6.5.2 Uncertainty in relation to the law governing the merits of the dispute

Unlike the Qatari arbitration law, the UAE arbitration law is silent about the parties' freedom to choose the applicable law to the merits of the dispute. In a situation where international arbitration takes place in the UAE and the parties agreed on English law as the law applicable to the merits of the dispute, or if a foreign arbitral award was governed by a foreign applicable law or the international rules chosen by parties, will the UAE court recognise this choice? Or if the parties did not make any choice, how will the arbitral tribunal seated in the UAE make the choice of the applicable law to the merits of the dispute?

More than one approach can be followed by the arbitral tribunal in the absence of choice that was discussed in detail in chapter two. The arbitral tribunal in the absence of choice may apply the law determined by the conflict of laws rules 'which is considered applicable'. This is the position adopted by the ML.⁷⁵ Alternatively, the arbitral tribunal may choose the applicable law to the merits of the dispute by direct application of a certain substantive law. If the arbitral tribunal selects the applicable law at random, such choice may lead to unpredictability, not only to the outcome of the case, but also as to how the arbitration would be conducted.⁷⁶ In order to overcome these uncertainties, the conflict of laws rules can be used to ascertain the laws applicable to the merits of the dispute in UAE. The legal position provided in the UAE arbitration law is not just that it is silent in the absence of the parties' choice, but it does not provide any indication whether the parties are allowed to make a choice or not.

Tweeddale noted that if the arbitration law of the place of arbitration does not permit the parties the freedom to choose the law applicable to the merits of the dispute, then the arbitral tribunal should refer to the rules of the conflict of laws of the place of arbitration. Even if the parties make a choice and the arbitration law of the seat does not permit the parties the

⁷⁴ Ibid, article (27) states "It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Sharia, public order, or morals in the State of the United Arab Emirates."

⁷⁵ ML, article 28 (2).

⁷⁶ Tweeddale, (n38) at 205.

freedom to make this choice, the arbitral tribunal may ignore the parties' choice and refer to the conflict of laws rules in the place of arbitration.⁷⁷ It seems that the Tweeddale argument is relevant to the position provided by the UAE arbitration law. This is to avoid any random choice of applicable law to the merits of dispute that might affect the enforceability of the arbitral award, particularly if the arbitration takes place in UAE.

By examining the rules of the conflict of laws in the UAE, it can be seen that the above-quoted Article 19 (section 6.5.1) is also applicable to the law governing the merits of the dispute if that dispute is on a contractual matter. The first line of Article 19 of the UAE conflict of laws rules provides that 'the *form and the substance* of contractual obligations...' Therefore, to avoid repetition the provisions explained in the above section (6.5.1) are also applicable to identifying the applicable law to the merits of the dispute. However, there are a number of cases where the arbitral award was foreign and governed by foreign 'applicable law to the merits' and enforced in the UAE, as seen earlier in the case law analysis at section (6.2.1).

6.5.3 Law governing the arbitration proceedings

Similarly to the Qatari arbitration law, the UAE arbitration law refers most arbitral procedures (i.e. tribunal compositions, hearings, evidence, form of awards) to the parties' agreement, subject to the mandatory provisions of the law.⁷⁸ Thus, if the arbitration takes place in UAE the parties may agree on the arbitration procedure. However, the grounds to set aside the arbitral award that are listed in Article (216) of the UAE arbitration law does not mention under which law the UAE Court shall examine the procedural challenge.⁷⁹ Indeed, it does not provide for explicit reference to the procedural law chosen by parties as did Article V (1)(d) of the NYC. This situation provides uncertainty surrounding the operation of the Article V (1)(d) in the UAE legal system.

⁷⁷ Diana Hogas, 'Principles of law applicable to the arbitration proceedings' (2014) 4:2 Juridical tribune journal 128-145 at 132.

⁷⁸ UAE arbitration law 1992 article 212(1): "The arbitrator shall issue his award without being bound by any procedures other than those stipulated in this Chapter and those pertaining to calling of the parties, hearing of their pleas and enabling them to submit their documents. *Notwithstanding the foregoing, the parties to the dispute may agree on certain procedures to be followed by the arbitrator.*"

⁷⁹ Ibid article 216 (c): "If the award of the arbitrators or the arbitration proceedings become void and such voidness affected the award."

In the following section, the grounds to challenge the arbitral award in UAE arbitration law are examined in light of Article V of the NYC. The grounds to challenge the arbitral award that are listed in Article V of the NYC reflect the globally-accepted grounds to challenge the arbitral award in nullity or challenge its enforcement request. Despite the adoption of the NYC in the UAE, it seems that its arbitration law provides for a different understanding to these grounds.

6.6 Challenges against arbitral awards in the UAE legal system

Unlike Qatari arbitration law, arbitral awards in the UAE are final and not open to appeal on the merits or on mistakes of fact or points of law. Article 217(1) of the UAE arbitration law states that: “The award of the arbitrators may not be contested by any manner of appeal”. The Dubai Court of Cassation expressly noted in a case that the arbitral award was final on its merits, and the arbitration parties were not allowed to appeal on a point of law or question of fact before the national court.⁸⁰ The only possibility to challenge the arbitral award is to set aside the arbitral award if one of the grounds listed in Article 216(1) of the UAE arbitration law arises. In addition, Article 216(2) of the same law does not allow the parties to waive their right to set aside or nullify the arbitral award.⁸¹ Article 216(1) of the UAE arbitration law sets out a number of challenges to set aside arbitral awards and these are as follows:

“1-the parties to a dispute may, at the time of consideration of the arbitrator’s award, request the nullification of the award in the following events”:

- a. “There is no arbitration agreement, or if the arbitration agreement was void, voidable or expired or if the arbitrator has exceeded his limits under the terms of reference.”

The validity of arbitration agreements in the UAE was discussed earlier in section 6.3. Article V (1)(a) of the NYC regulates the validity of arbitration agreements and the incapacity of the parties in one article, and subjects the validity of the arbitration agreement to the law chosen by the parties and failing any indication thereon, under the law of the place of arbitration. The above-quoted provision does not consider the capacity question and is silent about the law

⁸⁰ Dubai Court of Cassation [2005] appeal No. 225, *The Principles and Judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 148/Arabic.

⁸¹ UAE arbitration law 1992, article 216(2) states that: “A request for nullification of the award shall not be rejected on the grounds of a waiver by a party of its right to the same prior to the issue of the award.”

governing the validity of arbitration agreements. The issue of the applicable law to the capacity and validity of arbitration agreements was discussed in section 6.3 and 6.5 above. The second ground to set aside the arbitral award is as follows:

“Either party to the arbitration agreement was, at the time of the conclusion of this agreement, *under incapacity* or if the award issued by arbitrators who not appointed according to the law, or if the award issued by arbitrator in the absence of others, or if the terms of reference was not specified the dispute”

This ground concerns the parties’ incapacity and the invalid composition of the arbitral tribunal. The composition of the arbitral tribunal is a ground of refusal under Article V (1)(d) of the NYC. Although the UAE arbitration law allows the parties to agree on the composition of the arbitral tribunal subject to the mandatory rules of the UAE arbitration law (206–207), this article does not mention that the national courts should examine the composition of the arbitral tribunal according to the procedural rules chosen by the parties, as is the case in Article V (1)(d) of the NYC and Articles (34–36) of the ML. The third ground to set aside the arbitral award is as follow:

“c. If the arbitral award violates the due process or there is procedural irregularities that affect the award”.

This section concerns the procedural irregularities and the lack of due process as a ground to set aside an arbitral award. However, it does not explain under which law the national court shall examine the procedural defect, as was the case in Article V (1)(d) of the NYC. The law that examines the procedural irregularities should be the law chosen by the parties, subject to it not violating the mandatory rules of the arbitration law of the place of arbitration; this was discussed in detail in chapter two.⁸²

However, the above provisions of setting aside the award in UAE arbitration law (Article 216/1) suggest ambiguity and difficulties in terms of the articulation used. The first criticism is that they are not based on Article V of the NYC. Although the UAE arbitration law recognises the parties’ right to agree on arbitral procedures, it does not explain under which law the courts shall examine any procedural defect or the composition of the arbitral tribunal.

⁸² Chapter two (section 2.3.3).

In addition, the law is silent as to under which law the court shall examine the capacity question and the validity of the arbitration agreement. There is case law evidence where the Dubai courts provided broad interpretation to the issue of lack of due process as a ground to set aside the arbitral award. The following section will discuss this case in detail as it is relevant to the arbitration practices in UAE and might affect the REFAA.

6.6.1 Broad interpretation of the lack of due process as a ground for refusal

The case of *International Bechtel* (Panama registered company) v. *Department of Civil Aviation of Dubai (DCAD)*⁸³ concerns the enforcement of an international arbitral award that was seated and issued in Dubai according to the UAE arbitration law (*lex arbitri*). The *Bechtel* case is recorded before the adoption of the NYC by the UAE. In this case the Dubai Court of Cassation established the principle that the failure of the arbitrator to elicit an oath from the witnesses in the manner provided by the UAE Law of Evidence⁸⁴ formed a lack of due process that violated UAE public policy. Thus, the Dubai courts annulled the award, which was then recognised and enforced in France and the US.⁸⁵ This case also reflects the problem that was discussed in chapter three concerning the enforcement of the arbitral award annulled in the country of origin.

However, the facts of this case lie in the fact that in 1992 DCAD and Bechtel concluded a construction contract to develop a modern residential city containing all elements of commercial and residential activities in Dubai. The contract included an arbitration clause, which mentioned the UAE as a seat and the UAE arbitration law as a *lex arbitri* governing the arbitration procedure. UAE law was also the applicable law to the merits of the dispute. In 1999 a dispute arose between the parties. Bechtel argued that DCAD had not paid the amount that was due to be paid under the terms of the contract. DCAD argued that Bechtel had not

⁸³*International Bechtel v. Department of Civil Aviation of Dubai* [2003] 503 Dubai Court of Cassation, see also the ruling of Paris Court of Appeal 2004/07635, See also the ruling of United States District Court, District of Columbia. Published in YBCA (2005): Volume XXX at 1113. This case was also criticised on the basis that the award has nullified in seat jurisdiction has enforced in other jurisdictions. See *Journal of World Trade and Arbitration Materials* (2005) Vol. 17, Issue 1 pp. 261-274.

⁸⁴ Law of Proof in Civil and Commercial Transactions 1992, UAE Federal Law No 10 for 1992, Article (41) (2) states: "The witness shall swear on oath, saying that: I swear by Almighty God that I shall tell the whole truth and nothing but the truth. The oath shall be according to the particular custom of his own religion if he so requests".

⁸⁵ Paris Court of Appeal 2004/07635, See also the ruling of United States District Court, District of Columbia. Published in YBCA (2005): Volume XXX at 1113.

fulfilled its obligations under the terms of the contract, and that it was liable to pay compensation or to reschedule payments that it had already received from DCAD.

The arbitration took place in Dubai under the auspices of the Dubai Chamber of Commerce.⁸⁶ A sole arbitrator was appointed who issued the arbitral award in 2002 in favour of *Bechtel* for approximately USD 24.4 million after hearing the testimonies of 15 witnesses. The award debtor (DACD) challenged the arbitral award for nullity before the competent court in Dubai (seat jurisdiction) on the ground that the witnesses did not pronounce the oath in the same local wording provided by the UAE law (mandatory provision 41(2) of the UAE Law of Evidence).⁸⁷

DACD argued that the arbitral award violated UAE public policy because it violated the mandatory provision of the UAE Law of Evidence. Article 41(2) of this law requires the witness to declare '*I swear by Almighty God that I shall tell the whole truth and nothing but the truth*'.⁸⁸ As the arbitrator failed to perform this declaration, the Dubai Court of First instance annulled the award on the grounds that the arbitrator did not administer the oath to witnesses in the proper local form.⁸⁹ Therefore, the court considered that the award suffered from a '*procedural defect*' and that it breached the mandatory provision of the UAE Law of Evidence (Article 41/2), and thus that it was against UAE public policy to recognise and enforce this arbitral award. The Dubai Court of Appeal and Court of Cassation thereafter confirmed this judgment.⁹⁰ Besides the controversial and broad interpretation of mandatory rules as a public policy ground for refusal, this ruling also raised the issue of lack of differentiation between procedural defects and lack of due process as two separate grounds for refusal under the NYC.

⁸⁶ Dubai Chamber of Commerce <http://www.dubaichamber.com/en/> Accessed May 2015.

⁸⁷ See (n 84).

⁸⁸ *ibid*

⁸⁹ *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai* [2002] 288 Dubai Court of First Instance.

⁹⁰ *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai* [2003] 503 Dubai Court of Cassation.

- **Lack of due process: Procedural irregularities**

According to Article V (1)(d) of the NYC, a procedural challenge may arise if the arbitrator has not followed the procedural rules chosen by parties, subject to the mandatory rules of the arbitration law of the seat jurisdiction. The UAE arbitration law does not expressly mention how the arbitrator should take the oath from the witness. It only mentions that if there is a witness, then the arbitrator should take the oath.⁹¹ The way of taking this oath in the UAE is explained in the UAE Code of Evidence and not in the UAE arbitration law. Therefore, it is thought that this refusal was caused because of the fact that the arbitral award suffered from a lack of due process pursuant to the UAE law, and not from a direct breach of the procedural arbitration chosen by the parties *lex arbitri* (UAE arbitration law).

According to Article V (1)(b), an arbitral award can be challenged on the ground of lack of due process, and can also be challenged under Article V (1)(d) on the ground of procedural defect.⁹² An important question raised from this is what is the difference between these two grounds of challenges? An overlap between Articles V (1)(b) and V (1)(d) may frequently arise, since both articles relate to alleged procedural breaches in arbitral proceedings.⁹³ Notwithstanding this close relationship, there is an important distinction between them that should be borne in mind.

Article V (1)(b) deals in particular with breaches of basic standards of due process such as procedural fairness, opportunity to present the case and fair hearings.⁹⁴ By contrast, Article V (1)(d) focuses on non-compliance with aspects of arbitral procedure other than due process, which are agreed upon by the parties or, failing such an agreement, laid down by the law of the arbitration law of the seat (*lex arbitri*).⁹⁵ Consequently, if the arbitral award cannot be challenged under Article V (1)(d), it may yet offend against the fundamental requirements of due process under Article V (1)(b). For example, if the parties' agreement provides that one

⁹¹ UAE arbitration law 1992, article (211): "The arbitrators shall cause the witnesses to take oath. Whoever makes a false statement before the arbitrators shall be deemed to have committed the crime of perjury".

⁹² Chapter two (section 2.4.1).

⁹³ Matti Kurkela and Santtu Turune, *Due Process in International Commercial Arbitration* (2nd, OUP, Oxford 2010) at 8.

⁹⁴ Redfern and others, (n59) at 643.

⁹⁵ *Ibid* at 647.

of the parties has no right to be heard, or to put his case, or that the names of the arbitrators will not be disclosed to the parties, this is unquestionably contrary to the essential requirements of due process, and thus Article V (1)(b) or even V (2)(b) (public policy) may be invoked against the enforcement of an award resulting from such a case.⁹⁶

In the *Bechtel* case, the Paris Court of Appeal enforced the arbitral award although it was annulled by the court of the seat jurisdiction (UAE).⁹⁷ The court noted that the refusal in the Dubai court was based on a *lack of the due process* according to the UAE laws, and the arbitral award did not suffer from procedural defects. The court noted that the Dubai court's "invalidation of the arbitral award on the ground of improper administration of witness oath was repugnant to the *fundamental notion of what is decent and justice in UAE* and does not have an international effect outside the country where it has been rendered".⁹⁸ The next question that needs to be examined is whether this ground (the way in which the arbitrator has to take the oath from the witness) is sufficient as a ground for refusal under Article V (1)(b) of the NYC.

- **The technical violation of due process and the pro-enforcement bias**

It is important in this discussion to consider the question of whether the court might exercise its discretion to recognise and enforce an award if the decision of the arbitration tribunal would have been the same in the absence of the breach of due process. The permissive word used in the opening paragraph of Article V (1) of the NYC, 'recognition and enforcement *may* be refused...' indicates that the competent court still has marginal discretion to examine the presence of one of the grounds for refusal within the feature and spirit of the NYC that is to facilitate the REFAA.⁹⁹ The national courts have interpreted this discretion differently, as was shown in chapter three. The features of narrow interpretation and pro-enforcement bias might indicate how the national courts may interpret this discretion. Thus, it seems to be accepted in theory and in court practices, particularly in developed arbitration jurisdictions as will be

⁹⁶Albert Berg, (n44) at 298-301, Gary Born, *International Commercial Arbitration: Cases and Materials* (Aspen Publishers, New York 2011) at 833, Gabrielle Kaufmann, 'Identifying and Applying the Law Governing the Arbitration Procedure: The Role of the Law of the Place of Arbitration' at 337.

⁹⁷ *International Bechtel v. Department of Civil Aviation of Dubai* [2004] 07643Paris Court of Appeal, available in English at <http://www.newyorkconvention1958.org> Accessed June 2015.

⁹⁸ *Ibid.*

⁹⁹ Chapter two (section 2.4.2).

shown in the following discussion, that not every breach of due process or procedural irregularities constitutes a ground for refusal.

One of the leading commentators on the NYC stated that:

“Only if it beyond any doubts that the arbitral tribunal decision *could have been the same*, would a court be allowed *to override* the serious violation of due process. Courts before which enforcement of a Convention award is sought may not go further as this would amount *to an extensive* as to how an arbitrator would have decided if the violation had not occurred. The latter would yield to a review of the merits of the arbitral award which is excluded under the Convention”.¹⁰⁰

In fact, many national courts have taken a similar position to Berg’s opinion. For example, the US District Court in *Abu Dhabi Investment Authority (ADIA) v. Citigroup, Inc*¹⁰¹ refused ADIA’s claim of lack of due process and enforced the award. In this case, ADIA sought to challenge the enforcement of the award before the US courts on more than one ground. One of them was related to the violation of due process as alleged by ADIA. ADIA’s claim was based on the fact that the tribunal’s errors were based on its denial of two documents requested by ADIA. ADIA claimed that this denial violated the due process of the US because they left ADIA unable to present the case in a proper way.

The court dismissed this challenge and stated that the arbitral tribunal granted 56 of ADIA’s 58 requested documents, allowing ADIA access to most of the documents concerning Citigroup/award creditor.¹⁰² The court noted that denying ADIA two requested documents did not render the tribunal guilty of misconduct, or result in fundamental unfairness, as is required by the Federal Arbitration Law (FAA) and the NYC. The denial of such requested documents must have amounted to a violation of due process or *fundamental fairness*. However, the US court emphasised that since ADIA had access to the most requested documents, the denial of access to these two documents did not present fundamental unfairness. The court then

¹⁰⁰ Albert Berg, (n44) at 302.

¹⁰¹ *Abu Dhabi Investment Authority v. Citigroup, Inc* [2013] 12 Civ. 283 U.S. District Court (Southern District of New York United States).

¹⁰² *Ibid*, at 15.

affirmed that this allegation did not constitute an issue of fundamental due process and was not sufficient to refuse the enforcement of the arbitral award.¹⁰³ In another case, a German court went further and considered that the absence of the defendant from the hearing did not constitute a lack of due process, since the defendant had expressly informed the tribunal that he would not attend the hearing and was fully apprised of the proceedings.¹⁰⁴

It is accepted that any legal system normally works according to its norms and legal traditions.¹⁰⁵ US Federal Courts, for example, have regarded the failure to give the parties an oral hearing as not violating due process.¹⁰⁶ The German court went further and considered that the non-attendance of the defendant in the proceedings did not breach public policy or due process.¹⁰⁷ It is thought that in the *Bechtel* case there was a technical breach of due process, which may not be sufficient to justify the refusal to enforce the arbitral award.

The NYC imposes a policy that favours the enforcement of arbitration awards, and the refusal occurs only where the breach of due process is substantial and affects the outcome of the award.¹⁰⁸ The words of the oath or the declaration of the oath is an issue related to the religious beliefs of the witness. For example, the oath in Christianity is different from the words of the oath in Islam (the words adopted in the UAE law). However, in every legal tradition the oath is taken to prove that the party is telling the truth, which is matter of fact and not a matter of law. The competent court still has the discretion to evaluate the witness's statement.¹⁰⁹ In addition, the UAE arbitration law imposes a mandatory provision on the arbitrator to take the oath if there is a witness, which the arbitrator did in the *Bechtel* case.

¹⁰³ Ibid at 17.

¹⁰⁴ *Party v party* [2009] I-4 Sch 10/09 Oberlandesgericht Dusseldorf Germany (Higher Regional Court).

¹⁰⁵ Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration* (Kluwer Law International 2003) at V.

¹⁰⁶ *Parsons & Whittemore Overseas Co. v. Societe Generale* [1974] 508 F.2d 969, 975–76 (2d Cir. 1974).

¹⁰⁷ *Party v party* [2009] I-4 Sch 10/09 Oberlandesgericht Düsseldorf Germany (Higher Regional Court).

¹⁰⁸ ICCA, 'ICCA'S Guid to the Interpretation of the 1958 New York Convention, A Handbook for Judges'' (2011) at 14-16.

¹⁰⁹ UAE Federal Law No 10 for 1992 issuing the Law of Proof in Civil and Commercial Transactions, article (46) stated that: "If it appears to the court while hearing the case or when judging the merits of the case that the witness has given a perjured testimony, a minute shall be made to this effect and sent to the public prosecutor to take the necessary criminal actions."

Therefore, the lack of due process in this case may amount to a technical breach rather than a fundamental breach of due process. The Dubai courts in the *Bechtel* case did not even explain how the use of different words in the oath violated the public policy of the UAE. There is a trend among developed arbitration jurisdictions that a technical breach of due process will usually not be sufficient to justify the refusal to enforce an award.¹¹⁰ In *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,¹¹¹ the US court noted that the NYC exists to facilitate the REFAA on the pro-enforcement bias approach. A mere violation of the procedural or due process is not enough to set aside the award. It should ‘substantially prejudice the complaining party’. In *Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam*,¹¹² the England and Wales High Court considered whether a *technical breach* of the due process requirements would constitute sufficient grounds to annul the arbitral award. The court stated that section 68 of the UK Arbitration Act 1996 embodied the international accepted procedural issues, whereby the parties can challenge the award if one or more of these issues are raised. However, the court then noted that a “technical breach of the due process was not sufficient”. The court held that there had to be “substantial injustice before the court could act”.¹¹³

In light of the foregoing considerations, it may be accepted in theory that the competent court may be entitled to order the enforcement of an award, regardless of the violation of due process, if such a violation has no effect on the arbitral award. But in practice, some courts have appeared very cautious and hesitant in deciding whether the result would be the same if the violation had not occurred, such as in the *Bechtel* case. This hesitant attitude seems to be caused by the conflict between two important interests: The requirement for equal and fair treatment in arbitral procedures, on the one hand, and the need to deal with enforcement sensibly and realistically in a practical way rather than through theoretical considerations on the other. Yet, it would seem to make no sense to refuse enforcement if it is beyond doubt that a breach of due process would not have affected the outcome of the arbitration. Allowing such

¹¹⁰ Tweeddale,(n38) at 417.

¹¹¹ *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2002) XXVII YBCA at 814, United States District Court of Southern District of Texas.

¹¹² *Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam* [2001] EWHC 418 (Comm) See also *Primera Maritime (Hellas) Ltd and other companies v Jiangsu Eastern Heavy Industry Co Ltd and another company* [2014] EWHC 3066 (Comm).

¹¹³ Ibid

discretion in such circumstances should ensure the efficient functioning of international arbitration and serve, in particular, the general pro-enforcement bias manifested in the NYC.

6.6.2 The extensive approach to the public policy defence as a ground for refusal

At first sight, as this Article (216/1) of the UAE arbitration law does not list the non-arbitrability of the dispute nor mentions public policy as a ground to set aside the award, there seems to be a gap in relation to these issues. However, the arbitrability of the dispute still may be used to challenge the award under Article 203/4 of the UAE arbitration law that states that the subject matter of the dispute shall be valid and arbitrable according to the UAE law.¹¹⁴ In terms of the public policy defence, although it is not explicitly listed within the grounds to set aside the arbitral award, in a case the Dubai Court of Cassation ruled that:

“Although public policy is not one of the grounds on which an award may be set aside, *domestic public policy* should be taken into consideration at the recognition and enforcement stage”.¹¹⁵

Hence, there is no certainty as to the use of the public policy exception in this context as seen in the *Bechtel* case analysed above. The following section will examine another local standard that may get on the way of a harmonious interpretation of the NYC by the UAE courts in their decisions on the REFAA.

- **The lack of jurisdiction of the court of origin as a ground for refusal in Dubai**

The case of *Construction Company International (CCI) v Ministry of Irrigation of the Government of Sudan (MOI)* was discussed earlier in section (6.2.2) and showed how the inconsistencies between the national laws that regulate the REFAA led the Dubai court to ignore the state adoption of the NYC, and refer to its arbitration law, thus refusing the REFAA. However, this section will discuss the emerging notion in the domain of international commercial arbitration that a lack of court jurisdiction is a ground for refusal as suggested by the Dubai Court in this case.¹¹⁶

¹¹⁴ UAE arbitration law, 1992 article 203(4) states that: “Arbitration shall not be permissible in matters, which are not capable of being reconciled.”

¹¹⁵ Dubai Court of Cassation, petition No.146/2008. Published in *The Principles and Judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 230/Arabic.

¹¹⁶ Victor Reynes, ‘Forum Non Conveniens: A Hidden Ground to Refuse Enforcement of Arbitral Awards in the United States’ (2013) 30 *Journal of International Arbitration* 165, John Willems, ‘Shutting the U.S. Courthouse

A few commentators from the Gulf region criticised this ruling (CCI V MOI) from the view of the broad interpretation of the domestic public policy as a ground for refusal.¹¹⁷ None of these publications referred to the emerging notion in international arbitration that considers the lack of court jurisdiction to hear the request of REFAA as a ground for refusal. Thus, this section will analyse the origin of this notion and how it is arguably interpreted within the scheme of the NYC by relying on Article III of the NYC. This position might suggest another platform of different judicial interpretations of the NYC provisions, which led to the emergence of the ‘local standard’ that might be detrimental to the development of international commercial arbitration.

Nowadays, assets can be moved from one state to another in an instant. One of the key features of arbitration is the easy enforceability of arbitral awards worldwide because of the extensive adoption of the NYC. Neither the NYC nor the ML includes provisions requiring the national courts to investigate whether the award debtor has a permanent domicile or business branch to enforce the arbitral award. The only logical requirement is that the award debtor has assets or potential assets in the countries where the arbitral award is seeking recognition and enforcement. However, the Dubai courts in this decision seem to have applied the notion of *Forum Non-Conveniens* (FNC) as a ground to refuse the REFAA. The Dubai Court of Cassation states that:

“The international jurisdiction of courts is part of the *public policy*, and the State Courts shall have no competent jurisdiction to consider claims filed against *a foreigner who has no domicile or address in the State*, unless such claim is related to a commitment concluded, executed, or conditioned to be executed in the State, or the foreign entity whose head administrative office is located abroad *has a branch in the State*, provided that the dispute is related to such branch. It is established from the

Door?: *Forum Non Conveniens in International Arbitration*’ (2003) 58 *Dispute Resolution Journal* 54. Ben Juratowitch, ‘*Fora Non Conveniens for Enforcement of Arbitral Awards against States*’ (2014) 63 *International and Comparative Law Quarterly* 477-490, George Bermann, ‘*Domesticating the New York Convention: The Impact of the Federal Arbitration Act*’ (2011) 2 *Journal of International Dispute Settlement* 317, William W Park and Alexander Yanos, ‘*Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*’ (2006) 58 *Hastings Law Review* 251.

¹¹⁷Hassan Arab, ‘*Judicial Attitude Toward Foreign Arbitral Awards in the United Arab Emirates*’ (2014) 1 *BCDR International Arbitration Review* at 7 (Arabic version), Gordon Blanke, ‘*Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure*’ (2014) 1 *BCDR International Arbitration Review* at 18, Gordon Blanke, (n25) at 19-36, Habib Al Mulla and Gordon Blanke, (n4) .

papers that the Ministry of Irrigation (respondent) in the Republic of Sudan *has no domicile or address in the UAE*, and that the obligation was concluded and executed abroad....”¹¹⁸

This judgment attracted the attention of many arbitration practitioners in the UAE, as the Dubai courts established a new principle to the arbitration practice in Dubai whereby the lack of court jurisdiction was a ground for refusal.¹¹⁹ This concept has been applied previously to refuse enforcement of foreign arbitral awards by US courts¹²⁰ and has received harsh criticisms.

FNC is a procedural device characteristic of the common law countries paradigm of jurisdiction and allows a court to decline to exercise its jurisdiction in favour of an alternative forum.¹²¹ This allowance is limited to the cases where there is an available alternative forum that is considered to be a more appropriate venue for the particular litigation. In the case of *Spiliada Maritime Corp v Cansulex Ltd*,¹²² the English courts defined FNC [not arbitration case] as follows. Lord Goff set out that:

“The basic principle is that a stay will only be granted on the ground of forum non-conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably for the interests of all the parties and the ends of justice”.¹²³

¹¹⁸ Ibid at 140.

¹¹⁹Hassan Arab, (n117) at 7 (Arabic version), Gordon Blanke, ‘Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure’ (2014) 1 BCDR International Arbitration Review at 18, Gordon Blanke, (n25) at 22, Habib Al Mulla and Gordon Blanke, (n 4) 69.

¹²⁰*Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine* [2002] 311 F.3d 488 US Court of Appeal, Second Circuit, see also *Figueiredo Ferraz Consultoria e Engenharia de Projeto Ltda. (Brazil) v. Republic of Peru et al* [2011] 08 CIV. 492 (WHP) US District Court Southern District of New York. See also Victor Reynes, (n116) at 165, John Willems, (n116) at 54.

¹²¹David Holloway and others, *The Law and Practice of International Trade* (12th edn, Sweet & Maxwell 2012) at 556, Ben Juratowitch, ‘Fora Non Conveniens for Enforcement of Arbitral Awards against States’ (2014) 63 ICLQ 477-490, at 478.

¹²²*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 476 (HL).

¹²³ Ibid

However, the use of FNC to decline jurisdiction is far more common in relation to international litigation than international arbitration.¹²⁴ Its application has been found in multinational disputes where the parties seek to settle the ‘merits’ of the disputes before a national court.¹²⁵ In international arbitration, particularly in the actions brought before national courts to recognise and enforce foreign arbitral awards, it is rare to present FNC as a ground for refusal.¹²⁶ Some have gone further and have argued that an action for REFAA is not a ‘case’ in the usual sense, but a ‘summary proceeding’ that should follow the national procedure for a motion only.¹²⁷ This might be a highly respected opinion as the role of national courts in international arbitration is based on it having a supplementary nature and supervisory role rather than deciding the actual merits of the dispute.

A case that attracted the attention of the international arbitration community about FNC as a ground for refusal is the case of *Monegasque de Reassurances S.A.M. (Monde Re) v. NAKAK Naftogaz of Ukraine and State of Ukraine*.¹²⁸ In this case, the (U.S. Court of Appeals, Second Circuit) declined to enforce the award in favour of the Ukraine party on the grounds of FNC. The Court of Appeal then upheld the decision and held that Article III of the NYC accepted that *different procedural rules* could apply in different countries that were signatories to the NYC. As explained earlier in chapter two, Article III of the NYC obliged the NYC state parties to recognise and enforce arbitral awards according to their ‘national rules of procedure’.¹²⁹ However, the court held that the only limitation was that those rules could not be more onerous than those applying to domestic awards. If this requirement was met, any procedural rules would be acceptable.¹³⁰

¹²⁴Report of the International Arbitration Club of New York, (n120) ‘Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions’ (2013) 24 American Review of International Arbitration at 1.

¹²⁵George Bermann, (n116) at 322.

¹²⁶Ibid at 329, William Park and Alexander Yanos, (n116) at 251.

¹²⁷Report of the International Arbitration Club of New York, (n116) at 2.

¹²⁸*Monégasque de Réassurances S.A.M. v. NAK Naftogaz of Ukraine* [2002] 311 F.3d 488 U.S. Court of Appeals, Second Circuit United States.

¹²⁹Chapter two (2.4).

¹³⁰*Monégasque de Réassurances S.A.M. v. NAK Naftogaz of Ukraine* [2002] 311 F.3d 488 U.S. Court of Appeals, Second Circuit United States, page 14.

Monde Re (award creditor) argued that FNC could not be applied in this case because Article III of the NYC referred to the procedural rules of the enforcing state; it excluded any other circumstances to those stipulated in Article V of the NYC. The court then concluded that despite the fact that the NYC established the jurisdiction to the US, the court remained the “authority to reject that jurisdiction for reasons of conveniens, judicial economy and justice”.¹³¹ The court also noted that the only relation between *Monde Re* (award creditor) and the US was the link created by the NYC, and for this reason the court gave little deference to the petitioner’s choice of forum.¹³²

Again, in *Figueiredo Ltd v. Republic of Peru*¹³³ the United States (Second Circuit Appeal Court) made another application of FNC to refuse REFAA. The court also supported its reasoning by interpreting the words of Article III of the NYC ‘in accordance with national rules of procedures’ as allowing a party to the NYC to dismiss a request for enforcement on the basis of the FNC doctrine.¹³⁴ Many practitioners criticised the attitude of the US courts in the above-mentioned cases, together with the way in which the courts interpreted Article III of the NYC to give themselves an excuse to add another ground for refusal.¹³⁵

By contrast, in the case of *Rual Trade Limited (BVI) v UAB Ukio Banko Investicine Grupe*,¹³⁶ the Russian Federal Court dismissed the allegation that Russia was not the most convenient forum to hear the recognition and enforcement request as the award debtor in this case did not have a permanent domicile or business branch in Russia. The court then enforced the arbitral award and ruled that:

¹³¹Ibid, page 17.

¹³²Ibid, page 20.

¹³³*Figueiredo Ferraz Consultoria E Engenharia de Projeto Ltd v. Republic of Peru* [2011] 665 F.3d 384 (2d Cir. 2011).

¹³⁴Ibid, page 14-15.

¹³⁵See for example: William W. Park and Yanos, ‘Respecting the New York Convention’ (2007) 18 ICC International Court of Arbitration Bulletin 65-77, at 68, Albert Berg, ‘Why Are Some Awards Not Enforceable?’ (2005) 12 ICCA Congress Series 291.

¹³⁶*Rual Trade Limited (BVI) v UAB Ukio Banko Investicine Grupe and others* [2012] A40-105056/10-52-930 Federal Arbitration Court for the Moscow District/ Available at <http://www.newyorkconvention1958.org/> accessed June 2015.

“Neither the NYC nor Russian courts practice required the award debtor to be domiciled at the location where enforcement is sought against his assets”.¹³⁷

Therefore, it is important to understand the actual meaning of Article III of the NYC that is relied upon by the US and Dubai national courts as a justification to refer to the FNC as a ground for refusal.

- **The purpose of Article III of the NYC**

Article III of the NYC states that:

“Each Contracting State *shall* recognise arbitral awards as binding and enforce them in accordance with the *rules of procedure of the territory* where the award is relied upon, under the conditions laid down *in the following articles*. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to *which this Convention applies* than are imposed on the recognition or enforcement of domestic arbitral awards”.

This article was enacted to oblige the state party to recognise and enforce the foreign arbitral awards as explained earlier in chapter two. This appears from the use of word ‘shall’ in the opening line of Article III. Since the NYC does not govern the procedural rules of enforcement, it leaves this question to the national procedural rules of the enforcing state.¹³⁸ Nevertheless, there is a thin line that differentiates between ‘enforcement provisions’ and ‘procedural rules’ in order for the procedural rules to not be interpreted as an excuse to not enforce the arbitral award. It is submitted in the knowledge of law that the procedural rules refer to the rules that are procedural in nature such as the time limit, the competent court and many other procedural rules regulating the litigation. The preparatory work of the NYC provides that Article III of the NYC should *not* suggest another ground for refusal.¹³⁹ At the time of drafting Article III (which was proposed to be Article II), there were three options on the table:

¹³⁷Ibid.

¹³⁸George Bermann, (n116) at 330.

¹³⁹UNCITRAL Documents, No. E/CONF.26/2 (6 Mar. 1958) at 2.

“(a) To incorporate basic procedural rules into the NYC; (b) to provide that recognition and enforcement be dealt with in summary proceedings; or (c) to provide that recognition and enforcement should follow the same procedural rules as those applying to domestic awards”.¹⁴⁰

After criticisms were provided for each of the above options in that meeting, the drafters chose the last option, as it is now Article III of the NYC after adding the word ‘Convention’ to Article III. Therefore, it is understandable that the drafter subjects the procedure rules that apply to the domestic award to not add more conditions than the conditions established by the NYC. This means that the arbitral awards should be recognised and enforced pursuant to the NYC conditions (IV–V) and according to the national rules of procedure. Importantly, these national rules of procedure should not add additional conditions to those listed in Articles IV–V of the NYC, and in any event they should be not more than the enforcement conditions that were applied to the domestic arbitral award.¹⁴¹

Based on the preparatory works of the NYC, Article III is restricted by Articles IV–V of the NYC. It seems that the ‘national rules of procedure’ referred to in Article III of the NYC are limited to procedural questions such as the form of the request, the competent courts, and the time limits, while the conditions for the enforcement itself is set out in Articles IV–V of the NYC. The Italian Supreme Court confirmed this when it stated that in Article III of the NYC that a distinction is made between ‘rules of procedure’ and ‘conditions’. The former refers to rules of procedure in the literal sense (e.g. the jurisdiction of the appeal court, the request to be filed by summons, etc.) and does not, as such, set ‘conditions’.¹⁴²

However, one might still be able to criticise the formulation of Article III of the NYC. The use of the phrase ‘*more onerous conditions than are imposed on the recognition or enforcement of domestic arbitral awards*’ could give rise to a misunderstanding that Article III opened the door for new grounds of refusal to enforce foreign arbitral awards. Thus, it is

¹⁴⁰Ibid at 4.

¹⁴¹Ibid at 4.

¹⁴²*Privilegiata Fabbrica Maraschino Excelsior Girolamo Luxardo SpA v. Agrarcommerz AG* (1993) XVIII YBCA at 427, 429.

thought that it might be clearer if the phrase ‘more onerous rules of procedure’ had been in place rather than ‘more onerous conditions’.

Finally, the fact that the Dubai Court of Cassation in the case of *MOI v CCI* required a permanent domicile or business branch as a prerequisite for confirmation of an arbitral award might not be consistent with the actual meaning of Article III of the NYC. The judicial jurisdiction was supposed to exist once the UAE ratified the NYC, without a need to examine whether the award debtor has a permanent domicile or business branch in the UAE. This is also because Article V of the NYC did not list FNC as a ground to refuse the REFAA. It is to be hoped that this case, *MOI v CCI*, remains confined and will not affect the future implementation of the NYC in the Dubai courts. It is well known in the literature of international arbitration that one of the significant features of international arbitration is the easy enforceability of arbitration awards worldwide, and the doctrine of FNC certainly deprives international commercial arbitration from this feature; by its development it might hinder the enforceability of foreign arbitral awards in UAE.

6.6.3 Recognition and enforcement of arbitral awards in UAE

Arbitral awards issued in the UAE are subject to the annulment challenges discussed in the above (Article 216). These grounds are the only grounds on which an arbitral award issued in UAE can be set-aside. It is also worth mentioning here that the UAE arbitration law provides the mandatory provision that the arbitral award *must* be issued in the UAE; otherwise, the provisions of the REFAA shall be applied.¹⁴³ These provisions refer to the Articles (235-238) discussed earlier in section (6.2).

The enforcement of arbitral awards issued in the UAE is subject to Article 215 of the UAE arbitration law. The provisions of this Article are not clear and provide for numerous conditions. It states that:

“The arbitrators’ award may not be enforced unless it has been approved by the court with which the award was filed; provided that the court has reviewed the award and the terms of reference and ensured that there is no encumbrance to such enforcement. The said court *shall*,

¹⁴³UAE arbitration law 1992, article 212 (4) stated that: “the arbitrators’ award *shall* be issued within the United Arab Emirates; otherwise, the rules applicable to arbitration awards passed in foreign countries shall apply thereto.”

at the request of one of the parties concerned, correct the material errors in the arbitrators' award in accordance with the legally prescribed manners applicable to correction of errors. The Execution Judge '*has the jurisdiction to all the matters related to the execution of the arbitrators' awards*'.

It seems that the arbitral award has to undergo a validation (ratification) process before the UAE courts. There is no time limit for the commencement of the ratification process and the law does not list specific provisions that must be met in order to challenge the enforcement. The enforcement judge granted a wide discretion to enforce awards or to refuse their enforcement.¹⁴⁴ It should be taken into consideration that the enforcement request is suspended upon the completion of the annulment suit and the judgment of the annulment suit becomes final.¹⁴⁵

However, the foreign arbitral awards that seek recognition and enforcement in the UAE are subject to Articles 235–238 of the UAE arbitration law and are also subject to the NYC implementing decree, and both provide different standards to challenge the recognition and enforcement request. This situation has caused much uncertainty in practice, as seen in the case law analysis earlier in section (6.2). Nevertheless, Article 238 of the UAE arbitration law provides for the primacy of the NYC to the REFAA if should be the source that national courts should rely upon to guarantee such primacy in the context of REFAA.

6.7 Summary and suggestions for law reform

After the UAE adopted the NYC, the UAE courts have shown a positive attitude and have applied the NYC implementing decree to the REFAA. However, in the case of *CCI v MOI* the Dubai Court of Cassation unreasonably referred to the UAE arbitration law and refused recognition and enforcement for reasons of domestic public policy. It is hoped that this ruling will remain an isolated instance in the arbitration practice of the UAE courts. The main hindrance to the implementation of the NYC in the UAE is the lack of a proper arbitration law based on or inspired by the ML. Therefore, it is recommended to the UAE to promulgate new arbitration law that regulates the domestic and international arbitration and also regulates the

¹⁴⁴UAE arbitration law 1992, article 15(2): "The Execution Judge has the jurisdiction to all the matters related to the execution of the arbitral awards".

¹⁴⁵Dubai Court of Cassation [2007] appeal No. 265 Published in *The Principles and judgments of Dubai Court of Cassation in Arbitration*, issued by Dubai Courts/legal library in (2014) page 519/Arabic.

REFAA. Although the current UAE arbitration law is not based or inspired by the ML, the advantage is that the law does not provide for appealing arbitral awards on their merits, or point of law or question of fact. However, Article 216 provides for the grounds to set aside the arbitral award, which are procedural in nature and are inconsistent with Article V of the NYC. These grounds are limited to arbitral awards issued in the UAE, either domestic or non-domestic, and cannot be waived by the parties' agreement.

The foreign arbitral awards that are issued abroad are subject to provisions 235–238 of the UAE arbitration law, which are also inconsistent with Article V of the NYC. These grounds violate the NYC and add additional grounds for refusal to those listed in Article V of the NYC and Article 36 of the ML. However, it should also be mentioned here that Article 238 of the UAE arbitration law provides for the primacy of the NYC to the REFAA if it is interpreted ideally by the national courts.

The other challenge that might undermine the successful implementation of the NYC in the UAE is related to the broad interpretation of domestic public policy as a ground for refusal as seen in *Bechtel* and *CCI v MOI* cases. In the *Bechtel* case, the Dubai courts provided a broad interpretation of what constitutes a violation of due process and refused to enforce the arbitral award. The court referred to the mandatory procedural rules that were principally enacted to explain the way in which the judges in national courts shall take the oath from the witness in the normal hearing. As the arbitrator failed to take the oath in the exact local manner, the court annulled the arbitral award because of a lack of due process that violated the public policy of the UAE. Moreover, in *MOI v CCI* the court also referred to the mandatory procedural rules that were principally enacted to explain the court's jurisdiction over the merits of a dispute that included a foreigner who did not have a domicile in the UAE. It is suggested that award creditors who seek REFAA through Dubai courts should ensure that the award debtor has a permanent domicile or business branch registered within the UAE. It might be not enough that the award debtor only has assets in Dubai.

In summary it appears that the UAE and Qatari courts provided broad interpretations to the mandatory rules and considered every breach of mandatory rules as public policy grounds for refusal. This position is unfortunate and does not reflect the emerging notion in the world of international arbitration that distinguishes between domestic and international public policy to the REFAA. This is discussed in detail in chapter eight of this thesis. The next chapter examines the implementation of the NYC in the Kingdom of Saudi Arabia. The arbitration

law of Saudi Arabia provides a unique consideration to the rules of Islamic law as an essential requirement to the validity of arbitration agreement and arbitral award, which makes it difficult to understand the operation of the NYC in the Kingdom of Saudi Arabia.

Chapter Seven: The Implementation of the 1958 New York Convention in the Kingdom of Saudi Arabia

7.1 Introduction

In the final chapter of this section, arbitration law in the Kingdom of Saudi Arabia (KSA) is analysed to unpack the problems that have arisen in the implementation of the New York Convention¹ (NYC). A similar approach to the analytical methods that were used in the previous two chapters will be applied in this chapter. The addition in this chapter is that it will analyse some aspects of Sharia law to understand its relationship with the arbitration practices in the KSA. KSA arbitration law is subjected to not violating the rules of Sharia law in all arbitration processes without explaining what those rules are. Sharia law was introduced and discussed in detail in chapter four of this thesis. This chapter aims to provide an analysis to better understand how the recognition and enforcement of the foreign arbitral awards (REFAA) is regulated in the KSA's legal system. This chapter uncovers distinct variations between Sharia law and the international norms of international arbitration and discusses the implications for the REFAA in KSA.

The KSA ratified the NYC in 1994.² In 2012 a new arbitration law was issued in the KSA that was inspired by the texts of the Model Law on International Commercial Arbitration³ (ML) and was also required to not violate Sharia law.⁴ Sharia law in the KSA is not just religious law; according to the Saudi Basic Law, it forms the Constitution of the State. The

¹ "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) 330 United Nation Treaties Series (UNTS), No. 4739".

²UNCITRAL website.

³ "UNCITRAL Model Law on international Commercial Arbitration 1985 as amended in 2006, General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006)".

⁴Kingdom of Saudi Arabia Arbitration Law 2012, Royal Decree No: M/34 for 2012. An English version of KSA arbitration law available online at the official website of the Ministry of the Commerce and Industry <https://mci.gov.sa/en/> Accessed June 2015. See also Shaheer Tarin, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26:1 American Review of International Arbitration 1-24, Jean-Pierre Harb and Alexander Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30:2 Journal of International Arbitration 113-130, John Boehm and Mohammed Al-Ghamdi, 'New Saudi Arbitration Law: A Positive Step, but Practical Questions Remain' [2012] Norton Rose Bulletin 3.

new KSA arbitration law is one of many recent initiatives taken by the Saudi legislature to codify and modernise national laws.⁵

This chapter examines how the KSA legal system regulates the legal framework of international arbitration. It tackles the same topics that were clearly identified in the introductory section of chapter five. Additionally, the analysis in this chapter involves a doctrinal analysis of Sharia rules that are relevant to the validity of the arbitration agreement, validity of the arbitration proceedings, and the enforceability of the arbitral award in KSA. This is necessary because KSA arbitration law does not explain in detail how Sharia law might affect the arbitration process or REFAA in KSA.

In turn, the chapter examines: the formal and material validity of the arbitration agreement under KSA arbitration law compared with the practice of the NYC and ML; how the KSA arbitration law regulates the principles of the separability of arbitration agreements and competence-competence; the principle of party autonomy in choosing the law and rules governing the arbitration process as applied in KSA arbitration law; the concept of arbitral award in Sharia law including the concept of ‘foreign’ arbitral award, and the challenges against the arbitral award in the KSA legal system compared with the challenges provided by Article V of the NYC.

The analysis in this chapter identifies that the KSA arbitration law is in a much better position than the arbitration laws of Qatar and United Arab Emirates (UAE) in terms of accepting all modern principles of the operation of arbitration as an effective method of dispute resolution. The arbitration agreement must avoid two main prohibitions of Sharia contract law to be valid and enforceable in KSA. First is the uncertainty in the contractual relations that might affect the validity of the arbitration clause in KSA. In this context, the arbitration parties may have to clearly determine the subject matter of the dispute, and the applicable law and rules governing the arbitration process within the articulation of the arbitration clause. Secondly, the arbitral award that includes a sum of interest (usurious interest) is not enforceable in KSA. This is because Sharia contract law generally prohibits the commercial interest as used in conventional commercial transactions (usurious interest).

⁵Abdullah Alshikh, *Codification of Islamic Law in Saudi Arabia: A Potential Problem, Or Part of the Solution Toward Building a Nation of Laws?* (1st edn, Harvard Law School 2007).

KSA arbitration law is subjected to the chosen procedural rules in not violating Sharia law. However, the chapter reveals that Sharia procedural rules might not result in serious difficulties nullifying the parties' choice. Yet, Sharia law limits the party autonomy in choosing the members of the arbitral tribunal and it has affected the articulation of the KSA arbitration law. In addition, the foreign arbitral award that is governed by foreign arbitration law and which seeks recognition and enforcement in the KSA are not subject to KSA arbitration law. This is because Sharia law makes consideration of the parties' religions in determining the mean of 'foreign arbitral award'. However, in general although the KSA arbitration law is modernised to the tune of ML, the strict consideration of Sharia law suggests a level of vagueness and difficulty to the REFAA in KSA.

7.2 KSA arbitration law is subject to Sharia law⁶

The KSA legal system is the only system in the world that is based on the traditions of Sharia law.⁷ This clearly appears in its State Constitution, laws, and judicial practices. Article 1 of the KSA Basic Law (KSA Constitution) emphasises that “the Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s Book – Bible – and the Prophet *Sunnah* – prophetic words and traditions – are its *constitution...*”.⁸ Article 7 of the same law further lays down that “the regime derives its power from the Holy *Quran* (Muslim bible) and the Prophet *Sunnah* which rules over this law and all other state laws”.⁹

In 2012 the KSA issued a new arbitration law that takes into account the ML and requires the application of this law to not violate the provisions of Sharia law. The KSA arbitration law accepts most principles of modern arbitration, as will be shown here. However, despite this modernisation, Sharia law still plays a significant role as defined by the law. The first

⁶ See (n 4).

⁷ Abdullah Alshikh, (n5) 120, Muhammad Zaman, ‘Islamic Law and Legal System: Studies of Saudi Arabia’ (2002) 13:1 Journal of Islamic Studies at 51-54, The Islamic Republic of Iran is also based on Islamic legal traditions but the different is that it has got modern legal system similar to the rest of the GCC States, while in KSA the most aspects of laws is remain un-codified and the application of Sharia rules is prevailed. Sharia law has introduced in chapter four (section 4.3).

⁸ Saudi Basic Law of Governance of 1992, Art (1), The KSA Constitution available in English version at the official website of the Saudi parliament <
<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Laws+and+Regulations/> Accessed July 2015.

⁹ Ibid, Art (7).

mention of the word ‘Sharia’ in the KSA arbitration law is found in provision 2. Article 2 states that:

“Without prejudice to provisions of *Islamic Sharia* and international conventions to which the Kingdom is a party, the provisions of this Law *shall* apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration *takes place* in the Kingdom *or* is an international commercial arbitration taking place abroad and the parties thereof agree that the arbitration *be subject* to the provisions of this Law”.

Hence, the KSA arbitration law applies to all arbitrations taking place in the KSA, either domestic or international. It also applies to arbitration taking place abroad in which the parties agree to apply the KSA arbitration law to govern the arbitration procedure. Unfortunately, the provisions of this law are not applied to the recognition and enforcement of arbitral awards that are issued abroad and governed by foreign arbitration law. As mentioned in Article 2, this law ‘shall’ apply to all arbitration proceedings taking place in the KSA or arbitration proceedings taking place abroad if governed by the KSA arbitration law. Thus, uncertainty has arisen regarding arbitral awards governed by foreign arbitration law and which seek recognition and enforcement in the KSA pursuant to the NYC. These awards (foreign arbitral awards granted in arbitration proceedings governed by foreign arbitration law) are discussed below.¹⁰ Consequently, the KSA arbitration law is applied to the recognition and enforcement of three categories of awards: Domestic, non-domestic, and foreign arbitral awards issued according to KSA arbitration law. The impact of the Sharia law tradition clearly appears in all provisions of this piece of legislation.

7.3 The validity of the arbitration agreement in KSA

This section will analyse the requirements of the validity of arbitration agreement in the KSA legal system compared with the requirements of the validity of the arbitration agreement suggested by the Article II of the NYC and Article 7 of the ML. This section will follow a similar structure to the previous two chapters, in the sense that it will analyse the formal and material validity of the arbitration agreement in the KSA legal system. Additional analysis of the Sharia law requirements on the validity of the arbitration agreement will be made to understand the Sharia rules that might affect the validity of the arbitration agreement in KSA.

¹⁰See section 7.7.2.

The arbitration agreement in KSA is regulated under Articles 9–12 of the KSA arbitration law. Four conditions are required under these articles to ensure the validity of the arbitration agreement and they are as follows: The agreement must be in writing, and party capacity, arbitrability of the dispute and finally the agreement shall not violate the Sharia law.

7.3.1 Formal validity of the arbitration agreement

The first condition concerns the formal validity of the arbitration agreement, and the requirement for it to be in writing, as provided for in Article 7 of the ML. A noteworthy difference between Article 9 in KSA arbitration law and the correspondent provision in the ML is that KSA law requires the arbitration agreement to be in writing, failing that it will be void,¹¹ whereas the ML only requires the arbitration agreement to be made in writing. Hence, in KSA arbitration law the written requirement is in principle not met in circumstances where there is an exchange of statements of claim and defence in which one of the parties pleads in its submission the existence of an arbitration agreement and the other party does not object to its existence, circumstances expressly contemplated as meeting the ML requirements.¹²

In addition, according to Article 9 of KSA arbitration law, the requirement for the agreement to be in writing is met by various forms of agreement evidenced in writing such as telegrams, correspondence documents, or electronic communications.¹³ This can be seen as a more liberal approach than Article II (2) of the NYC. Thus, arbitration agreements in the KSA have to be in writing and cannot be proved by any other form such as a witness statement or oath.¹⁴ Unlike the Qatar and UAE arbitration laws, that are both silent about the form of writing, the KSA arbitration law provides a much more advanced position in this question.

¹¹KSA arbitration law 2012, Article (9)(2): “The arbitration agreement shall be in writing; otherwise, it shall be void.”

¹²UNCITRAL Model Law 1985 as amended in 2006, Article 7(5): “Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other”.

¹³KSA arbitration law 2012, article 9 (3).

¹⁴See (n11).

7.3.2 Material validity of the arbitration agreement

The second condition is related to the material validity of the arbitration agreement. This involves three sub-conditions; a capacity question; a requirement that the subject matter of the dispute shall be arbitrable and the arbitration agreement shall not violate Sharia law. The following section will analyse the capacity question and Sharia law requirements while the arbitrability question is examined in detail in the next chapter where the public policy of the GCC states and its relation to the arbitration practices is examined in detail.

Article 5 of the KSA arbitration law requires that in order for the arbitration agreement to be valid, it should not violate Sharia law.¹⁵ The questions that will be analysed in the following sections are as follows: How does Sharia law define the formal and substantive validity of contractual relations, and what is the required capacity in the KSA to enter into an arbitration agreement? Therefore, in the following section an introduction will first be conducted to Sharia contract law, as this is essential in understanding how the KSA legal system regulates the capacity question, and essential material conditions related to the validity of the arbitration agreement in the KSA.

- **The influence of Sharia contract law**

To date, the KSA does not have a codified contract law, and Sharia contract law governs contractual relations.¹⁶ Sharia law defines a contract as a valid action that obliges the parties who enter into any contract to perform their obligations in accordance with the terms and conditions of the contract.¹⁷ The concept of contract is recognised in the main source of the Sharia, the Quran, which states that: “You who believe, fulfil any contracts you may make”.¹⁸ The concept of contract is mentioned many times in the Quran as regulating different aspects

¹⁵KSA Arbitration law 2012: Article (5): “If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, *including those related to arbitration*, shall apply, provided this is not in conflict with the provisions of Sharia.”

¹⁶Shaheer Tarin, (n4) at 2, Reyadh Seyadi, ‘Legal Aspect of Islamic Finance’ (2015) 29:3 Arab Law Quarterly at 285-295 at 289, Noor Mohammed, ‘Principles of Islamic Contract Law’ (1988) 6:1 Journal of Law and Religion at 115-130, Ibrahim Algari, ‘The Formation of the Contract in Islamic Sharia’ (2001) 11 Ministry of Justice Journal at 1-13/Arabic,

¹⁷Salman Mahmoud, *Arbitration Codes: Comparative study between the arbitration codes of Saudi Arabia, Kuwait and Egypt* (2 edn, Dar Alkotob Alqanonyah, KSA 2007) at 56 /Arabic.

¹⁸The Qur’an, chapter 5 verse 1.

of life and is not limited to the conventional understanding of the contract in different legal traditions, in terms of it regulating the legal activities between individuals or between individuals and any other entities. For example, the religious obligation to God and the relationship between the political regime and citizens is also governed by an oral contract, similar to the historical concept of the ‘Social Contract’ that was developed by Rousseau in the eighteenth century.

However, there is no precise definition of the concept of contract in the Quran or Sunnah.¹⁹ As explained in chapter four,²⁰ Sharia law developed by the secondary sources that are more evidently human in origin, and are based on the mental efforts of Islamic juristic expertise aimed at finding solutions to the emerging issues that had not arisen during the prophet’s life.²¹ There are four major schools of jurisprudence that are well recognised in the literature of Sharia law, and have existed since the first century of Islam.²² They are the *Hanbali* School, the *Hanafi* School, the *Shafi’i* School, and the *Maliki* School.²³ However, the Sharia schools of jurisprudence emphasise the importance of a valid offer and acceptance in order to legalise the formation of a contract.²⁴ By examining the validity of contracts in Sharia law, one finds that the most important pillars for the validity of the agreement is the existence of mutual consent. As such, mutual consent is essential to the formation of contracts in all legal traditions and not just the Islamic legal tradition. The Quran explicitly states that:

“O you who believe! Do not consume each other’s wealth illicitly, *but trade by mutual consent*. And do not kill yourselves, for God is Merciful towards you”.²⁵

This verse makes explicit reference to mutual consent in trade relations. One can now understand why the Islamic schools of jurisprudence emphasises the importance of mutual

¹⁹Ibrahim Algari, (n16) at 1-13/Arabic.

²⁰See in particular section (4.3.2).

²¹Patrick Glenn, *Legal Traditions of the World* (4th edn, OUP, Oxford 2010) at 186.

²²Ibid at 207.

²³Ibid, Frank Vogel and others, *The Islamic School of Law: Evolution, Devolution, and Progress* (Harvard University Press, United States 2005).

²⁴Ibrahim Algari, (n16) at 2/Arabic.

²⁵The Quran, chapter 4 verse 29.

consent in examining the validity of a contract. This means that any contract suffering from coercion or duress will be strictly null and void. The existence of mutual consent occurring when one party gives an explicit offer is called *Ijab* in Arabic, and if the other party expresses unequivocal acceptance this is referred to as *Qoboul* in Arabic.²⁶ If *Ijab* and *Qoboul* (offer and acceptance) are present in relation to an arbitration agreement, and are provided for in accordance with the formalistic issues identified by the KSA arbitration law (writing), then the arbitration agreement will be valid in terms of formality and in line with the Sharia rules, subject to meeting the legal capacity under Sharia law.

- **The capacity of natural persons in Sharia law**

Article 10(1) of the KSA arbitration law states that:

“An arbitration agreement may only be concluded by persons having legal capacity to dispose of their rights (or designees) or by corporate persons.”

Questions that have arisen are: What is the required legal capacity of a natural person in KSA law and what are the rules of Sharia that relate to the capacity question? Some commentators have submitted that a natural person has full legal capacity to enter into a contract in the KSA at the age of 18 years old.²⁷ This is according to an earlier resolution by the *Al-Shura Council* (Saudi parliament).²⁸ However, this view appears to be questionable because this resolution has not been given Royal assent, and the *Al-Shura Council's* resolutions or bills cannot come into force as law in themselves without being given Royal assent.²⁹ Therefore, the Sharia rules must be recalled in this respect and the standard set by the Sharia rules will be applied as long as the Saudi laws give no precise age for the full capacity to enter into an arbitration agreement, as well as the fact that Sharia is the general foundation of all Saudi regulations.

²⁶Noor Mohammed, (n16) at 115-130.

²⁷Ibrahim Algari, (n16) at 3 /Arabic.

²⁸ Saudi Al-Shura Council resolution no. 114 dated 1995, See official website at <http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Home/> Accessed June 2015.

²⁹ *Al-Shura Council's* resolutions or bills do not acquire force of law without being given Royal assent. Al-Shura Council Law no A/91 for 1992, article 17 stated that: “The Shura council’s resolutions shall be submitted to the king who decides what resolutions to be referred to Cabinet. If views of both The Shura council and the Cabinet agree, the resolutions are issued after the king approval. If views of both councils vary the issue shall be returned back to The Shura council to decide whatever it deems appropriate, and send the new resolution to the king who takes the final decisions.”

In a similar way to any other legal tradition in the world, attaining physical and intellectual maturity is the first criterion that would validate a contractual relation. Legal capacity in Sharia is known as *Ahliyat Al adaa*.³⁰ This term has an Arabic origin and is defined by Sharia jurisprudence as follows: “Any natural person who may not acquire or exercise rights due to a lack of understanding, abnormal behaviour or a martial incapacity which prevents such person from performing certain acts or actions by his self”.³¹ Other Sharia jurists have also defined it as the ability of a person to act in the “presence of a sound mind, intellectual capacity and discernment”.³² Any absence of one of these three pillars of capacity may be considered as indicating a lack of legal capacity to enter into an arbitration agreement. Unlike other legal systems, the KSA gives no precise age of legal capacity because the Sharia understanding of capacity gives no precise age of legal capacity. Therefore, the age of legal capacity in the KSA differs from person to person and a young person may have reached a stage of both mental and physical development that is characteristic of an adult before the age of 18 years old.

It seems that Sharia law sets out certain standards for granting legal capacity, whereby a natural person has legal capacity when he: a) attains physical puberty; b) has rational and logical judgment; and c) is not sequestrated or interdicted.³³ Therefore, the KSA law/Sharia rules does not impose additional requirements for natural persons to have the capacity to enter into arbitration agreements other than those imposed by the different legal traditions, except that there is no precise age of legal capacity.

- **The capacity of legal persons in Sharia law**

One of the problems of Sharia law is the lack of understanding over whether or not it recognises the concept of legal persons.³⁴ This question is important because, if the legal person is not precisely defined in the KSA, then private companies or state-owned enterprises

³⁰Mahdi Zahraa, ‘The Legal Capacity of Women in Islamic Law’ (1996) 11 ALQ at 245-263, Ibrahim Algari, (n16) at 1-13/ Arabic, Noor Mohammed, (n16) at 115-130.

³¹Mahdi Zahraa, (n28) at 245-263.

³²Ibid, Jamal Nassir, *The Islamic Law of Personal Status* (2edn, Graham and Trotman Ltd, 1990) at 215.

³³Ibrahim Algari, (n16) at 2 /Arabic.

³⁴Jalal El-Ahdab and Abdul Hamid El.Ahdab, *Arbitration With the Arab Countries* (3rd edn, Kluwer Law International, Netherlands 2011) at 31.

would not have the capacity to resort into arbitration independently from the members or partners of which they are composed. For some Sharia jurists, there are many legal persons in the Sharia law other than the modern understanding of government entities or private corporations.³⁵ According to others, legal persons exist only exceptionally, and according to others they are completely unknown in Sharia law.³⁶

According to Marcel Morand, the legal person does exist in Sharia law.³⁷ He has argued that legal persons in Sharia law are either groups of individuals, groups of associations or groups of establishments founded with religious or public service purposes (mosques, schools or hospitals), or a property which has been endowed for religious or public purposes.³⁸ However, the question of the capacity of the legal person in relation to arbitration is now purely theoretical in the KSA legal system. This is because the KSA arbitration law includes a provision that expressly allows private companies to enter into arbitration agreement. Article 10(1) of the KSA arbitration law states that:

“An arbitration agreement may only be concluded by persons having legal capacity to dispose of their rights (or designees) or *by corporate persons*”.

It is still questionable whether there are any special Sharia requirements for a corporation to have validity as a legal person. It seems that the Sharia scholars do not make a distinction between companies and associations or between public entities or commercial companies when defining legal persons.³⁹ The only observation is that the legal person should not be formed on a basis that violates Sharia public policy. In support of this view, the KSA issued a company law that recognises all types of modern companies and requires the formation of these companies to not violate Sharia public policy.⁴⁰ For example, the Quran prohibits alcoholic spirits by a mandatory rule, and thus if a private corporation is formed to sell or

³⁵Mohammed Ahmed, *Bidayat Al Mujtahed* (Dar ibn Hazm, KSA 1990) at 462-465/ Arabic.

³⁶Jamal Nassir, (n32) at 56-77.

³⁷Marcel Morand, *The idea of juristic personality in the views of Islamic law* (Alexandria publication, Egypt 1992) at 97/Arabic.

³⁸Ibid at 184.

³⁹El- Ahdab, (n34) at 33.

⁴⁰Kingdom of Saudi Arabia company law 2015, this law replaced the former Saudi company law 1965, Royal Decree No. M/6 for (1965) promulgate KSA company law. See also Noor Mohammed, (n16) at 115-130.

produce alcoholic spirits, it will not be recognised as a legal person in the KSA, even if this is permitted under its own laws. However, the KSA arbitration law also includes one provision that prohibits government entities from entering into arbitration agreement. Article 10(2) of the KSA arbitration law states that:

“*Government bodies* may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law.”

This attitude towards arbitration as a means of dispute resolution can be traced back to the historical stages of development of international arbitration in the GCC states.⁴¹ There was some hesitancy in accepting arbitration as a means of dispute resolution as it was seen as biased in favour of the foreign party.⁴² For example, in 1963, following the unsuccessful *Aramco*⁴³ case, the KSA issued a Royal Decree forbids any state agencies in the KSA from referring to arbitration without the approval of the KSA cabinet.⁴⁴ This now appears in the KSA arbitration law. This provision is also not clear over whether the government bodies include the state-owned enterprises or whether they are limited to ministries and public entities. There is a lack of published case law in this regard. The model law does not include a similar provision. The following section will examine how the KSA arbitration law regulates the law governing the capacity question and validity of the arbitration agreement, and whether there is a variation from the NYC or not.

- **Law governing the capacity and validity of the arbitration agreement**

Article 50(1) of the KSA arbitration law states that:

“An action to nullify an arbitration award shall not be admitted except in the following cases:”

- a. “If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term”

⁴¹See chapter (section 4.4).

⁴²Reza Mohtashami, ‘Banishing the Ghost of Lord Asquith’s Award: A Resurgence of Arbitration in the Middle East’ (2014) 1 BCDR International Arbitration Review 121.

⁴³*Saudi Arabia v. Arabian American Oil Company*, (1963) published in 27 International Law Report, at 117.

⁴⁴Saudi Arabia Royal Decree No. 58/1963.

- b. “If either party, at the time of concluding the arbitration agreement lacks legal capacity, pursuant to the law governing his capacity”.

This provision is not mirrored in Article V (1)(a) of the NYC and it seems to not accept the right of the parties to choose the law governing the arbitration agreement. Article 50(1)(a) of KSA arbitration law does not mention that the court shall examine the validity of the arbitration agreement according to the law chosen by the parties and failing any indication thereon according to the law of the place of arbitration.

However, Article 5 of the KSA arbitration law states that:

“If both parties to arbitration agree to subject the relationship between them to the provisions of any document (model contract, international convention, etc.), then the provisions of such document, *including those related to arbitration*, shall apply, provided this is not in conflict with the provisions of Sharia”.

These provisions are not particularly helpful. Article 50(1) fails to establish according to which law the validity of the arbitration agreement will be determined (if that chosen by the parties, or that of the seat of the arbitration, or providing for any other possible connecting factor). In a separate provision that is Article 5 of the KSA arbitration law, it provides the possibility for the arbitration parties to choose any laws and rules that govern the validity of the arbitration agreement. However, in the case where the parties choose the law governing the validity of the arbitration agreement, then this choice is limited to a law that does not violate the Sharia law, as stipulated by the above-quoted Article 5. Issues such as mutual consent and capacity should meet the Sharia understanding of capacity and mutual consent, as discussed above.

By contrast, the question of which law governs the capacity question is clearer in the above-quoted Article 50 (1)(b). This provision establishes that the applicable law to issues of capacity is the law that governs that party’s capacity, similar to the position provided by the NYC and ML as discussed in chapter two. This indicates that the personal law of such a person may apply, such as the law of his nationality or permanent domicile if a natural person, or the law of the state of incorporation if a legal person, subject to the law not violating the Sharia law understanding of capacity.

However, it also important to note here that the KSA legal system does not have a codified Contract Law or Civil Code that includes a set conflict of laws rules that would help to examine the possible relevant laws to the capacity questions and whether there is a difficulty compared with the general understanding about the law that governs the capacity question. In general, and as stipulated by Article 50 (1)(b): “Pursuant to the law governing his capacity” the general rule is that the personal law of the party’s nationality or personal law of the domicile or the personal law of the habitual residence might be applied by the courts to examine the capacity question.

There are other requirements imposed by Sharia contract law regarding the material validity of all contractual relations including the arbitration agreements. These requirements are of utmost important, and they have previously blocked the REFAA in the KSA.

7.3.3 Sharia prohibitions related to the material validity of the arbitration agreement

In principle, Sharia contract law emphasises the autonomy of the parties to engage in any contractual relations, subject to a number of prohibitions.⁴⁵ There are two major prohibitions, which are accepted by all jurisprudence schools of Sharia law. The first is the prohibition of *Gharar* (uncertainty in relation to rights and obligations between the parties) and the second is the prohibition of *Riba* (usurious interest in civil or commercial transactions). Both of these prohibitions are unfamiliar concepts in other legal traditions, and they are most likely to affect the validity of arbitration agreements and the REFAA in the KSA pursuant to Article V (2)(b) of the NYC (public policy defence).

- **Gharar**

The first prohibition is *Gharar*, which refers to uncertainty about the rights and obligations of the parties to a contract or the uncertainty regarding the subject matter of the contract at the time they enter into contract.⁴⁶ An over-simplified example of *Gharar* is selling a bird in the

⁴⁵ Abaas Mohamed, *Contract in Sharia Law: Comparative Study* (Islamic study publications, 1993 Egypt) 5/Arabic. Zamir Iqbal and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice* (2nd edn, John Wiley and Sons, United Kingdom 2011) at 31.

⁴⁶ Nathan Berga and Jeong-Yoo Kim, ‘Prohibition of Riba and Gharar: A signalling and screening explanation?’ (2014) 103 *Journal of Economic Behaviour and Organization* at 146-1559, Reyadh Seyadi, (n16) at 285-295,

air or a fish in the sea. The prohibition of *Gharar* is derived from the fact that gambling and betting contracts are prohibited by the mandatory rules of the Quran.⁴⁷ Therefore, the concept of *Gharar* has been extended by Sharia jurisprudential schools to cover any form of speculation where the parties are placed in a situation where they do not know exactly what the scope of the contract may be. In the context of an arbitration agreement, it refers to the necessity under Sharia rules to have an *existing dispute* before an agreement to refer the dispute to arbitration.⁴⁸ Therefore, the validity of the arbitration clause in the underlying contract is debatable under the Sharia contract law.⁴⁹

The main source that implicitly prohibits *Gharar* is found in the words of the Quran. It states that:

“And do not consume one another's wealth by unjust means, nor offer it as bribes to the officials in order to consume part of other people’s wealth illicitly, while you know.”⁵⁰

And in another verse:

“O you who believe! Do not consume each other’s wealth illicitly....”⁵¹

There is no explicit reference to the validity of contract clauses in the primary sources of Sharia law. The majority of Sharia schools have interpreted the above two verses from the Quran, along with the other statements of the Prophet in the Sunnah, as a prohibition of *Gharar* that might be present in any contract such as Gambling and betting contracts. The

AlSadiq Aldharer ‘Gharar in the contracts and its effects in the contemporary transactions’ (1993) Islamic Institution of Research and Training, published by Islamic development bank- Jeddah City/Kingdom of Saudi Arabia, Arabic/1-55, Nadhirah Nordin and others, ‘contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?’ (2014) 10:15 Journal of Asian Social Science 37-47.

⁴⁷The Qur’an, chapter five, verse 90 states that “O you who believe! Intoxicants, *gambling*, idolatry, and divination are abominations of Satan's doing. Avoid them, so that you may prosper”.

⁴⁸Arthur Gemmell, ‘Commercial Arbitration in the Islamic Middle East’ (2006) 5 Santa Clara Journal of International Law 169-193 at 181, Mark Wakim, ‘Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East’ (2008) 21:1 New York International Law Review 1-51.

⁴⁹Muhammed Ayub, *Understanding Islamic Finance* (1st edn, John Wiley and Sons, London 2008) at 57, Mark Wakim, (n 48) at 48.

⁵⁰The Qur’an, chapter two, verse 188.

⁵¹The Qur’an, chapter four, verse 29.

concept of an arbitration clause did not appear in the past during the Prophet's life. Therefore, in order to study this issue, one must resort to the doctrine of 'clause' in Sharia law through an examination of the secondary source of Sharia, *Ijtihad* (The output of Sharia jurisprudential schools).

Sharia jurisprudential schools indicate that there are two different types of clauses.⁵² The first applies when the valid clause meets the following conditions: 1) A clause is necessary on the performance of the contract such as delivery of the item sold. 2) The clause must be final and certain when signing the contract. This refers to a type of clause that does not result in uncertainty in understanding. For example, the performance of the clause should not be based on vague circumstances or allow for divergent interpretations. 3) The clause should not add intensive advantage to one party of the contract over the other party of the contract.⁵³

Sharia jurisprudential schools define the second type of clause as an invalid clause. The effect of the invalidity of such a clause might extend *to the whole contract* or be limited to the clause itself.⁵⁴ Consider the following points: 1) If the clause is void in itself, the contract remains valid and the clause is void. This clause is a type of clause which is impossible to perform by the parties because of foreign reasons. 2) A clause is not void in itself but the contract containing this type of clause would be void. They are as follows: a) clauses containing *usurious interest* or ensuring an additional profit to one of the parties without a corresponding counter profit for the other party; b) clauses containing uncertainty, *Gharar*, which are forbidden under the Sharia contract law in order *to avoid betting and gambling contracts*.⁵⁵ Gambling and betting contracts are prohibited by the mandatory rules of the Quran.⁵⁶ Therefore, the concept of uncertainty, *Gharar*, has been extended by Sharia

⁵²Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28:3 Loyola of Los Angeles International and Comparative Law Review 565-624 at 596, El-Ahdab, (n34) at 22, Mohamed Albashir, 'The clauses of the contract in light of the Sharia law' (2004) 22 Journal of Faculty of Sharia law/Qatar university 57-115 at 60/Arabic, Al Sadiq Aldharer, (n46) at 6.

⁵³ Al Sadiq Aldharer, (n46) at 13, Mohamed Albashir, (n52) at 60-62.

⁵⁴ Ibid.

⁵⁵ Mohamed Albashir, (n52) at 87-90, Al Sadiq Aldharer, (n46) at 39.

⁵⁶ The Qur'an, chapter five, verse 90 states that "O you who believe! Intoxicants, *gambling*, idolatry, and divination are abominations of Satan's doing. Avoid them, so that you may prosper."

jurisprudential schools to cover any form of speculation where the parties are placed in a situation where they do not know exactly what the scope of the contract may be.

It should be noted here that Sharia jurisprudential schools are unanimous about the above distinctions of the validity of the clause.⁵⁷ Therefore, if a contract contains a clause that is not certain, *Gharar*, then the whole contract might be void.⁵⁸ Some commentators have argued that the basic condition for the validity of the arbitration clause to be enforceable under Sharia law is for the dispute to have already arisen at the time the agreement to arbitrate was concluded.⁵⁹ For example, according to Wakim, the Quran requires that parties to a contract “must be fully aware of their obligations at the time they enter into the contract”.⁶⁰ Therefore, according to Wakim, “contract clauses calling for the arbitration of future disputes are technically unenforceable”.⁶¹ It is thought that this opinion was given because the previous KSA arbitration law was silent about the validity of the arbitration clause in the underlying contract.

Nevertheless, one school of Sharia law, the Hanbali School, adopted the opinion that the *invalidity of the whole contract* that contains an uncertain clause is an exception, and it occurs only when the uncertainty of the clause is contrary to the whole purpose of the contract.⁶² For example, if the lessor in a tenancy agreement adds a clause to the tenancy agreement which imposes that the lessee does not have the right to use the subject of the contract in certain circumstances (without identify these circumstances), then this clause might be void and affect the validity of the whole contract, because it might be against the whole purpose of the contract.⁶³ Therefore, according to this opinion,⁶³ as long as the clause is

⁵⁷ El-Ahdab, (n34) at 23, Mohamed Albashir, (n52) at 70.

⁵⁸ Mohamed Albashir, (n52) at 58.

⁵⁹ Qadri Mahmoud, *Arbitration in Sharia law* (Dar Alsomia, KSA 2009) at 134/Arabic, Faisal Kutty, (n49) 136 at 605.

⁶⁰ Mark Wakim, (n48) at 47-48.

⁶¹ Ibid at 48, see also Final Award issued by ICC No. 7063 (1993) reported in in YBCA, Vol XXII (1997) at 87. “The arbitrator makes the statement that: ‘contracts providing for solutions to a future dispute should be unenforceable under the principle of Gharar’”.

⁶² El Ahdab, (n34) at 23, Al Sadiq Aldharer, (n46) at 44.

⁶³ Mohamed Albashir, (n52) at 45-46.

not contrary to the object of the contract, the clause is valid.⁶⁴ This opinion is basically based on the fact that, although Gharar in any contract may make the whole contract void, this is subject to the situation where the clause is contrary to the purpose of the whole contract. The KSA arbitration law currently in force has adopted this position as it allows the parties to have an arbitration clause in the underlying contract before a dispute arises.⁶⁵

However, it is preferable when formulating the arbitration clause for arbitration governed by the KSA arbitration law to clearly state (if possible) the elements and scope of the disputes that might be referred to arbitration. It is not clear whether the Saudi court will accept the statement that “any dispute raised from this contract shall be referred to arbitration in accordance with....”. There is a lack of published case law in this regard. It is suggested that the elements of the expected dispute should be articulated, such as that the dispute might involve an insurance issue or payment obligation, or any other types of disputes that can be expected to avoid an uncertainty that might be classified as Gharar.

An example that explains the prohibition of Gharar at the present time is the Sharia prohibition of conventional insurance contracts.⁶⁶ In conventional insurance contracts the “policyholders do not benefit unless there is a loss, and a loss is not a guaranteed event, the contract is void as being ill-defined or speculative”.⁶⁷ The KSA, however, has realised that insurance companies play a major role in modern commerce and has relaxed its restrictive policy regarding insurance contracts.⁶⁸ The KSA now permits parties to utilise insurance as an investment tool, so long as the insurance companies invest all insurance profits within the borders of the KSA.⁶⁹ Sharia law contains a similar transaction to the concept of insurance

⁶⁴Ibid.

⁶⁵Saudi Arbitration law 2012, article (9) stated that: “The arbitration agreement may be concluded prior to the occurrence of the dispute whether in the form of a separate agreement or stipulated in a specific contract. The arbitration agreement may also be concluded after the occurrence of a dispute, even if such dispute was the subject of an action before the competent court. In such a case, the agreement shall determine matters included in the arbitration; otherwise, the agreement shall be void”.

⁶⁶Khan Hayat, ‘Optimal incentives for *takaful* (insurance) operators’ (2015) 109 Journal of Economic Behaviour and Organization 135-144, Reyadh Seyadi, (n16) at 293.

⁶⁷ibid

⁶⁸ Shaun Crawley, ‘Does an Extension of Time Clause Prevent a Construction Contract Being Infected by Gharar?’ (2012) 26:2 Arab Law Quarterly at 155.

⁶⁹“The Saudi Arabian government requires private insurance companies to invest their profit in land development or business enterprises with the Kingdom of Saudi Arabia. In 1986 the government began to recognize the use of cooperative insurance, wherein each policyholder is a partner in the company and all

transactions, and this is called *Takaful*.⁷⁰ It seems that the KSA arbitration law has also relaxed its attitude regarding the prohibition of Gharar and has adopted the liberal opinion of the Hanbali School, which was not the case in the former KSA arbitration law.⁷¹

One can make arguments against some Sharia scholars and commentators who consider that the arbitration clause includes a level of uncertainty (Gharar) and that the parties should agree on taking the case to arbitration after a dispute has arisen.⁷² There is a necessity to have an arbitration clause in the underlying contract even if the parties agreed to take the case to arbitration prior to the dispute arising. The arbitration clause does not contain any uncertainty (Gharar) or speculation within the meaning of the validity of the clause in the Sharia contract law. For example, the argument of uncertainty of the subject matter of the insurance transaction and the contracts of bets or gambling does not suggest similar uncertainty in the arbitration clause itself. The arbitration clause usually mentions that the scope of the dispute is limited to disputes arising from the underlying contract.

In addition, the arbitration clause protects the parties' rights and preserves justice. It only grants the jurisdiction of the national court to the arbitrators. Furthermore, the arbitration clause does not give any added benefits to one party, which is required for the clause to have validity in Sharia law. The arbitration clause is beneficial for both parties, given that the dispute would be settled quicker by virtue of these clauses than through the court procedures. In the following section, the much-debated prohibition of contractual relations in Sharia law will be examined. In the KSA, this is still put forward as a ground for the invalidity of arbitration agreements and the non-enforceability of arbitral awards.

company funds are invested. This type of insurance is not seen as immoral because there is no *Riba*. In the case of loss, the policyholder recovers, and if there is not loss the policyholder receives a return on his investment. There is no uncertainty of return. The cooperative is strictly a non-profit organization designed to meet the need for insurance without compromising Islamic principles.”

⁷⁰ See (n66).

⁷¹The former Saudi arbitration law 1983, promulgated by Royal Decree No. M/46 for 1983.

⁷²Qadri Mahmoud, (n59) at 134/Arabic, Mark Wakim, (n48) at 47-48.

- **Riba**

Riba is an Arabic word, which literally means ‘excess’, and in the context of contractual relations it is known as ‘usurious interest’.⁷³ One of the leading jurists in Islamic finance defined *Riba* as “any increase over and above the principal amount payable in a contract obligation, not covered by a corresponding increase in labour, commodity, risk or expertise”.⁷⁴ Hence, *Riba* include both usury and interest as used in modern commercial terminology (compound interest).⁷⁵ In the context of international commercial arbitration it refers to the arbitral award that includes a sum of interest. Arbitrators usually grant a sum of interest alongside the main damages to be paid to the aggrieved party (award creditor). There is case law evidence where the foreign arbitral award has been refused enforcement by the Saudi courts because it included a sum of interest.⁷⁶

Unlike *Gharar*, *Riba* is prohibited by the explicit mandatory provision in the Quran when God states: “Commerce is like usury. But God has permitted commerce, and has forbidden usury”.⁷⁷ Thus, the core point of *Riba* is that, although making profit in trade is allowed in Sharia law, *Riba* is not allowed. An example of this prohibition is the conventional loan transaction, where the bank/lender makes a profit *on the principal amount of money* without the sale of any commodities or risk to have a sum of profit. Therefore, the conventional loan transaction is completely prohibited in Sharia law because it includes a sum of interest that is defined as *Riba*. However, Islamic finance literature provides for similar bank transactions that meet Islamic law conditions but that are also not free from criticism.⁷⁸ A similar approach applies to the arbitration agreement. For example, if the arbitration parties agree in the wording of the arbitration agreement that there may be a sum of interest, or if the arbitral tribunal granted a sum of interest, then the arbitration agreement and the arbitral award will not be enforceable in the KSA.

⁷³ Nathan Berga and Jeong-Yoo Kim, (n46) at 134, Reyadh Seyadi, (n16) at 287.

⁷⁴ Mohamed Ayub, (n49) at 44.

⁷⁵ Reyadh Seyadi, (n16) at 287-288.

⁷⁶ See section (7.7.3).

⁷⁷ The Qur’an, chapter two verse 275.

⁷⁸ These transactions are similar to conventional transactions such as commercial loans, mortgage ...for further expanding in this topic see Reyadh Seyadi, (n16) at 285-295.

The rationale behind prohibiting *Riba* in Sharia law is that earning money on money is not allowed, because there is no productive and/or trade activity creating additional wealth.⁷⁹ To make a valid profit under Sharia law, a level of risk and liability should accompany any reward or return.⁸⁰ Muslim jurists have unanimously prohibited *Riba*.⁸¹ This is because *Riba* has been prohibited by an explicit mandatory provision in the Quran, as seen in the above-quoted verse. The philosophy of Sharia law to prohibit *Riba* derives from the basic notion that the use of interest by lenders is inherently unfair⁸² to the borrower and is a “morally reprehensible” exploitation by one who has money over one who has none.⁸³ Based on the above definition of *Riba*, it is submitted that not every profit from commercial activities constitutes *Riba* in Sharia law. Sharia law permits profit from commercial transactions under certain conditions. The prohibition of *Riba* is only related to making money on money without any risks or commodity accompanied for gain for this amount of profit.

In today’s international arbitration practice, arbitral awards usually grant a sum of interest alongside the main damages to be paid to the award creditor.⁸⁴ It is non-debatable under Sharia law that there can be a sum of interest in commercial activities, but this interest should avoid being defined as *Riba* to be enforceable in the KSA. For example, if the arbitration parties *agree* on a sum of interest (even in the case of late payment), then this agreement will not be recognised in Sharia law and the arbitral award will not be enforced in the KSA. This is similar to loan transactions, where the contracting parties agree on the sum of interest to be paid to the lender and thus the conventional loan transaction is completely void in Sharia

⁷⁹ Muhammad Iqbal, ‘Prohibition of Interest and Economic Rationality’ (2010) 24:3 Arab Law Quarterly 293-308.

⁸⁰ Barbara Seniawski, ‘Riba Today: Social Equity, the Economy, and Doing Business under Islamic Law’ (2001) 39 Columbia Journal of Transnational Law at 701.

⁸¹ Frank Vogel and Samuel Hayes, (n23) at 72.

⁸² Mohammed Ayub, (n49) at 74.

⁸³ Mark Wakim, (n48) at 45.

⁸⁴ Donald Davies, ‘Arbitration: Interest on the Award’ (1990) 2 Law for Business. 230-234, Richard Branson and David Wallace, ‘Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach’ (1988) 28 Virginia Journal of International Law 919, Natasha Affolder, ‘Awarding Compound Interest in International Arbitration’ (2001) 12 American Review of International Arbitration at 45.

law.⁸⁵ If the arbitral award grants a sum of interest, then it should not be defined as such, as it merely arose because of the parties' agreement or late payment.⁸⁶

Once the arbitration agreement is made in accordance with the conditions discussed in the above section (7.3), it starts to give its effect.⁸⁷ The following section will examine how the KSA arbitration law regulates the principle of separability of the arbitration agreement and the principle of competence-competence. Unlike Qatari and UAE arbitration laws, the KSA arbitration law recognised these two principles and provide for slightly different legal positions than those provided by Article 16 of the ML in implementing these two principles.

7.4 The principle of separability of the arbitration agreement in KSA

KSA arbitration law has developed its position significantly in recognising the principle of separability of the arbitration agreement in comparison to the previous arbitration law, which was silent about this principle.⁸⁸ Article 21 of KSA arbitration law expressly considers that the invalidity of the underlying contract does not result in the automatic invalidity of the arbitration agreement (principle of separability of the arbitration agreement).⁸⁹ Additionally, the KSA arbitration law obliges the court to refer the parties to arbitration if it finds a valid arbitration agreement and if the defendant raises such a defence. Article 11 (1) of the KSA arbitration law states that:

“A court before which a dispute, which is the subject of an arbitration agreement, is filed *shall* dismiss the case *if* the defendant raises such defence before any other claim or defence.”

In the event court proceedings are initiated despite the existence of an arbitration agreement, the court before which the action is brought should declare the inadmissibility of said action, if such plea is invoked prior to submitting the claims or defences on the merits of the case. It should be noted that the provisions of Article 11 seems stricter than the ML in respect of the jurisdiction of the courts in the existence of an arbitration agreement. The KSA arbitration

⁸⁵ Reyadh Seyadi, (n16) at 285-295.

⁸⁶ Ibid, See section 7.7.3 for an analysis of the case law.

⁸⁷ The effect of a valid arbitration agreement is discussed in detail in chapter two (section 2.2.2).

⁸⁸ The former Saudi arbitration law 1983, promulgated by Royal Decree No. M/46 for 1983.

⁸⁹ KSA Arbitration Law 2012: Article (21) stated that: “An arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. The nullification, revocation or termination of the contract, which includes said arbitration clause should not entail nullification of the arbitration clause therein, if such clause is valid.”

law does not provide for any exception that may permit the courts to proceed with the action despite the existence of an arbitration agreement, not even in the event of a flagrantly null and void or inoperative arbitration agreement (an exception that is retained by the ML).⁹⁰ Such an omission seems too strict, especially if the courts were seized prior to the constitution of the arbitral tribunal.

It might be acceptable in international best practice that the invalidity of the underlying contract may extend to affect the validity of the arbitration clause. There is no uniform understanding among the national courts about when the invalidity of the underlying contract might affect the validity of the arbitration clause. It might be hard to assume that in a country like the KSA, which provides strict consideration to the issues related to the Sharia law, that it will enforce the arbitration clause that is included in a contract that violates the Sharia public policy. The limits of the principle of separability of the arbitration agreement from the underlying contract are still to be tested by Saudi court practices. In general, and according to Article 21 of the KSA arbitration law, the arbitration clause is independent and the nullification of the underlying contract is not an automatic invalidity of the arbitration clause.

7.5 The principle of competence- competence in KSA

Article 20(1) states:

“The arbitration tribunal *shall* decide on any pleas related to its jurisdiction, including those based on absence of an arbitration agreement, expiry or nullity of such agreement or non-inclusion of the dispute subject matter in the agreement”.

The competence-competence doctrine is clearly considered by the KSA arbitration law. In the event that court proceedings are initiated despite the existence of an arbitration agreement, the court before which the action is brought *shall* declare the inadmissibility of the said action and refer the case to arbitration if the defendant raises such defence pursuant to Article 11 that was explained above.⁹¹ However, Article 20 (1) of the KSA arbitration law uses the verb ‘shall’ to rule on its jurisdiction, thus diverging from the ML equivalent text, which uses the

⁹⁰ML, article 8 (1).

⁹¹KSA Arbitration Law, 2012 article (11): “A court before which a dispute, which is the subject of an arbitration agreement, is filed *shall* dismiss the case if the defendant raises such defense before any other claim or defence.”

verb ‘may’.⁹² This is further corroborated by Article 11, which imposes on the courts the obligation to declare the inadmissibility of an action brought before them in the presence of an arbitration agreement if the defendant raises such a defence.⁹³ In this sense, reading Articles 11 and 21(1) of the KSA arbitration law one may see the Saudi legislators’ will to give the arbitral tribunal exclusive power to rule in its own jurisdiction with very limited discretionary power granted to the national courts. The power of the arbitral tribunal to rule on its jurisdiction is not subject to challenge unless by way of recourse to set aside the final arbitral award.⁹⁴ The limits of the principle of competence-competence in KSA are still to be tested by the Saudi court practices.

The following section will examine how the KSA arbitration law regulates the principle of party autonomy in choosing the law and rules that governs the arbitration process. As mentioned earlier the KSA arbitration law is modernised to the tune of ML, therefore the parties may choose the law governing the validity of arbitration agreement, arbitration procedure and merits of the dispute. The difference between the KSA arbitration law and ML is that it subjects this autonomy to not violate Sharia law. Therefore, the question raised is what is the Sharia law that might limit the party autonomy in choosing the law and rules that govern the arbitration process?

7.6 Party autonomy and limitations imposed by Sharia law

Despite the adoption of the NYC by Qatar and UAE there remains a high level of uncertainty in the applicable laws in arbitration practices. The KSA arbitration law provides a different understanding in which it recognised the party autonomy in this regard and imposed Sharia law as an essential requirement to the practice of this autonomy. The earlier analysis (section 7.3.2) discussed how the KSA arbitration law recognised the parties’ autonomy in choosing the law and rules that governing the arbitration agreement. The KSA arbitration law also recognised the parties’ right to choose the law and rules that govern the merits of the dispute

⁹²ML, article 16(1).

⁹³See (n91).

⁹⁴KSA Arbitration Law, 2012 article 20(3): “The arbitration tribunal shall decide on pleas referred to in Paragraph 1 of this Article prior to deciding on the subject of the dispute. However, it may join said pleas to the subject and decide on them both. If the arbitration tribunal decides to dismiss the plea, such a plea may not be raised *except* through the filing of a case to *nullify* the arbitration award ending the entire dispute, pursuant to Article 54 of this Law.”

subject to not violating the Sharia public policy.⁹⁵ The concept of Sharia public policy is examined in detail in the next chapter. This section will examine how Sharia law might limit the composition of the arbitral tribunal and the chosen procedural rules.

7.6.1 Sharia law requirements as to the composition of the arbitral tribunal

One of the significant features of arbitration that distinguishes arbitration from litigation in national courts is the parties' freedom to select the arbitrator or the members of the arbitral tribunal who are familiar with the kind of business in which the dispute might arise. Unfortunately, the KSA arbitration law includes mandatory provisions regarding the capability of the arbitrator to act as an arbitrator. According to the KSA arbitration law, the arbitrator must be qualified as a lawyer with a law degree or a Sharia degree.⁹⁶ If the arbitral tribunal is composed of three arbitrators, it is sufficient for only the chairman to meet such requirements. This provision is seen as developing the position of the previous KSA arbitration law, where it was required that the arbitrator should be a Muslim.⁹⁷

The requirement that the arbitrator should be qualified as a lawyer, or have a Sharia law degree, can be traced back to the Sharia jurisprudence debate on the capability of the judge to act as a judge. Some of the Sharia jurisprudential schools consider that any person appointed to resolve the disputes between Muslims must have the same qualifications as the judge.⁹⁸ According to this opinion, a non-Muslim cannot be appointed as an arbitrator in a dispute between two Muslims, which was a position adopted by the former KSA arbitration law. This opinion is based on a verse from the Quran, which states that: "...and never will Allah grant

⁹⁵KSA Arbitration Law 2012, article (38) states: "Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following:"

"a. Apply to the subject matter of the dispute rules agreed upon by the arbitration parties. If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise."

⁹⁶ KSA Arbitration Law, 2012 article (14) stated that: "An arbitrator shall satisfy the following conditions":

1. "Be of full legal capacity and
2. Be of good conduct and reputation
3. Be a holder of at least a university degree in Sharia or law. If the arbitration tribunal is composed of more than one arbitrator, it is sufficient that the chairman meets such requirement."

⁹⁷ Previous KSA arbitration law 1985, article (3) stated that: "The arbitrator shall be a Saudi national or Muslim expatriate."

⁹⁸ Qadri Mahmoud, (n59) at 177/Arabic.

to the unbelievers a way to judge over the believers”.⁹⁹ Hence, the majority of Sharia jurisprudential schools require the arbitrator in disputes between Muslims to be a Muslim. In addition, they also go further and require a level of knowledge of Sharia law.¹⁰⁰

There is, however, another opinion which allows the arbitrator to be non-Muslim.¹⁰¹ Holders of such an opinion refer to the earlier discussed Quran verse,¹⁰² which concerns arbitration between a husband and wife, without further conditions regarding the capacity of the arbitrator. This debate is now purely theoretical, and the KSA arbitration law requires the arbitrator to be qualified as a lawyer or to have a Sharia law degree, regardless of whether he is Muslim or not. In the presence of more than one arbitrator, then only the chairman should meet these requirements.¹⁰³ These provisions are mandatory and the parties cannot agree otherwise.

However, this position can also be strongly criticised compared with today’s international commercial arbitration practice. One of the most significant features of arbitration that was discussed earlier in chapter one is the parties’ freedom to choose the members of the arbitral tribunal. This choice is usually based on the arbitrator’s expertise and familiarity with the substance of the dispute. For example, an arbitrator with an engineering background might be most suitable for a dispute concerning an engineering project. The position of the KSA suggests more difficulty if the arbitrator is single, as in this instance the parties are obliged to appoint an arbitrator who is qualified as a lawyer, or who has a Sharia law degree.

It is questionable whether this mandatory requirement is applicable to an award governed by a foreign arbitration law and seeking enforcement in the KSA. The Saudi courts previously adopted the principle that if there is an agreement between a Saudi party and a foreign party to resort to arbitration rules outside the KSA under foreign laws, the Saudi party is bound by that arbitration law and its rules as well as its outcome.¹⁰⁴ In addition, the Saudi courts have

⁹⁹ Quran, chapter four, verse 141.

¹⁰⁰ El-Ahdab, (n34) at 37.

¹⁰¹ Ibid.

¹⁰² See chapter four (section 4.3.1).

¹⁰³ KSA Arbitration Law, 2012 article (14).

¹⁰⁴ Mohammed Albajad, *Arbitration in the Kingdom of Saudi Arabia* (1st edn, Institution of Management 1999) at 77-85/ Arabic.

granted enforcement of a number of foreign awards governed by foreign arbitration law and rendered by non-Muslim arbitrators.¹⁰⁵ Despite this position, it is thought that there is no need for this mandatory provision given that every part of the KSA arbitration law is subject to Sharia rules. Therefore, any arbitrator or arbitral tribunal that is appointed to arbitrate according to the KSA arbitration law should conduct the arbitration proceedings according to the mandatory rules of the KSA arbitration law. In addition, if the KSA arbitration law authorises the arbitrator to be qualified as a lawyer (with a non-Sharia law degree or a non-Muslim), on what basis does the law prevent people with other qualifications, such as engineers or accountants, to act as arbitrators? The following section will examine to what extent Sharia law might affect the chosen procedural rules and thus affect the enforceability of the arbitral award in KSA.

7.6.2 Sharia law and the limitations its impose on the chosen procedural rules by the parties

The KSA arbitration law expressly recognises the autonomy of the parties to choose any law or rules governing the arbitral procedure, subject to this choice not violating the rules of Sharia. Article 25 of the KSA arbitration law states that:

1. “The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal in conducting the proceedings, including their right to subject such proceedings to effective rules of any organization, agency or arbitration centre within the Kingdom or abroad, provided said rules are not in conflict with *the provisions of Sharia*.”
2. “*In the absence* of such an agreement, the arbitration tribunal may, subject to the *provisions of Sharia and this Law*, decide the arbitration proceedings it deems fit”.

This article allows parties to choose any procedural rules other than those imposed by KSA arbitration law. Importantly, the procedural rules are chosen subject to them not violating Sharia law, and are not subject to the mandatory provisions of the KSA arbitration law, which is what one might expect in different arbitration laws. *In the absence* of the parties’ choice, then the arbitral tribunal is free to decide on any procedural rules, subject to the mandatory

¹⁰⁵ This is discussed in (section 7.10.1)

provisions of the KSA arbitration law and Sharia rules. The questions raised in relation to this issue are, first, what are the Sharia procedural rules that might affect the validity of the chosen arbitration rules, and second, are there any special mandatory procedures in Sharia that the arbitral tribunal must not ignore during the arbitration proceedings?

The Quran and Sunnah do not include any specific rules referring to arbitral proceedings.¹⁰⁶ However, there are many verses in the Quran and Sunnah that emphasise the general concept of natural justice in any type of adjudication proceedings. By examining the rules of Sharia in this regard, one might find that great stress is given to the twin principles that must be held in order for a fair trial to be observed by the arbitrators from the very outset of the arbitration.¹⁰⁷ The first principle is the necessity to treat parties in an equal manner, and the second is that the parties should be given the opportunity to present their case. It seems that there is no difference between the ordinary concept of lack of due process under Sharia law and in different legal traditions, although the interpretation of what constitutes lack of due process might differ from one legal system to another.¹⁰⁸

- **Treating parties in an equal manner**

The first main principle that can be understood as a reflection of Sharia due process in the arbitration proceedings is the equality of treatment of the arbitration parties regardless of their personal status.¹⁰⁹ The differences in the personal status of the parties, such as one party being rich and influential and the other party being less privileged, or one party representing the government, should not have any impact on the arbitral proceedings. Equality in treatment should hold true in all aspects of the arbitration proceedings, including seating and speaking from the beginning of arbitration until the issuance of the arbitral award. The parties must feel this equality while presenting their case.¹¹⁰ This strict obligation of equality is basically based upon the following verses of the Quran:

¹⁰⁶Nudrat Majeed, 'Good Faith and Due Process: Lessons from the Sharia' (2004) 20:1 *Arbitration International* 97-112 at 106.

¹⁰⁷Mark Wakim, (n48) at 45, Samir Saleh, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1986) 1:1 *Arab Law Quarterly* 19-31, Nudrat Majeed, (n106) at 97.

¹⁰⁸See chapter six (section 6.3.2).

¹⁰⁹Nudrat Majeed, (n106) at 98.

¹¹⁰*Ibid* at 106.

“O you who believe, Be upright to God, witnessing with justice; and let not the hatred of a certain people prevent you from acting justly. Adhere to justice, for that is nearer to piety; and fear God. God is informed of what you do.”¹¹¹

In another verse of the Quran:

“O you who believe! Stand firmly for justice, as witnesses to God, even if against yourselves, or your parents, or your relatives. Whether one is rich or poor, God takes care of both. So do not follow your desires, lest you swerve. If you deviate, or turn away – then God is Aware of what you do.”¹¹²

In addition, Sunnah, the second primary source of Sharia, has frequently put significant emphasis on the obligation of a fair trial in many instances. By way of an example, the Prophet held that: “Whoever is put to the ordeal of judging between Muslims, let him then be just between them in his expression, gesture, looking and seating, and not to raise his voice against one of the party more than the other”.¹¹³

- **Opportunity to present a case**

The second principle is to allow both parties to present their case equally. The arbitrator is bound under Sharia rules to give equal opportunities to both parties to present their case. In this regard, the Prophet in one case sent Ali Ibn Abi Talib, the Prophet’s cousin to be a judge in Yemen, and said to him that:

“Oh Ali, when two litigants sit in front of you, do not decide till you hear what the other has to say as you heard what the first had to say, for it is best that you should have a clear idea of the best decision”.¹¹⁴

This means that the arbitrator is obliged under Sharia rules to give each party a fair opportunity to put its case forward before the arbitrator or arbitration panel, as well as to

¹¹¹The Qur’an, chapter 5 verse 8.

¹¹²The Qur’an, chapter 4 verse 135.

¹¹³Statement of the Prophet Reported in Muslim, *Sahih Muslim* no 1827/Arabic.

¹¹⁴Statement of the Reported by Ibn Hanbal, *Al Musnad* no.868, Abu Daoud, *Sunan* no 3164, A Al-Nnasai, *Al-Sunan Al-Kubra*, no 7192, Al-Hakem, *Al Mustadrak* no 7125 (Arabic sources).

rebut the case made against him or her during the arbitral proceedings. Consequently, the tribunal is not authorised to make a decision without having given such an opportunity to each party. The Sharia rules requirement for arbitral procedures do not seem to add additional requirements to those established in different legal traditions.¹¹⁵ However, the above-discussed two principles of fair proceedings are today recognised in all institutional arbitration rules and it seems that the Sharia law understanding of fair proceedings does not suggest a serious difficulty or anything different.

In a case brought before a Saudi enforcing court, an application was made by a foreign claimant to enforce an International Chamber of Commerce (ICC) award issued in the KSA.¹¹⁶ The Saudi respondent challenged the enforcement request on the ground that the award had been made through proceedings that were not in compliance with the former KSA arbitration law. He further argued that the award was rendered in default, as no notices for the arbitral hearings were given to the respondent or his lawyer. However, the claimant produced documents to prove the respondent and his lawyer were continually given notice of all arbitral proceedings from the beginning by registered mail. The respondent replied that notices by registered mail were not sufficient since they did not contain his signature.¹¹⁷ The courts, however, rejected the respondent's objections, holding that registered mail was sufficient to assume that the respondent/award debtor was properly informed. The court went on to hold that the respondent's allegation that such documents were not sufficient as proof of proper notice was considered to be a frivolous allegation and was a tactic to delay enforcement of the award with no legal justification. The Saudi respondent then appealed before the appeal court but the Court of Appeal dismissed the appeal and affirmed the leave of enforcement of the arbitral award.¹¹⁸

In another case, a foreign plaintiff submitted a request before a Saudi enforcing court to obtain enforcement of a foreign arbitral award in the KSA.¹¹⁹ The Saudi party challenged the

¹¹⁵Nudrat Majeed, (n106) at 158.

¹¹⁶The 25th Subsidiary Panel, decision No. 11/D/F/25 dated (1996) cited in Mohammed Albajad, (n104) at 167/Arabic.

¹¹⁷Ibid at 168.

¹¹⁸ 2nd Review Committee, decision No 208/T/2 dated 1997 cited in Mohammed Albajad, (n104) at 170/ Arabic.

¹¹⁹ 18th Subsidiary Panel, decision No 8/D/F/18 dated (2003) case cited in Jean Zegers, 'Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia' (2014) 1:1 BCDR International Arbitration Review 69-83.

enforcement on a number of grounds, one of which was that the award was rendered in default and the plaintiff had failed to prove that the respondent had been properly informed about the award. The court rejected the respondent's objection, holding that, according to the documents produced by the plaintiff, the award was not rendered in default and the respondent was informed about the award by diplomatic means.¹²⁰ The Court of Appeal later affirmed the lower court's decision.¹²¹ These cases illustrate the Saudi courts' refusal to dismiss an arbitral award on the basis of violation of due process, as they interpreted this ground narrowly in favour of the enforcement of the arbitral award.

In summary, there are no substantial differences between due process in Sharia law and the international notions of fairness and due process. However, some practitioners have argued "in countries that strictly apply certain Islamic legal principles, the concept of what violates basic principles as well as public morals may differ substantially from such concepts in other parts of the world".¹²² This might not be the case with regards to the general understanding of due process or procedural defects in Sharia. This argument might be true in terms of the substantive Sharia rules that might affect the validity of an arbitration agreement, such as Riba and Gharar. It might also be true in relation to the concept of Sharia public policy that will be discussed in the next chapter. The following section will discuss the concept of the arbitral award and the concept of 'foreign' arbitral award in Sharia law. The KSA legislature is affected by the view of the Sharia law to these two concepts, which lead to uncertainty surrounding the operation of the NYC in the KSA legal system.

7.7 Recognition and enforcement of arbitral award in KSA

Despite the adoption of the NYC by KSA, the REFAA is treated differently at domestic level than the legal framework established by the NYC, ML and followed by most national arbitration laws. It is also treated differently from the complicated legal position suggested by the arbitration laws of Qatar and UAE. As discussed above, the KSA arbitration law is

¹²⁰Ibid.

¹²¹4^t ^hReview Committee, decision No 36/T/4 dated (2004) case cited in Jean Zegers, 'Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia' (2014) 1:1 BCDR International Arbitration Review 69-83.

¹²²Dirk Otto and Omaia Elwan, 'Article V (2)' in Herbert Kronke and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) at 365.

applied to the recognition and enforcement of three categories of awards: Domestic, non-domestic, and foreign arbitral awards issued according to the KSA arbitration law. The foreign arbitral award that is governed by foreign arbitration law, and seeks recognition and enforcement in KSA, is subject to the Law of Execution¹²³ and not to the KSA arbitration law. Therefore, this section seeks to understand why the Saudi legislature makes this differentiation, and whether it is necessary to promulgate two domestic legislations regulating the REFAA in KSA. This section also discusses the grounds to challenge the arbitral award provided by the KSA arbitration law and Law of Execution compared with the grounds to challenge the arbitral award under Article V of the NYC.

7.7.1 Definition of ‘arbitral award’ in Sharia law

Understanding the definition of ‘arbitral award’ in Sharia law jurisprudence is important in order to better understand the legal effect of arbitral awards in the KSA, and the different approach taken by the KSA legislature to differentiate between awards governed by the KSA arbitration law and awards governed by foreign arbitration law at the recognition and enforcement stage.

The term ‘award’ itself is not defined in the NYC. However, during the drafting conference, there was a debate about the lack of definition of ‘arbitral award’ within the text of the NYC, which ultimately ended with the view that it is not necessary to define it.¹²⁴ There is no

¹²³The Statute of Execution in Saudi Arabia issued by legislative Decree No. M/53 for 2012, see the official web site of Saudi Government <http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=296&VersionID=275> accessed in April 2015/ Arabic.

Articles (11) states that:

“Without prejudice to the rules of Sharia and to the provisions of international conventions and treaties, which the Kingdom is a party, it is not permissible for the Court of Execution to enforce foreign order and judgment without taking into consideration the principle of Reciprocity as well as the following conditions:”

- 1- The Saudi Courts are not classified as a competent court in order to look into the merit of the dispute that foreign judgment and order had been issued, and that the foreign courts are classified as competent courts in accordance to the rules of conflict of law that stipulated in its statutes.
- 2- The parties of the judgment that seek enforcement in the kingdom had received fair hearings and proceedings.
- 3- The judgment became final in accordance to the law of the court that issued the judgment.
- 4- The judgment is not in conflict with another judgment that is issued by Saudi Courts.
- 5- The judgment does not violate the public policy in the Kingdom.”

Article (12): “The provisions of the foregoing article *shall apply to the arbitral awards made in a foreign country.*”

¹²⁴UNCITRAL Document E/2822 for 1956 at 10.

international definition of the term ‘award’. Indeed, none is to be found in the international conventions such the NYC or ML, or the UNCITRAL Arbitration Rules. Even though the NYC is directed to the recognition and enforcement of awards, the nearest it comes to a definition found at Article I (2) of the NYC.¹²⁵ However, it was proposed that there should be a definition of the term ‘award’ in the ML, but ultimately none was adopted.¹²⁶

Sharia schools of jurisprudence provide a different understanding of the term ‘award’.¹²⁷ There is no explicit mention in the Quran or Sunnah of the term ‘award’. The Sharia jurisprudential schools defined arbitral awards by using the secondary source of Sharia law, that is, ‘deductive analogy’, to compare the meaning of ‘arbitral award’ with the original concept of a court judgment, which is called *Hukm* in Arabic.¹²⁸ *Hukm* is an Arabic word that literally means ‘judgment’ and does not necessarily refer only to a court judgment. It can be used to indicate the determination of the dispute, either through a court judgment, conciliation, arbitration, or any form of dispute resolution. In this sense, the term ‘arbitral award’ within Sharia jurisprudence does not differ from that of a court judgment except in its initiator.¹²⁹

However, there are some different opinions regarding the binding nature of arbitral awards.¹³⁰ This debate can be traced back to the original debate about how the Sharia jurisprudence perceived arbitration as a means of dispute resolution.¹³¹ The *Hanafi* and *Shafi’i* schools view

¹²⁵NYC, Article I (2): “The term arbitral awards shall include not only the awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted”.

¹²⁶The proposed definition was as follows: “Award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award”, Alan Redfern and others, *Law and practice of international commercial arbitration* (4th edn, Sweet & Maxwell, London 2004) at 515,

¹²⁷El-Ahdab, (n34) at 47.

¹²⁸Khalid Al Jamrah, *Arbitration between Islamic rules and secular rules* (Dar Alnashar, Sudan 2002) 45/Arabic.

¹²⁹Khalid Aldakhel, *Arbitration in KSA in accordance with Sharia rules* (King Saud University publications, KSA 2004) at 130-233/Arabic.

¹³⁰Abdul Majeed, ‘The legal effect of arbitration in Sharia law’ (2005) 22 *Journal of Law and Sharia* 101-150 at 134/Arabic.

¹³¹See chapter four (section 4.3.3).

arbitration as a form of conciliation, similar to mediation, where decisions are not binding on the parties. On the other hand, the *Maliki* and *Hanbali* schools treat arbitral decisions as having the same binding force as judicial decisions.¹³² Therefore, arbitral awards in this opinion are subject to the same rules as court judgments.¹³³ However, the position of the Sharia jurisprudence in defining the term ‘arbitral award’ as a ‘court judgment’ has affected the words of the KSA arbitration law.

“Subject to the provisions of this Law, the arbitration award rendered in accordance with this Law *shall have the authority of a judicial ruling* and shall be enforceable”.¹³⁴

Although the theoretical basis of this position can be criticised, from a practical view it must be seen as preferable to the ML.¹³⁵ The ML considers arbitral awards to be final without providing any further explanation, while the KSA arbitration law gives an arbitral award the effect of a court judgment issued by the national courts. However, the concept of a *foreign* arbitral award has also received different treatment in Sharia law, which affects the KSA legislature in terms of differentiating between awards governed by foreign arbitration law and those governed by the KSA arbitration law (‘Islamic law’). This leaves many difficulties in understanding how the foreign arbitral awards are treated at domestic level of KSA legal system.

7.7.2 Foreign arbitral awards under Sharia law vs. the NYC

As discussed earlier in chapter two (section 2.4), the NYC covers two types of arbitral awards; foreign and non-domestic arbitral awards. The foreign arbitral award is an award issued in one state, which seeks recognition and enforcement in another state.¹³⁶ All other elements, such as the nature of the disputes, nationalities of the parties, domicile, or subject

¹³²Ibid.

¹³³Abdul Majeed, (n130) at 134/Arabic.

¹³⁴KSA arbitration law 2012, Article 52.

¹³⁵ML as amended in 2006, article 35(1) stated that: “An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.”

¹³⁶Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* at 12.

matter of the disputes, are irrelevant to determine whether the award is foreign or not.¹³⁷ It is essential that the forum state and the state of enforcement are different in order to consider the award as a foreign arbitral award subject to the NYC.

There is more division between the Sharia law jurisprudence on the definition of a ‘foreign’ arbitral award. El-Ahdab categorised the views of the four major schools of Sharia law into three main views: 1) An arbitral award issued outside an Islamic country is foreign only if none of the parties is Muslim, but is domestic if one of the parties is Muslim. 2) An arbitral award issued outside an Islamic country is foreign even if one of the parties is Muslim, but is domestic if both parties are Muslim. 3) An arbitral award issued outside an Islamic country is always foreign even if a Muslim is involved.¹³⁸ The NYC covers two types of awards that are foreign and non-domestic, regardless of the nationalities or religion of the parties. In contrast, Sharia law gives effect to the religion of the parties, except in the last point, which has been adopted by the KSA legislature in recognising foreign awards regardless of the religion of the parties. The only standard in this opinion is that the award has been issued outside an Islamic country similar to the different legal tradition.

However, the Saudi legislature also provides a different understanding to that provided in the Sharia law in their view of foreign awards. The KSA legislature adopts the opinion that if the arbitral award is governed by foreign arbitration law *lex arbitri* and sought enforcement in the KSA, it is subject to the Law of Execution¹³⁹ and not to the KSA arbitration law. It seems that the KSA legislature differentiates between awards governed by the KSA arbitration law (‘Islamic law’) and those governed by the foreign arbitration law (‘non-Islamic law’). This position might reflect the restrictive view of Sharia jurisprudential schools regarding the concept of foreign arbitral awards. It seems that the KSA legislature in this position added uncertainty to existing uncertainty, by providing for two different laws regulating the REFAA.

Therefore, if the arbitral award governed by the KSA arbitration law (‘Islamic law’), then the enforcement will proceed according to the KSA arbitration law regardless of whether the

¹³⁷ Alfons Claudia, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation* at 27.

¹³⁸ Ibid at 50.

¹³⁹ See (n123)

award was issued abroad or not.¹⁴⁰ If different arbitration laws have governed the award, ‘non-Muslim arbitration law’, then the Law of Execution will be the applicable law to its recognition and enforcement, as will be shown in next section.

- **Foreign arbitral awards governed by foreign arbitration laws**

In 2012, the Saudi legislator issued the Law of Execution,¹⁴¹ which also includes provisions regulating the REFAA and foreign judgments.¹⁴² The KSA Law of Execution is not only concerned with the procedural issues of enforcement, as might be expected in conventional legal systems, but it surprisingly includes provisions regulating the REFAA. According to Articles 11 and 12 of the Saudi Law of Execution, foreign arbitral awards that are governed by foreign arbitration law are subject to the Law of Execution. However, the enforcement provisions in this law do not mirror Article V of the NYC. The grounds for refusal are as follows: 1) the principle of reciprocity; 2) the Saudi Court is not classified as a competent court to hear the merits of the dispute; 3) the foreign award is not in conflict with any judgment issued by the Saudi courts; 4) the arbitral award becomes final according to the law of the country of origin; 5) the parties have received fair hearings and proceedings; 6) the Sharia public policy. Bearing in mind the first part of Article 11 of this law mentions “without prejudice to the ... provisions of *international conventions and treaties*, which the Kingdom is a party”, this means that as the KSA has acceded to the NYC, its provisions come under the scope of this phrase. However, certainty is still lacking as to whether the court will give consideration to Article V of the NYC or the provisions of Article 11; these articles are inconsistent with each other. This is because of the lack of published case law after the issuance of this law.

A consultation conducted by the researcher with the Ministry of Justice in Saudi Arabia confirmed that the provisions of this law are applicable to the REFAA governed by foreign arbitration laws.¹⁴³ The Ministry confirmed that approximately 20 foreign awards have been executed in Saudi Arabia after the issuance of the Law of Execution in 2012. Most of the

¹⁴⁰KSA arbitration laws 2012, article 2.

¹⁴¹See (n123).

¹⁴²Ibid.

¹⁴³The consultation was through a phone call with Mr Hisham Abu-Hmoud who works as legal counsel in the Ministry of Justice in Saudi Arabia dated 25 March 2015.

arbitral awards have been issued in Egypt, London, the United States, Japan, Germany, and France.¹⁴⁴ However, it seems that the ratification of the NYC in KSA is an international act whereby the state is obliged to recognise and enforce the arbitral award according to the NYC provisions, while at the domestic level the REFAA occurs according to the domestic law that violates NYC provisions as is the case with Article (11) of the KSA Law of Execution explained above. This point is discussed more in chapter nine.

It is also worth mentioning here that the Saudi courts previously enforced a number of foreign awards that were subject to a foreign arbitration law. The courts ruled that “if the arbitration agreement between the Saudi party and a foreign party provides for arbitration abroad, it will be deemed to be binding even if the arbitration is governed by non-Islamic Law”.¹⁴⁵ In these rulings, the laws of the seat were the law of France,¹⁴⁶ the US,¹⁴⁷ and Austria.¹⁴⁸ Accordingly, this means that applying a foreign arbitration law to govern foreign awards will not in itself be deemed to be a violation of Sharia public policy.

The question arises as to whether the presence of more than one domestic law regulating the REFFA are supporting the development of arbitration practices in KSA? However, by examining the Law of Execution in the above discussion, it seems that it does not suggest a stricter grounds for refusal than those established by the KSA arbitration law as will be seen in the next section. Therefore, what is the logic of having two separate domestic laws regulates the REFAA? It seems that the KSA legislature adds uncertainty to more uncertainty in the sense that the NYC is adopted at international level, while at the domestic level, the legislature provides different treatment to the foreign arbitral award, despite the fact that the KSA arbitration law is modernised to the tune of ML.

¹⁴⁴On request for copies of these rulings, or whether they were published in any sources in KSA, the answer was that they were not publishable at the moment and the court was working to publish them in a specific journal designed for this purpose.

¹⁴⁵Board of Grievances, *The Audit Committee* (6th edn, Minsitry of Justice of Saudi Arabia 2005) Decision No: 155/T/4 (1994) at 72-73/Arabic.

¹⁴⁶Board of Grievances, *The Audit Committee*, (5th edn, Minsitry of Justice of Saudi Arabia 2002) 40-42 Arabic decision No: 15/T/3 at 40-42 Arabic.

¹⁴⁷*Ibid*, decision No: 43/T/4 at 83-84/Arabic.

¹⁴⁸*Ibid*, decision No: decision No 10/T/2 at 85-87/Arabic.

Certainty and predictability are two vital principles in the domain of dispute resolution in international commerce. In order to support the flow of international arbitration in the KSA, legal uncertainty must be kept to a minimum.¹⁴⁹ For example, if the foreign party seeks to enforce a foreign arbitral award in the KSA, the first question he or she will ask is whether the KSA is an NYC party. But when it comes to domestic legislation, he or she will encounter complicated national rules and more than one domestic law regulating the REFAA. This is not the end of the story, as the KSA arbitration law provides different grounds for refusal than those established by Article V of the NYC and Articles 34-36 of the ML.

7.7.3 Grounds to set aside the arbitral awards governed by the KSA arbitration law

Article V of the NYC set out the grounds to set aside the arbitral award, which are considered as globally accepted grounds for setting aside the arbitral award or refusing its enforcement. Despite the adoption of the NYC in KSA, the KSA arbitration laws and Law of Execution provide additional grounds for refusal than those listed in Article V of the NYC. Article 49 of the KSA arbitration law expressly provides that the arbitral awards cannot be challenged by any means of recourse, except for the action of setting aside the arbitral award. Article 50 provides the grounds for which the action of setting aside the arbitral award is exclusively admissible. In general, the grounds to set aside the award does not suggest serious difficulties such as those associated with appealing the award on a question of fact, appealing on a point of law or appealing the award on the merits of the dispute.¹⁵⁰ This must be seen as a more advanced position compared to the former KSA arbitration law. However, there might be two possible key difficulties. First, the law does not explain under which law the court shall examine the validity of the arbitration agreement as was the case in Article V (1)(a) of the NYC. Second, Sharia public policy might affect the validity of the arbitration agreement, the chosen procedural rules, the chosen law or the rules governing the merits of the dispute. The concept of Sharia public policy has been discussed in detail in the next chapter as it relevant to the arbitration practices in all GCC states and not just the KSA. In addition, Article V (1)(e) of the NYC, “which provides the parties the right to challenge the arbitral award if it has not yet become binding, or has been set aside or suspended by the country in which, or

¹⁴⁹Silvia Fazio, *The Harmonization of International Commercial Law* (1st edn, Kluwer Law International, Netherlands 2007) at 5.

¹⁵⁰KSA arbitration law 2012, article (50) states that: “An action to nullify an arbitration award shall not be admitted except in the following cases:” “(4): The competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute”.

under the law of which, the award was made” is not listed within the grounds to set aside the arbitral award. This is because arbitral awards that are governed by foreign arbitration law and which seek enforcement through KSA national courts are subject to the Law of Execution and not to the KSA arbitration law, as discussed in the above section.

- **Another grounds to challenge the enforcement request**

The recognition and enforcement of arbitral awards that are governed by the KSA arbitration law is subject to Articles 52–55 of the KSA arbitration law. The request for recognition and enforcement of the arbitral award should be submitted to the Court of First Instance originally competent to hear the dispute after the expiration of the time limit to submit the request for setting aside the award.¹⁵¹ Article 55(2) provides the grounds for challenging the enforcement request which are not consistent with Article V of the NYC or the grounds to set aside the award that are discussed above. The order to execute the arbitration award shall not be issued except upon verification of the following:

- “It should not contradict a decision or order issued by a court, committee or tribunal that has jurisdiction to rule on the subject matter of the dispute in KSA”.
- “It should not be contrary to the provisions of Sharia law and KSA public policy”.
- “It should have been properly notified to the party against whom the award was rendered”.

These provisions are inconsistent with Article V of the NYC and Article 36 of the ML. Moreover, it is questionable why the KSA arbitration law differentiates between the grounds to set aside the award and the grounds to refuse enforcement. The ML and most modern arbitration legislation is modelled on the grounds to set aside the arbitral award and the grounds to challenge the enforcement request according to the Article V of the NYC. It should be noted that the order to enforce the arbitral award is not open to challenge, whereas the order to refuse enforcement may be challenged before the relevant court of appeal within 30 days from the date of issuance.¹⁵² However, there is case law evidence where the foreign arbitral award has been refused enforcement in the KSA because it violates the Sharia law.

¹⁵¹KSA arbitration law 2012, article 51(1), see also article 55(1).

¹⁵²Ibid, article 55(3).

7.7.4 Sharia law as a ground for refusal in the KSA

The *Riba* in summary refers to the situation where the arbitral award is granted a sum of interest in addition to the due amount. This sum of interest violates Sharia law and thus it is not enforceable in KSA. The Sharia contract law requirements to the validity of arbitration agreement, particularly the prohibition of *Riba* that was discussed above,¹⁵³ raise difficulties to the REFAA in KSA.

In a case dated 1997, in an arbitration seated in Jordan, the Saudi courts enforced a foreign award issued by the International Chamber of Commerce (ICC) apart from the sum of interest.¹⁵⁴ The award in this case included a sum of interest and therefore it was refused enforcement in the lower court on the ground of Sharia public policy (*Riba*). The award creditor appealed this decision and in his memorandum waived the right to claim the sum of interest included in the award. The higher court then recognised and enforced the award apart from the sum of interest.¹⁵⁵ It is worth mentioning here that if the award granted interest, it would be held that the arbitral award would be completely unenforceable, or that only the part awarding interest would be refused enforcement. Saudi judicial practice confirms that partial enforcement is applied in this situation. Consequently, a number of foreign awards apart from the sum of interest have been granted enforcement.¹⁵⁶

In the light of the foregoing strong prohibitions of *Riba* under the Sharia contract law, one may understand why Saudi courts consistently refuse to enforce *Riba*. Thus, one of the Saudi commentators noted that:

“It is not possible in any case to grant execution of any foreign award that violates any general principles of Sharia, and this has been consistently confirmed in the

¹⁵³Section (7.3.3).

¹⁵⁴Cited in Board of Grievances, *The Audit Committee* (5th edn, Ministry of Justice of Saudi Arabia 2002) 6-9/Arabic.

¹⁵⁵*Ibid* at 9.

¹⁵⁶Board of Grievances, *The Audit Committee* (6th edn, Ministry of Justice of Saudi Arabia 2005) 34-48 - Arabic decision No: 32/D/A/9, see also same book decision No. 8/D/F/18 at 53-54, decision No: 36/T/4 at 97-99.

judicial precedents of the Saudi Courts *in which execution of interest contained in foreign awards was prevented*”.¹⁵⁷

It is suggested that the arbitrators or parties that seek recognition and enforcement of an arbitral award in the KSA should include the amount representing the sum of ‘conventional interest’ within the main sum of the award without identifying it separately as interest. This is in order to avoid the refusal in the Saudi courts on the ground of Sharia public policy. The following section will examine the different forms of Riba that has affected the recognition and enforcement of foreign arbitral award in KSA.

- **Compensation for loss of future profit, loss of opportunity or damage to reputation**

Riba might take another form to the form of direct ‘interest’. Arbitral awards that grant compensation for loss of future profit are not recognised in Sharia contract law, as it constitutes part of *Riba*.¹⁵⁸ It should be noted that the general principle for compensation for ‘actual loss’, including legal and arbitration costs, is clearly accepted within KSA judicial practice, as in any other legal system in the world.¹⁵⁹ The reference to the term ‘actual loss’ means the plaintiff has to prove that such loss had taken place as a result of the default in contractual obligations.¹⁶⁰ However, there is diversity among contemporary Sharia scholars regarding the issue of compensation for loss of future profit or lost opportunity for future benefits.¹⁶¹

A case came before the Saudi courts in which there was an application for the enforcement of a foreign award containing compensation for lost future profits.¹⁶² In this case, disputes arose out of a contract between a Romanian car spare parts company and a Saudi party in which the

¹⁵⁷Mohammed Albajad, (n104) at 90/ Arabic.

¹⁵⁸Abdul Hamid El Ahdab, ‘Saudi Arabia Acceds to the New York Convention’ (1994) 11:3 Journal of International Arbitration 87-91 at 90, Mohammed Albajad, (n104) at 92/Arabic.

¹⁵⁹Mohammed Albajad, (n104) at 94.

¹⁶⁰*Ibid.*

¹⁶¹Mohammed Ayub, (n49) at 165, Mohammed Alzarqa, ‘About the legitimacy of imposing the Dilatory Debtor to Compensate the Creditor’ (1996) 3:2 Journal of Islamic Economic Studies at 11/Arabic.

¹⁶²Case cited in Mohammed Albajad, (n104) at 96-97.

former gave the latter the rights to market, sell, and service its spare parts in Saudi Arabia. The disputes were submitted to arbitration as the contract provided for, and an award was made in favour of the Romanian company. The award ordered the Saudi party to pay a sum of \$253,760 as compensation for the ‘loss of future profit’ because the Saudi party had failed to continue to buy the amount of spare parts agreed upon, and a sum of \$250,000 as compensation for damage to reputation.

The Romanian company sought to recognise and enforce the arbitral award through the Saudi courts. The court refused enforcement and affirmed that the award aimed mainly to compensate the plaintiff for loss of future profits and for moral (reputation) damages arising from the dispute. This, in the court’s opinion, was contrary to Sharia law and constituted *Riba*. Sharia law requires that the damage should have clearly occurred, whereas in this case the Saudi party had not received the spare parts, and the amount awarded to the Romanian party was based on the compensation for loss of future profits and damage to reputation, which is not certain but merely potential. Accordingly, the court refused to enforce the award. The Court of Appeal then upheld the decision of the lower court and refused enforcement.¹⁶³

This case confirmed the Saudi court’s position regarding the fact that compensation for loss of future profit would constitute a violation of Sharia public policy. This is to say that if one of the parties breached the contract, the Saudi court would order compensation for the rest of the obligations (actual loss), but if a party claims for the loss of ‘future profit’, the other parties have to prove that the loss of future profit had occurred.¹⁶⁴

In different legal traditions, the parties may be able to claim for compensation for the loss of future profit in certain circumstances. The Saudi court based its argument on Sharia jurisprudence; it is out of the scope of this research study to examine this in detail. However, it is suggested that Saudi courts should relax their domestic standard of compensation for the loss of future profits when dealing with foreign awards. They could take into consideration the position of some contemporary jurists of Sharia, particularly those specialising in Islamic finance.

¹⁶³Ibid.

¹⁶⁴Ibid at 97.

A few contemporary Islamic jurists argue in relation to the problem of future profit that if the debtor is dilatory (financially capable and not in constrained circumstances such as being poor or declared insolvent), the judge should, by the request of the creditor, order the debtor to pay the creditor not only the capital of the delayed payment or debit, but also an extra amount of compensation to cover the unjustified delay in fulfilling the payment. They consider this extra payment to be justified under Sharia law and it is not considered as *Riba*, since the judge, rather than the parties to the contract, determine the sum of this compensation.¹⁶⁵

Finally, it is thought that the prohibition of *Riba* in KSA could be relaxed particularly to the foreign arbitral award that sought recognition and enforcement through the Saudi national courts. For example one leading commentator on international arbitration notes that “if the arbitration concerned matters having no connection to the forum, governed by foreign law, there would ordinarily be no reason to apply the strict consideration to the national rules to claims governed by foreign law”.¹⁶⁶ This suggestion is also correlated with emerging notion in international private law that distinguish between domestic and international public policy that will be discussed in detail in the next chapter. However, it is doubtful whether a country like KSA, with its legal system built upon Sharia law, would accept the relaxation of the requirement of Sharia contract law such as *Gharar* and *Riba* in the domain of international commercial arbitration.

7.8 Summary and suggestions for law reform

There are definite areas of conflict and tension, between accepting the norms of international commercial arbitration and the Sharia law requirements to the validity of the arbitration agreement, arbitration proceedings and arbitral award. However, Sharia law is not well understood in western business circles, or even not well understood in the rest of the non-Muslim world. International commerce cannot take place within a vacuum, and the strict application of these ancient legal rules (Sharia law) to complex commercial transactions might present elements of risk and uncertainty that must be weighed against the potential

¹⁶⁵Mohammed Alzarqa, ‘About the legitimacy of imposing the Dilatory Debtor to Compensate the Creditor’ (1996) 3:2 Journal of Islamic Economic Studies at 11/Arabic.

¹⁶⁶Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, Netherlands 2014) at 3309.

benefits of doing business in KSA. This should not be understood as an attack on Sharia law. The lack of conciliation between Sharia law and modern arbitration norms might create huge legal vacuum to the flow of international arbitration in KSA. This argument finds its example in KSA arbitration law where all arbitration process subjected to the Sharia law without explaining what Sharia law is, or even a presence of uniform meaning of Sharia law.

Nevertheless, the KSA arbitration law is much more developed than Qatari and UAE arbitration laws. It is inspired by the ML in accepting most of the modern principles of the operation of arbitration as a means of dispute resolution. The form of written agreement is well defined in the KSA arbitration law and is almost consistent with Article 7 of the ML. The principle of party autonomy in choosing the law and rules governing the arbitration process is also recognised. In addition, the principles of separability of the arbitration agreement and competence-competence are also recognised. The main peculiarity of the functioning of the legal framework governing international arbitration in the KSA is that its application is subject to it not violating the Sharia law in all its provisions, which as it has been discussed may affect the effectiveness of the international legal framework in KSA in several respects in practice.

The analysis in this chapter revealed that the Sharia contract law does not bring difficulties regarding the parties' capacity to enter into an arbitration agreement and the formal validity of the arbitration agreement. However, a difficulty may arise in relation to a different aspect of the substantive validity of the arbitration agreement if that is affected by the Sharia law prohibitions of Gharar or Riba, as previously discussed.¹⁶⁷

The Sharia law requirements have also affected the composition of the arbitral tribunal in KSA arbitration law. The arbitral tribunal must be formed of an uneven number of people and the arbitrators must be qualified as lawyers or have Sharia degrees, unless the tribunal is composed of three arbitrators or more, in which case the chairman of the arbitral tribunal must meet these requirements. In addition, the chosen procedural rules are required to not violate Sharia law. The Sharia procedural rules contain general principles of adjudication that

¹⁶⁷In this regard it is recommended for the parties that envisage seeking REFAA in the KSA to request the arbitrators to include the amount representing the sum of interest within the main sum of the award without identifying it separately as interest. It is also recommended for the KSA legislature to have a codified contract law that incorporates all Sharia law prohibitions in contractual relations such as the issue of Riba and Gharar.

do not suggest difficulties for the ordinary concept of lack of due process in different legal traditions. In addition, the law chosen by parties to govern the merits of the dispute is required not to violate Sharia public policy. Sharia public policy also plays an uncertain role in the rest of the GCC states. Therefore, the next chapter examines to what extent Sharia public policy may affect the REFAA in all GCC states.

An unnecessary complexity of the KSA legal system as uncovered in this chapter is that there are two domestic laws regulating the REFAA. First is the KSA arbitration law and second is the Law of Execution. This only adds uncertainty to the picture. The KSA arbitration law is applied to the recognition and enforcement of three categories of awards: Domestic, non-domestic, and foreign arbitral awards that are issued according to the KSA arbitration law. Foreign arbitral awards that are governed by foreign arbitration law and seek recognition and enforcement in the KSA are subject to the Law of Execution. Therefore, the first recommendation to the KSA legislature would be to harmonise the laws in this regard, and provide for a single instrument to govern the issue of REFAA in KSA. The existence of two domestic laws regulating the REFAA is unjustified; there is virtually no difference in the grounds for refusal as provided for in both instruments.

The second recommendation to the KSA legislature is that there is no need to differentiate between the grounds to set aside the arbitral award (Article 50) and the grounds to challenge the enforcement request (Article 53). Importantly, the grounds to set aside the arbitral award in the KSA arbitration law are almost the same as Article V of the NYC, while the grounds to challenge the enforcement request are completely different from those in Article V of the NYC. In addition, the grounds to challenge the enforcement of foreign arbitral awards that are *governed by foreign arbitration law* are also inconsistent with Article V of the NYC. Therefore, it is recommended that the KSA legislature should regulate the REFAA in one domestic law, without there being a need to differentiate between the grounds to challenge the enforcement request and the grounds to set aside the award. Both should be similar to Article V of the NYC and Articles 34–36 of the ML.

In the next chapter, the thesis moves to the consideration of an overarching theme in the GCC states, that of the use of the public policy defence under the NYC, including analysis of arbitrability questions, and an assessment of the situation in the GCC states in light of the emerging distinction between domestic and international public policy in the domain of

private international law more generally. The analysis in this chapter and previous two revealed that most of the foreign arbitral awards that sought recognition and enforcement in the states of Qatar, UAE and KSA have refused enforcement because of the strict consideration of the domestic public policy. Furthermore, the response gained from the practitioners that interviewed by this thesis confirmed that the GCC public policy including the sharia public policy is constitute a challenges to the REFAA in all GCC states and not just in these three states. The treatment of this topic at the crossroads of the interaction between the foreign and the national, the sovereignty of the states and the autonomy of the parties, the public and the private interests at stake, seems crucial for the full understanding of the functioning of the legal framework of international arbitration in this region.

Chapter Eight: The use of Public Policy as a Ground for Refusal in the GCC states

8.1 Introduction

The previous three chapters analysed the implementation of the New York Convention¹ (NYC) in the states of Qatar, United Arab Emirates (UAE) and Kingdom of Saudi Arabia (KSA). These chapters revealed many distinct variations between the provisions of the NYC and the arbitration laws of the three states. Many recommendations and observations have been suggested to the legislative authorities of these three countries that would enhance the legal regime regulating the recognition and enforcement of the foreign arbitral awards (REFAA). However, one of the common findings of chapters five and six is that the national courts of Qatar and UAE share the position of considering infringements related to fairness and due process as within the public policy ground for refusal.² Chapter seven also showed that Sharia law forms the state constitution of the KSA, and that Sharia public policy is relevant to all aspects of arbitration practices in KSA. In addition, chapter four demonstrated that Sharia law is part of the legal systems of the GCC states, without providing further explanation about the role of Sharia public policy.³ All these findings are complemented by the results gained from the interview study which shows that the public policy of the GCC states, including the concept of public policy in Sharia law, is one of the main challenges that may affect the REFAA under the NYC in the GCC states.⁴ Therefore, this chapter seeks to clearly understand the exact reasons that are presented in the public policy of the GCC states

¹ “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739.”

² Gordon Blanke, ‘Enforcement of New York Convention Awards in the UAE: The Story Re-Told’ (2013) 5 *International Journal of Arab Arbitration* 19, Mark Wakim, ‘Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East’ (2008) 21:1 *New York International Law Review* 1-51, BantekasIlias and Mohamed Alnasair, ‘The effect of public policy on the enforcement of foreign arbitral awards in Bahrain and UAE’ (2013) 13:3 *International Arbitration Law Review* 88-96, Reyadh Seyadi, ‘Arbitration and Private International Law Conference’, Public Policy as a Ground for Refusal to Enforce Foreign Arbitral Awards in the Arab Gulf States (University of Edinburgh - Conference paper 2015).

³Chapter four (section 4.5.1).

⁴Appendix, section (e), See also Ahmed Almutawa and Maniruzzaman, ‘Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study’ [2015] *Transnational Dispute Management*. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559690> accessed May 2015, at 25 section (3.2.2) and (section 3.3) at 28.

as a barrier to the REFAA and whether there are any recommendations that might be forwarded to relax the use of the public policy defence as a ground for refusal.

Public policy is a very wide topic that can be addressed from many different angles. The manner in which the NYC has been constructed means that one of the major constraints on the REFAA is the inclusion of a public policy exception available as escape device to prevent REFAA before national courts. This is seen as putting an ultimate limit on the autonomy of international arbitration. This potential problem has proved to be a very real practical problem in the GCC states. Pursuant to Article V (2)(b) of the NYC, a national court may on its own motion refuse REFAA if it finds that the arbitral award violates the public policy of the state. Greater attention has been given to public policy under the NYC because of the open texture of the term 'public policy' used in the treaty.

This chapter aims to analyse some aspects of the public policy of the GCC states that have been problematic for the REFAA under the NYC in the GCC states. It focuses on analysing the following aspects of the GCC public policy. First, the chapter examines the role of Sharia public policy in the GCC legal systems, and to what extent it can be used as a ground to refuse the REFAA under the NYC. Secondly, it discusses the doctrinal developments that distinguish domestic from international public policy as a ground for refusal under the NYC, which is notably missing in the judicial practices of the states of Qatar, UAE and KSA. Thirdly, the chapter examines how the GCC national laws and court practices regulate the question of arbitrability of the subject matter of the dispute.

The chapter concludes that the main reason why the public policy of the GCC states has been presented as a challenge to the implementation of the NYC is the lack of judicial distinction between domestic and international public policy as a ground for refusal. Another reason is the undefined role of Sharia public policy in the GCC legal systems. However, the chapter discovers that the Sharia public policy might have a subsidiary role in preventing the REFAA in the GCC states (except in KSA). This finding is limited to the role of Sharia public policy in civil and commercial transactions that have a close relationship to arbitration practices in the GCC states. In addition, there are a wide number of disputes that are not arbitrable in the GCC states, and in relation to them the public policy defence might be invoked as a ground for refusal. In any case, Sharia public policy is limitedly relevant to the arbitrability question.

8.2 The conceptual framework of public policy

The concept of ‘public policy’ is controversial and much debated, not only in arbitration but in litigation as well.⁵ The NYC and Model Law on International Commercial Arbitration⁶ (ML) and most national arbitration laws allow the state parties to refuse the REFAA if it breaches the public policy of the state.⁷ Public policy is a defence that seeks to safeguard the state’s interest and it can be seen as a limitation to the principle of party autonomy in the domain of private international law and international commercial arbitration (ICA).⁸

Through the rise of the traditional theory of territoriality, whereby the state is sovereign within its borders and its laws and courts have exclusive jurisdiction over the acts and legal relations that occur within its territory, states throughout the world sought to regulate all private activities, including arbitration.⁹ Nevertheless, most of the states recognise the principle of party autonomy in contractual relations, including the contractual nature of arbitration as a dispute resolution mechanism. As a result of this autonomy, most of the arbitration laws provide great freedom to the parties to choose the place of arbitration, and the laws and rules governing the arbitral process.

However, party autonomy in arbitration is not absolute. States still have the power, either in the seat jurisdiction or in the place where the arbitral award sought recognition and enforcement, to invalidate the arbitration agreement or to refuse the recognition and enforcement of the arbitral award for public policy reasons. Public policy is the tool that has the final word on the validity of an arbitration agreement and the validity of the arbitral award.¹⁰ It refers to the fundamental principles and values that the state is built upon. These

⁵ Aton Maurer, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application* (Juris Publishing, New York 2013) at 1-4.

⁶ UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006. General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006).

⁷ NYC 1958, article V (2)(b), ML 1985 as amended in 2006, article 34(2)(b)(ii) and 36(2)(b)(ii).

⁸ Keren Tweeddale and Andrew Tweeddale, *Arbitration of commercial disputes: International and English law and practice* (OUP, Oxford 2007) at 260, See in General Journal of American Review of International Arbitration ‘ARIA’ (2007) volume 18 issues 1-2. These two issues were specified to discuss the mandatory rules and public policy in international commercial arbitration by number of articles.

⁹ Gary Born, *International Commercial Arbitration: Cases and Materials* (Aspen Publisher, New York 2011) at 14.

¹⁰ Troy Harris, ‘Public Policy Exception to Enforcement of International Arbitration Awards under the New York Convention’ (2007) 24 Journal of International Arbitration at 9-24 at 10.

principles are, for example, related to the moral, economic, political, community and religious values, and other principles, and differ from one country to another.¹¹ These principles and values are usually found in state constitutions, national laws or are interpreted by the national courts on a case-by-case basis. Therefore, the arbitration parties shall not agree on what violates public policy and the autonomy of the parties is respected as long as it does not violate public policy.¹² The public policy defence can also be found in most international treaties relating to contractual relations or international arbitration.¹³

In the context of international arbitration, the public policy defence is a traditional ground to deny the enforceability of arbitration agreements or arbitral awards, as well as to control the applicability of the international rules or foreign laws chosen by parties to govern the arbitration process.¹⁴ It is also usually invoked to deny the arbitrability of the subject matter of the dispute.¹⁵ Its function is to safeguard state interests and to grant the authority to the national courts to refuse to give effect to the arbitration agreement or to refuse to recognise and enforce an arbitral award.¹⁶

It has been argued that the public policy defence allows the circumvention of the goal of the uniform treatment of the REFAA that the NYC sought to establish.¹⁷ However, this argument

¹¹Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26:3 American Business Law Journal 511-531 at 512.

¹²Ibid at 518.

¹³ See for example the New York Convention 1958: Article V(2)(b), 'The Inter Arab Convention on Judicial Co-operation' known as Riyadh Convention signed in 1983, Article 37(e). The 'Agreement on the Execution of Judgments, Delegations and Judicial Notifications' known as GCC Convention and signed in 1995: Article (2)(1), 'The Inter-American Convention on International Commercial Arbitration' known as Panama Convention, signed in 1975, article 5 (2)(b).

¹⁴Albert Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International, Netherlands 1981) at 360, Aton Maurer, (n5) at 54.

¹⁵Albert Berg, (n14) at 360.

¹⁶ Troy Harris, (n10) at 9.

¹⁷Homayoon Arfazadeh, 'In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception' (2002) 13 ARIA at 44, Obinna Ozumba, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?' available at www.dundee.ac.uk. Accessed May 2015, Kristin Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 Fordham International Law Journal at 953, see also the UNCITRAL Documents, A/40/17 dated August 21, 1985, at VII. 'It has even proposed during the preparation of the UNCITRAL Model Law that "the provision 34 (2) (b) should be deleted since the term public policy was too vague.'

appears to be too simplistic. Although the goal of uniform treatment is strongly recommended, one cannot deny the need for each legal system to have the power to protect its major principles of legal, moral, economic, political, religious, and community values. The argument of the difficulty of uniform treatment in the public policy defence may be raised as a result of the lack of differentiation between domestic and international public policy in the domain of ICA as, for example, is suggested by the case study of the GCC states.¹⁸

Public policy is correlated with many areas of law, and its treatment differs from one legal system to another.¹⁹ The ultimate reason for the difficulty associated with the goal of uniform treatment is the difference between countries in terms of the interpretation of the fundamental principles and values that trigger the application of the public policy defence. Principles that are considered essential to one country's legal or social order may be considered less important in other countries. Thus, it may be difficult to define public policy in a precise way that is globally accepted.²⁰ The Court of Appeal in England and Wales in *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H v. Ras Al Khaimah National Oil Co*²¹ noted that:

“Considerations of public policy *can never be exhaustively defined*, but they should be approached with extreme caution”.

Another explanation was given by an English court in the nineteenth century in *Richardson v Mellish*, where the court stated that:²²

¹⁸ See section (8.6.1).

¹⁹ Alan Redfern, ‘Commercial Arbitration and Transnational Public Policy’ (2006) 18 ICCA Congress Series at 2.

²⁰ Loukas Mistelis and others, *Comparative International Commercial Arbitration* (1st edn, Kluwer Law International, Netherlands 2003) Para 26-115, Emmanuel Gaillard and others, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (1st edn, Cameron, May 2008) at 788, Pierre Mayer and others, ‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19:2 *Arbitration International* at 249-263.

²¹ *Deutsch Schachtbau-und Tiefbohrgesellschaft MBH v RasAlkaimah National Oil Co* [1987] England and Wales Court of Appeal, 3 *Weekly Law Report W.L.R* page 1035.

²² *Richardson v Mellish* [1832] Court of Common Pleas 131 ER 562, See also Michael Reisman, ‘Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration’ (2007) 13 *CCA Congress Series* at 849-856.

“Public policy is a *very unruly horse*, and when you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when other points fail”.

On the other hand, there have been many attempts by courts and jurisprudence to provide a general definition of public policy. For example, the US Court of Appeal in *Parsons and Whittemore Overseas v Societe Generale de L'Industrie du Papier (RAKTA)*²³ defined public policy in terms of the fundamental notions of justice and morality. The Egyptian Supreme Court defined public policy as involving any matter affecting the fundamental interests of the state. These matters, according to the court, may have political, social, economic or moral bases.²⁴ Lew defined public policy by indicating essential standards such as “economic, legal, moral, political, religious and social standards”, and any breach of these standards might be defined as a violation of the state public policy.²⁵ Looking at the jurisprudence that has tried to define public policy, one may conclude that these definitions are of such generality that they do not allow for a predictable outcome in any given case. They often read along the same lines.

8.3 The definition of public policy in the GCC states

The above-discussed conceptual framework of public policy also applies in the case of the GCC states. There is a lack of precise definition of public policy. Only the UAE and KSA laws have provided a general understanding of what constitutes the state’s public policy. The UAE Civil Transactions Code states that:

“Public policy shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and

²³*Parsons and Whittemore Overseas v Societe Generale de L'Industrie du Papier (RAKTA)* [1974] 508 F.2d 969 US Court of Appeal, Second Circuit, Case No 74-1642, 74-1676.

²⁴*Party v party* [1984] Egypt Court of Cassation, Civil appeal No: 714 for 47 judicial years. Cited in Ahmed Abdulsadeq, *The General Reference For Arbitration in Egypt, Arab World and International* (7th edn, The House of Law for Legal Publications 2014). 761/Arabic.

²⁵Julian Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications 1978) at 523, See also Loukas Mistelis and others, (n20) at 720-721.

foundations upon which society is based, in such manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia”.²⁶

In the KSA the concept of public policy is correlated solely with the concept of Sharia public policy. For example, Article 1 of the KSA Basic Law (KSA Constitution) emphasises that: “the Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s Book – Bible – and the Prophet *Sunnah* – prophetic words and traditions – are its *constitution*...”²⁷

Article 7 of the KSA Basic Law also notes that:

“Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet, which are the ultimate sources of reference for this Law and the other laws of the State”.²⁸

In the rest of the GCC states there is a lack of definition of public policy, either in their constitutions or in other legislation. However, in this instance one can assume that the general definition of public policy discussed in section 8.2 also applies in the case of the GCC states, except for the UAE and KSA where the general understanding of what constitutes state public policy is defined. Nevertheless, there are some provisions in the GCC constitutions that may reflect fundamental community values such as those associated with politics, economics, private ownership, personal statutes, religion and Sharia law. But the focus in this section will be on the uncertain role of Sharia public policy in the GCC legal systems. This is because the Sharia public policy has blocked the REFAA in the KSA, and has also categorised by the interviewed practitioners as a challenge that might undermine the purpose of the NYC that is to facilitate the REFAA in GCC states.

The impact of Sharia public policy in the GCC legal systems is a much-debated issue.²⁹ This is because all GCC states have established modern legal systems (except the KSA) that are

²⁶UAE Civil Code 1985, Law No. (5) for 1985 promulgate UAE Civil Code, article (3).

²⁷Saudi Basic Law of Governance of 1992, Art (1), The KSA Constitution available in English version at the official website of the Saudi parliament <http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Laws+and+Regulations/> Accessed July 2015.

²⁸Saudi Basic Law of Governance of 1992, Art (7).

²⁹Hamad Al-Humaidhi ‘Arbitration in the Arab–Islamic World’ (2015) 29:1 Arab Law Quarterly 92-99, Gamal Moursi Badr, ‘Islamic Law: Its Relation to Other Legal Systems’ (1978) 26 The American Journal of

affected by civil legal traditions and at the same time make reference to Sharia law in their constitutions. This has led to the situation of Sharia public policy in the GCC legal systems having a non-defined role, which is also supported by the presence of many national laws that violate Sharia law. For example, the constitutions of Bahrain, Oman, Kuwait and Qatar provide that Sharia law is one of the principal sources of law.³⁰ At the same time, there are national laws that violate Sharia law. It is important at the beginning of this discussion to outline how the GCC arbitration laws recognise the word ‘Sharia’ and then examine what is Sharia public policy.

None of the GCC arbitration laws have made explicit reference to the words ‘Sharia’ or ‘Sharia public policy’.³¹ The KSA arbitration law is the only arbitration law in the GCC states that gives effect to Sharia law, as discussed in detail in the previous chapter. However, this does not mean that Sharia public policy does not play any role in the rest of the GCC states. As explained in the above, they do consider Sharia law in their constitutions. One of the commentators in the GCC region noted that:

“Even where the Sharia is not applied in current practice, there could be a reversion to it in any particular case. Without doubt, knowledge of the Sharia will become increasingly important for practitioners, not only in Saudi Arabia, but also in the other Muslim jurisdictions”.³²

The questions to be raised are: What is Sharia public policy and what role does Sharia public policy play in the legal systems of the GCC states?

Comparative Law 187. Steven Finizio and Christopher Howitt, ‘When international arbitration meet Sharia’ (2013) *Commercial Dispute Resolution* 49-52, Mark Wakim, (n2) at 2, Musad Aljohani, *Arbitration in Sharia’a Law and in Secular Legislations: Analytical Study* (1st edn, Dar Aleman Library 1996), Ali Mansor, *Comparison between Islamis Law and Secular Legislations- Arabic* (1st edn, Dar AlFath 1970), Mary Ayad, ‘Harmonization of Custom, General Principles of Law, and Islamic Law in Oil Concessions’ (2012) 29 *Journal of International Arbitration* 477.

³⁰ The constitution of Bahrain 2002, article (2), the constitution of UAE 1971, article (7), the constitution of Qatar 2003, article (1). The constitution of Oman 1996, article (2). The constitution of Kuwait 1962, article (2).

³¹ There are two regional arbitration treaties ratified by the GCC States and they are Riyadh convention and GCC Convention. Both of these two treaties make explicit reference to Sharia public policy as a ground for refusal. Riyadh Convention, article (37) (e), GCC Convention 1995, Article (2) (a).

³² William Ballantyne, *Commercial Law in the Arab Middle East: The Gulf States* (Lloyd’s of London Press, London 1986) at 4.

8.3.1 The concept of Sharia public policy

Sharia law was introduced earlier in this thesis.³³ No precise definition for Sharia public policy has been given. One commentator defines it as:

“In Muslim Law, the concept of public policy is based on the respect of the general spirit of the Sharia and its sources (Quran and Sunnah) and on the principle that individuals (Muslim or Islamic state) must respect their clauses, unless they forbid what is authorised and authorise what is forbidden”.³⁴

Other have defined Sharia public policy as a collection of political, social and economic norms that differ in different periods of time and which should not violate the spirit of Sharia law.³⁵ However, by examining some original sources of the Sharia jurisprudential schools one can find that they commonly define Sharia public policy by simplified into three main categories of issues.³⁶ Any violation of these issues might invoke the Sharia public policy and thus for varying degrees might affect the REFAA in the GCC states.

The first category of issues is the concept of God’s rights.³⁷ This concept is based on the religious context that the God ‘*Allah*’ is the only God in the world and that all humanity shall worship him alone and not associate other Gods with him. This category is related to the religious rites of non-Muslims such as Catholics or Jews or worshippers of any other religion, which are prohibited in the KSA and seen as an extreme violation of Sharia public policy. However, Bahrain, the UAE and Qatar have relaxed this position and many churches and religious temples for non-Muslims have been built to allow non-Muslims to practise their religion freely. This is accepted under the concept of the modern state, freedom of speech and freedom to practise religion that is accepted worldwide. It is also accepted by a limited number of Sharia scholars under the general rule that the Islamic state shall protect the rights

³³Chapter four (section 4.3)

³⁴Emad Al Bishry, *The theoretical and practical concept of public policy: Comparison study of public policy in Sharia law and secular law* (Islamic library publications, KSA, 2005) at 3/Arabic.

³⁵Abdullah Alotaibi, *Public Policy in the Islamic State* (1st edn, Eshbilia Publication Centre, KSA 2009) at 6/Arabic.

³⁶Al-Bishry, (n34) at 43-44, Abdulla Madhi, *Public Policy in Islamic State - Comparative Study* (1st edn, Dar Knose Ishbilih, KSA 2008) at 4, Abdullah Alotaibi, (n35) at 16.

³⁷Al Bishry, (n34) 183.

of non-Muslims (under certain conditions) who live in its territory.³⁸ This category of Sharia public policy seems not to be closely linked to contractual relations or civil and commercial activities, such as arbitration agreements or arbitral awards.

The second category of issues of Sharia public policy is related to forbidden and non-forbidden acts under Sharia law.³⁹ It is related to the mandatory and non-mandatory rules of Sharia law. This category of issues of Sharia public policy is most closely related to the arbitration practice in the KSA, as seen in the case of Riba and Gharar, and may also play a role (albeit limited in some scenarios) in relation to the REFAA under the NYC in the GCC states. Under this category of issues, any breach of the mandatory rules of Sharia law would violate the Sharia public policy. This may be because of the Muslim belief that Sharia law is the divine law, and thus any breach of this divine law will invoke the use of Sharia public policy as a defence. It differs from the practice in different legal traditions where a breach of mandatory rules does not necessarily violate state public policy.

For example, the Swiss Court has emphasised that the public policy is not necessarily contravened when a foreign award is not in conformity with mandatory provisions of Swiss Law.⁴⁰ In addition, the German Court of Appeal, after making reference to the principle of distinction between domestic and international public policy, observed that in the case of foreign awards, not all breaches of mandatory provisions of German law constitute a breach of German public policy, since the latter only includes extreme cases.⁴¹ The concept of relaxing the approach of mandatory rules in relation to ICA is recognised by many authors and courts' practices in their decisions on the foreign arbitral awards.⁴²

However, in Sharia law there are many mandatory prohibitions or mandatory rules that are similar to those in different legal traditions. For example, the Quran prohibits Muslims from eating pork or drinking alcoholic spirits, and thus any contractual relation that includes pigs

³⁸Ibid.

³⁹Al Bishry, (n34) at 102, Abdullah Alotaibi, (n35) at 184.

⁴⁰*Inter Maritime Management SA v Russin and Vecchi* (1997) Switzerland Supreme Court 1995 XXII YBCA at 789.

⁴¹*Firm P (US) v Firm F (Germany)* (1975) German Court of Appeal, published in II YBCA (1977) at 241.

⁴²Journal of American Review of International Arbitration 'ARIA' (2007) volume 18 issues 1-2. These two issues were specified to discuss the mandatory rules in international commercial arbitration by number of articles. See chapter two (section 2.3.5).

or alcohol might violate Sharia public policy. In addition, the Quran prohibits sexual relationships between adults who are not married, and also prohibits sexual relationships between men. Hence, any sexual relations of these types will violate Sharia public policy.

The same is the case for Riba and Gharar that were discussed in the previous chapter. Riba and Gharar are both two essential requirements to the validity of the contract in Sharia law. They are both prohibited under the mandatory provisions of the Quran, and thus any contract that includes Riba or Gharar will violate the public policy of Sharia law. However, this category of issues of Sharia public policy has received different treatment in the laws of GCC countries, and is applied to the full only in the KSA. For example, the GCC modern commercial code is now applied to the issue of Riba, which permits its collection. This is a direct violation to the Sharia public policy (mandatory rules of Quran that prohibited Riba ‘usurious interest in commercial context’).⁴³ This argument is developed in the next section which proves one of the arguments that this chapter tries to defend which is that the Sharia public policy might play subsidiary role in relation to the REFAA in the GCC states (except in KSA).

The third category of Sharia public policy concerns the general concept of public interest in Islamic society.⁴⁴ Sharia public policy in this category is defined as the fundamental principles of society – economic, religious, political and moral – which all must not violate the spirit of Sharia law. Sharia public policy in this category is based on the prescribed philosophical visions of life that are derived from the words of the Quran and Sunnah.⁴⁵ This definition of Sharia public policy is quite similar to the general understanding of public policy in different legal traditions except that it is limited to the spirit of the Sharia law.

However, the above three categories of issues do not suggest a conflict in understanding of Sharia public policy; instead, they serve as the basis upon which its overall concept can be understood. The second category of issues that relates to the mandatory prohibitions in Sharia law may be the category of Sharia public policy that has the greatest likelihood of affecting arbitration agreements and the REFAA award in the GCC states. The impact of Sharia law in

⁴³ The Qur’an, chapter two, verse 275 states that “Commerce is like usury. But God has permitted commerce, and has forbidden usury”.

⁴⁴ Abdulla Madhi, (n36) at 50.

⁴⁵ Al Bishry, (n34) at 183.

the GCC states differs from the strict position adopted by the KSA. Additional analysis is required to understand the role of Sharia law in the current GCC legal systems.

8.3.2 The subsidiary role of Sharia law in the GCC legal systems

As mentioned in chapter four, the modern legal systems formed in the GCC states are strongly affected by civil law traditions. Despite this secularisation, the GCC constitutions still give effect to Sharia law, as presented in section 8.3 above. This means that the question of the role of Sharia law or Sharia public policy in the GCC legal system remains unclear. However, examining the GCC civil transactions codes shows that there is a common provision that may indicate the role that Sharia law has in civil and commercial activities in the GCC states. For example, Article 1 of the Bahraini Civil Transactions Code states that:

“(a) Provisions of laws govern all matters to which these provisions apply in letter or spirit.”

“(b) *In the absence* of a provision of a law that is applicable, the Judge will decide according to *custom* and in the absence of custom in accordance with the principles of *Islamic Sharia* that suit the conditions and circumstances of the country. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity”.⁴⁶

Hence, it can be observed from this text that it mentions that the principles of Sharia law should apply in a hierarchical order in the absence of a law or custom. All GCC states include similar texts in their GCC civil transaction codes except for the KSA.⁴⁷ However, the above provision indicates that the parties and judges are obliged to refer initially to a law, and in the absence of a law, consideration shall be given to customs, and in the absence of customs, consideration shall be given to the Sharia principles and *not* Sharia law.

In this sense, there are many codified laws in the GCC states such as civil, commercial and criminal laws that include provisions violating Sharia law. For example, the prohibition of

⁴⁶ Bahrain Civil Code 2001, law no. 19 for 2001, article (1).

⁴⁷ Qatar Civil Code 2004, law no. 22 for 2004, article (1), Kuwaiti Civil Code 1980, law no.67 for 1980 article (1), Omani Civil Code 2013, law no.29 for 2013, article (1), UAE Civil Code 1985, law no. (5) for 1985, article (1).

Riba explained in the previous chapter is prohibited under Sharia law but it is collected and recognised in all GCC commercial codes (under certain conditions), except in the KSA. Again, there are some texts in the GCC criminal codes that violate Sharia law. For example, the Quran includes mandatory provisions that regulate the punishment of murder crimes, while the GCC criminal codes provide a different understanding of the punishment of murder crimes except for the KSA, which still follows the words of the Quran.

However, it seems that in the GCC states (except in KSA) Sharia law might come into force only in the absence of a law. This argument is limited to the commercial and civil activities that might have a close relation to the REFAA in the GCC states. In this sense, the examination of what constitutes public policy in relation to arbitration practices in the GCC states does not require an analysis of Sharia law aspects, as was practised in the case of the KSA presented in the previous chapter. Given that none of the GCC arbitration laws make reference to the word ‘Sharia’ and the above quoted provision that gives the Sharia law hierarchical order in the absence of a law or custom. In addition, there is case law evidence whereby some of the GCC laws and courts practices violate the Sharia public policy in their court decisions on the REFAA.

8.4 The violation of Sharia public policy in relation to the REFAA in the GCC states

The above analysis discussed three categories of issues that define Sharia public policy. The second category of issues of Sharia public policy is related to forbidden and non-forbidden acts under Sharia law.⁴⁸ Under this category of issues, any breach of the mandatory rules of Sharia law would violate the Sharia public policy. This category of issues is evidenced for example in the position adopted by the KSA arbitration law in which it provides strict consideration to the mandatory rules of Quran and Sunnah (sources of Sharia law) that are reflected in the wordings of the KSA arbitration law. However, this section seeks to prove that the rest of the GCC states provide a different understanding to the KSA position. Although Sharia law has given a legal effect in all GCC constitutions, there is evidence that the GCC laws and some court decisions on the REFAA in fact violate Sharia public policy. This section takes one example in which the Sharia public policy has been violated by the GCC laws and courts decision on the REFAA, and that is the issue of *Riba*.

⁴⁸Al Bishry, (n34) at 183.

8.4.1 Riba and the public policy defence in GCC laws

Riba (arbitral award include a sum of interest) was defined and explained in detail in the previous chapter (section 7.3.3). *Riba* is one of the essential prohibitions in Sharia contract law, which might affect the validity of arbitration agreements and the enforceability of arbitral awards in the countries affected by Sharia law principles such as the GCC states. The question of *Riba* is a much-debated one and many have argued that *Riba* is not collected in the GCC states, and thus if an arbitral award contains a sum of interest then it may not be enforceable in the GCC states.⁴⁹ These allegations in fact lack precision as the GCC commercial codes provide certain regulations that regulate the Sharia prohibition of *Riba* (except in KSA). The following paragraphs examine how the GCC laws regulate the subject of commercial interest as used in conventional commercial transactions.

- **Riba is allowed in commercial activities**

It is important at the beginning of this discussion to clarify the mean of commercial and civil activities in the GCC states as *Riba* (commercial interest as used in conventional commercial transactions) is treated differently in this context. The GCC legal systems differentiate between civil and commercial activities by providing two separate codes that regulate such activities. In general the GCC civil codes regulate all essential elements of the contract either civil or commercial such as offer and acceptance, subject matter of the contract, and the legality of the contract and all other issue that related to the validity of the contract.⁵⁰ Therefore, in general all contractual relations in the GCC states must meet the requirements of the GCC contract laws that are part of the GCC civil codes. However, the GCC civil codes include provisions that prohibited interest *Riba* arose from contractual relations. For example, the Kuwaiti contract law provides that “any agreement for interest in consideration of utilising a sum of money or against delay in settlement thereof shall be void”.⁵¹ The contract laws of Bahrain, Qatar, and the UAE contain a similar rule.⁵² Therefore, as a general rule, in

⁴⁹ Muhammad Billah, ‘The Prohibition of *Riba* and the Use of *Hiyal*’ by Islamic Banks to Overcome the Prohibition’ (2014) 28 ALQ 392–408, Barbara Seniawski, ‘*Riba* Today: Social Equity, the Economy, and Doing Business under Islamic Law’ (2001) 39 Columbia Journal of Transnational Law at 701, Mark Wakim, (n2) at 10 and 46.

⁵⁰ See (n47).

⁵¹ Kuwaiti Civil Code 1980, article (305).

⁵² Bahrain Civil Code 2001, article 228 (1) (a); Qatar Civil Code 2004, article (568), UAE Civil Code 1985, article (714).

all GCC states, the Riba is completely prohibited by mandatory rules of GCC contract law.⁵³ Thus, if an arbitral award concerning a civil dispute (which rarely takes place in arbitration practice but in the form of an assumption) orders a sum of interest, this sum of interest might be considered as *Riba* and thus the arbitral award might not be enforceable in all GCC states. This prohibition is one of the direct inspirations of Islamic legal tradition in the GCC contract laws.

By contrast, the GCC commercial codes promulgated to distinguish between civil and commercial activities in the GCC states.⁵⁴ It generally includes provisions that define the meaning of commercial activities, and define the instances when the contract falls within the scope of the commercial codes. In general, it requires that the contract shall be between merchants for the purpose of making profit to be classified as commercial activities. It also includes provisions defining the merchant, commercial mortgage, commercial books, trade name, commercial obligations and etc. Importantly, all GCC commercial codes recognise the commercial interest Riba (usurious interest) in commercial activities, and thus it can be seen as an *exception* to the general rule that prohibited Riba in GCC civil codes.

Riba is valid and collected under modern *commercial* laws in all GCC states, except in the KSA.⁵⁵ For example, the commercial codes of Kuwait, Bahrain, Qatar, Oman and the UAE recognise the conventional interest that is classified as *Riba* for obligations arising from commercial transactions.⁵⁶ This approach is seen as a breach of one of the main prohibitions of Sharia contract law. Pursuant to the commercial codes of Bahrain and Kuwait, *Riba* is only banned if it exceeds the capital fund, or if it is above the legal rate.⁵⁷ It is specified in law that the legal rate in Kuwait and the UAE must not be more than 7% in Kuwait,⁵⁸ and 12% in the

⁵³Kuwait Cassation Court decision no 166 commercial/ 2, dated 2/3/2005, Dubai Court of Cassation, case No. 146/2008.

⁵⁴Kuwaiti Commercial Code 1980, Law no (68) for 1980, Bahrain Commercial Code 1987, Law no (7) for 1987, UAE Commercial Code 1993, Law No (13) for 1993, Oman Commercial Code 1990, Law no (55) for 1990, Qatar Commercial Code 2006, Law no (27) for 2006.

⁵⁵Kuwaiti Commercial Code 1980, articles 102 (1), 110 and 115. Bahrain Commercial Code 1987, articles 76 and 81, UAE Commercial Code 1993, articles (76, 77, 88), Oman Commercial Code 1990, article 80, Qatari Law of Central Bank No (33) for 2006, article 110.

⁵⁶ Ibid.

⁵⁷ Bahrain Commercial Code 1987, articles 76 and 81.

⁵⁸ Kuwaiti Commercial Code 1980, Articles 102 (1) and 110.

UAE in the absence of agreement.⁵⁹ In Bahrain and Qatar, the legal rate is specified by the Monetary Agency.⁶⁰ Consequently, in these states *Riba* might be considered as contrary to public policy if it breaches the mandatory provisions explained above. In Oman, although commercial law permits the payment and receipt taking of interest, it does not provide any further rules on this matter.⁶¹ Therefore, if the arbitration parties agreed on a sum of interest for the late payments, or if the arbitral award grants a sum of interest, it will be enforceable subject to the above mandatory rules. In the following section an examination will be presented of some case law where the arbitral awards included a sum of interest, and recognition and enforcement was sought in the GCC states.

- **Examples of the issue of Riba in the context of REFAA in the GCC courts**

There are cases from the national courts in Qatar and Dubai where the foreign awards included a sum of interest that was defined as *Riba* and the arbitral awards were recognised and enforced with some important observations that should be taken into account.

In *International Trading and Industrial Investment Company (ITIIC) v. DynCorp Aerospace Technology (DynCorp)*, the Qatari Court of Appeal enforced the award apart from the sum of interest.⁶² The court's reason in this case was not because the 'interest' violated Sharia public policy, but because the awarded interest was above the rate specified by the Qatari Monetary Agency.⁶³ However, the important observation of this judgment is that the Qatari Court refused enforcement of this sum of interest not because *Riba* violated Sharia public policy, as would be the position of the KSA courts. The refusal was based on the fact that the sum of interest was above the rate specified by the mandatory rule of the enforcing court, which might be seen as a breach of one of the economic principles of Qatar.

⁵⁹UAE Commercial Code 1993, articles (76, 77, 88). See also, the Abu Dhabi Federal Court of Cassation no 245/2000 dated 7 may 2000.

⁶⁰Bahraini Commercial Code 1987, article 76; Qatar: Law of the Central Bank no (33) for 2006, article 110. See also *party v party* [2010] 207 Qatari Court of Cassation/ Commercial appeal No. 207/2010.

⁶¹Oman Commercial Code 1990, article 80.

⁶²*International Trading and Industrial Investment Company (ITIIC) v. DynCorp Aerospace Technology (DynCorp)*[2008] 631 Qatar Court of Appeal. The arbitral award in this case has then refused to enforce by Qatari Court of Cassation. See chapter five (section 5.2.1).

⁶³Qatari Law of Central Bank , 2006, article 110.

In the case of *Airmec Dubai LLC v Maxtel International LLC*,⁶⁴ the Dubai Court of Cassation explained the position of the Dubai courts regarding the sum of interest granted in the arbitral award. In this case, *Airmec* was the award debtor. One of the challenges provided before the Dubai Court of Cassation was that the arbitral award issued in London was contrary to Sharia public policy because it awarded a sum of interest, *Riba*. As mentioned earlier in this chapter the UAE Civil Code defines the public policy of the state, which includes the Sharia law as one of the pillars that reflect the state public policy.⁶⁵ However, the Dubai Court of Cassation in this case explains the role of Sharia public policy if the arbitral award granted a sum of interest (*Riba*).

The court dismissed this challenge and established the following principle: In general, agreeing on ‘interest’ in any type of civil transaction is prohibited under Article 409 of the Penal Code,⁶⁶ and such agreement is also void under Article 714 of the Civil Code.⁶⁷ The court also noted that this is limited to dealings between individuals, without extending to dealings between individuals and corporate entities that are classified as merchants according to the UAE laws or the parties’ own laws. Therefore, interest collected from commercial activities is not banned pursuant to Article 76 of the UAE Commercial Code.⁶⁸

It seems that the arbitral award that includes a sum of interest will be enforced in GCC states only if it has emerged from a commercial dispute, which is common in the practices of international commercial arbitration. This is subject to the sum of interest not exceeding the

⁶⁴*Airmec Dubai v Maxtel International* [2012] 132/2012 Dubai Court of Cassation. This case is published in International Journal of Arab Arbitration [2013] Volume (5) issue (1) at 52-60, see also Dubai Court of First Instance, Judgment No 190/98, 10 November 1998.

⁶⁵See (n26).

⁶⁶ UAE Federal Penal Code 1978, Law No (3) for 1978, article (409): “Punishment by detention for at least three months and by a fine of at least two thousand Dirhams shall be inflicted upon any natural person who deals with another natural person by *usury interest* in any kind of civil or commercial transaction, including any express or latent condition that involves *usury interest*. *Latent interest* shall include any commission or benefit stipulated by a creditor, if such a commission or benefit has no corresponding real legal benefit or service provided by the creditor as a consideration. A principal debt and implied interest may be proved by all means available.”

⁶⁷ UAE Civil Code 1985, article (714) states that: “If the contract of loan provides for a benefit in excess of the essence of the contract otherwise than a guarantee of the rights of the lender, such provision shall be void but the contract shall be valid.”

⁶⁸ UAE Commercial Code 1993, article (76): “Where the loan is for a specified term, the creditor shall not be bound to accept payment prematurely, unless the debtor pays the interest which accrues for the remaining period of the loan term, save where both parties agree otherwise.”

interest rates provided by the commercial codes or monetary agencies of the GCC states. While if the arbitral award emerged from civil disputes that are not classified as commercial according to the GCC commercial codes then the arbitral award might be refused enforcement pursuant to the mandatory rules provided by the civil codes.

However, accepting the norms and standards of international commercial arbitration, such as an arbitral award including a sum of interest without making reservations according to the rules of religion, as is the case with the KSA must be seen as an ambitious move and development in the GCC states. This analysis demonstrates how Sharia law's requirement for the validity of the arbitration agreement such as Riba is now accepted in the GCC states, subject to the mandatory rules of GCC commercial law. Nevertheless, although Sharia public policy might play a subsidiary role in the GCC legal systems in relation to commercial activities, one may not generalise this argument.

This is because the GCC constitutions still give weight to the values of Sharia law and consider Sharia law as one of the principle sources of law in the GCC legal systems. At the same time, they have enacted national legislation that violates Sharia law as seen in the case of commercial codes that legalise the issue of Riba which is prohibited by mandatory rules of Sharia law. This means that there are elements of vagueness and uncertainty regarding the role of Sharia public policy in the GCC legal system. This situation provides no support to the need for certainty and predictability in the flow of international trade, including arbitration practices in the GCC states. To prevent problems in the future it is recommended that western lawyers and arbitration professionals have a reasonable grasp of the general principles of Sharia law.

In light of the current move towards secularisation in the GCC states, it is suggested that the role of Sharia public policy in the GCC legal systems might be clearly identified. For example, there may be an article in the GCC constitutions that clarify what Sharia public policy is, and in which circumstances it can be invoked. Leaving the question floating about the role of Sharia public policy in the GCC legal systems certainly brings elements of risk and uncertainty, providing no support to the development of international commercial arbitration in the GCC states. This is also evidenced, for example, by the responses of the interviewed practitioners who categorised Sharia public policy as one of the barriers to the

REFAA.⁶⁹ In the following section, there will be an examination to the emerging notion of the distinction between domestic and international public policy in the REFAA that is remarkably missed in the GCC states as seen in the previous three chapters.

8.5 The public policy defence in the view of the NYC

The NYC makes an express reference to the public policy defence in Article V (2)(b), where the NYC provides as follows:

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:”

“b. the recognition or enforcement of the award would be contrary *to the public policy* of that country”.

It is observed that while the NYC generally places significant emphasis on party autonomy under Article V (1) in general, the public policy exception under Article V (2)(b) indicates that such autonomy is not without limits. The public policy principle thus defines the boundary between party autonomy in the settlement of disputes on the one hand and the interest of the forum state on the other, putting them in direct competition.⁷⁰

However, Article V (2)(b) does not clear up the content and standards of the public policy defence but rather refers the issue to be identified by the domestic law of the relevant state. Therefore, what standards of violation of public policy are applied under the NYC? There are no uniform standards of what constitute public policy as explained earlier in this chapter. This is not an unexpected fact as one of national public policy’s essential characteristics is its uncertainty and ambiguity, and its vague nature is hence well recognised. This is because the principle of public policy touches a great variety of subjects, and its content changes as public convictions, beliefs, and interest change from time to time and from country to country.⁷¹ Thus, it may be logical since the NYC does not spell out the contents of public policy, but rather refers the issue to the law of the enforcing country, and since national laws

⁶⁹Appendix, section (e).

⁷⁰ Loukas Mistelis and others, (n20) para 26-144.

⁷¹ Alan Redfern, (n19) at 2.

do not provide a precise definition of the concept, it is clear that the ultimate decision on what may violate public policy of the enforcing country is left to the discretion of the courts of that country. Hence, it may differ not only from state to state, but also from case to case, from time to time, and from court to court of the same country.

8.5.1 Distinction between national and international public policy

The important question that is relevant to the case study of the GCC states is that when considering allegations that the REFAA would breach public policy, should the enforcing courts apply the same standards they apply to domestic arbitral awards? The general trend is in favour of a negative answer. It is accepted that the public policy defence functions to protect the fundamental notions of the legal system; it is also accepted that it should function as a means of promoting the interests of international trade.⁷² Since domestic and international relations are different,⁷³ many court practices, authors and specialised organisations recommend a relaxation of the standards of public policy to the extent that it protects the legal system and takes into account the distinction between domestic and international public policy.

The preparatory work of the NYC emphasised the narrow interpretation of what constitutes public policy under Article V (2)(b) of the NYC.⁷⁴ In addition, the 2006 amendment to the ML added an interpretative provision explaining the importance of considering international features while interpreting this law.⁷⁵ The explanatory note of this amendment noted the importance to understand the narrow interpretation of public policy as a serious violation of essential notions of justice.⁷⁶ In 2003, the International Law Association (ILA) Committee on International Commercial Arbitration⁷⁷ issued a report emphasising the narrow interpretation

⁷²Homayoon Arfazadeh, (n17) at 45.

⁷³Albert Berg, 'Consolidated Commentary' (2003) XXVIII YBCA at 655.

⁷⁴Albert Berg, (n14) at 361, Aton Maurer, (n5) at 71, ML 1985 as amended in 2006, explanatory note at 35 Para 46.

⁷⁵ ML article 2A: 'In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'.

⁷⁶ Explanatory note issued by UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para 46 at 35.

⁷⁷ See chapter two (n127).

of the public policy defence that distinguishes between domestic and international public policy.⁷⁸ This report defined international public policy as follows:

“a) *Fundamental principles*, pertaining to justice or morality, that the State wishes to protect even where it is not directly concerned; b) rules designed to serve the *essential* political, social or economic interests of the State, these being known as public policy rules; c) the duty of the State to respect its obligation towards other states or international organisations”.⁷⁹

Taking all these facts together, it seems that there is a consensus in the international arbitration community in terms of narrowing the scope of public policy as a ground for refusal under Article V (2)(b) of the NYC.⁸⁰ Yet within this general trend, there is diversity in the judicial and theoretical approaches. Two main approaches are presented below.

- **International public policy**

The presence of international public policy means that the public policy of the state should be applied narrowly.⁸¹ However, international public policy is not independent of the standards of the domestic public policy of the state; it reflects only a restricted version of these standards. Sanders, one of the drafters of the NYC, stated that the concept of international public policy covers a narrower field than domestic public policy.⁸² The need for a distinction between domestic public policy and international public policy arises from the special features of multinational commercial transactions.⁸³ International public policy, therefore, has a narrower scope of application than that applied to domestic commercial transactions. It is designed to harmonise international private contracting and adjudication with the

⁷⁸ Pierre Mayer and others, (n20) 249-263.

⁷⁹ Ibid at 254.

⁸⁰ UNCITRAL Doc. E/2704 and E/AC.42/4/Rev.1.

⁸¹ Mark Buchanan, (n11) at 512, Berthold Goldman and others, *International Commercial Arbitration* (Kluwer Law International, Netherlands 1999) para 1711-12, Di Pietro, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron 2001) at 181.

⁸² Pieter Sanders, ‘Consolidated Commentary’ (1979) IV Year Book of Commercial Arbitration at 251.

⁸³ Fernando Serrano, ‘Towards a Transnational Procedural Public Policy’ (2004) 20:4 *Arbitration International* 333-354 at 333.

fundamental principles of a legal order.⁸⁴ There is much judicial support for this approach, and none of the GCC states provide interpretations that distinguish between domestic and international public policy. This could be one of the underlying reasons that have resulted in the GCC public policy being presented as a challenge to the REFAA in the GCC states.⁸⁵

For example, in *IPCO v. Nigeria*,⁸⁶ the England and Wales Court of Appeal emphasised the narrow interpretation of the public policy by stating that if public policy was relied on to resist enforcement of foreign arbitral awards, the court should approach it with extreme caution. In the court's view, the public policy exception in section 103(3) of the UK Arbitration Act is not enacted to furnish an open-ended escape route to block the REFAA.⁸⁷

In *Technip v. Asmidal*,⁸⁸ the Paris Court of Appeal provided an explicit distinction between domestic and international public policy. The court noted that Article V (2)(b) of the NYC was in 'perfect harmony' with international public policy related to the fundamental breach of French public policy. The new French Arbitration Law went further and made explicit reference to international public policy as a ground for refusal.⁸⁹ The Australian Federal Court also provided a similar approach and added that Article V (2)(b) of the NYC is not a source of general discretion to refuse enforcement.⁹⁰ The Egyptian Court of Cassation has also taken a position that distinguishes between domestic and international public policy. In *Misr Foreign Trade Co. v. R.D Harboties (Mercantile)*, the Court of Cassation rejected the claimant's challenge and held that:

⁸⁴ Mark Buchanan, (n11) at 513.

⁸⁵ See appendix (e).

⁸⁶ *IPCO v. Nigeria (NNPC)* [2005] EWHC 726 (Comm) 2 Lloyd's Rep 326.

⁸⁷ *Ibid* at 13.

⁸⁸ *Compagnie française d'études et de construction Technip (Technip) v Entreprise nationale des engrais et des produits phytosanitaires (Asmidal)* [1998] 97/6929 Paris Court of Appeal, See also *Société O.A.O.NPO Saturn v Société Unimpex Entreprises Ltd France* [2009] 07/17049 Paris court of appeal, *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar (ASECNA) v M. N'DOYE Issakha* [1997] 96/84842 Paris court of appeal, *Société Le Pool d'Assurance des Risques Internationaux et Sociaux (P.A.R.I.S.) v. Société Razel* [1996] 94/26063 Paris Court of Appeal. All these cases are available in English at <http://www.newyorkconvention1958.org/>> Accessed June 2015.

⁸⁹ France arbitration law 2011, Decree No. 2011-48, article 1520(5): "The recognition or enforcement of the award is contrary to international public policy."

⁹⁰ *Uganda Telecom Ltd v. Hi-Tech Telecom Pty Ltd* [2011] Federal Court of Australia, NSD 171 of 2010.

“The arbitral award was not contrary to public policy as Article 226 of the Civil Code is a mandatory rule but that is unrelated to public policy under Article V (2)(b) NYC”.⁹¹

The decisions from the Egyptian and French courts may be very important for the case study of the GCC states. The national courts in the GCC states never distinguish between domestic and international public policy, particularly in the states of Qatar, the UAE, and the KSA.

- **Transnational public policy**

This approach is known as the ‘transnational public policy’ or ‘truly international public policy’.⁹² Unlike international public policy, which is based on a narrow interpretation of the domestic public policy of the enforcing state, transnational public policy is basically intended to encompass the rules and policies considered by the international community, rather than each state’s independent view.⁹³ Hence, it only includes principles that present an international consensus of the fundamental principles that must always apply as a restriction to multinational commercial transactions.⁹⁴ While transnational public policy closely resembles international public policy, they are distinct. The latter unavoidably embodies the particular character of public policy within each individual state, whereas the former is a reflection of the common standards of the international community.⁹⁵

There are a few cases that have made implicit reference to transnational public policy and none of the GCC courts has adopted this approach. For instance, the Milan Court of Appeal construed transnational public policy as a group of international doctrines shared by most of

⁹¹*Misr Foreign Trade Co. v. R.D Harboties* [2008] 64 Egypt Court of Cassation, see also *party v party* [1984] 714 for 47 judicial years, Egypt Court of Cassation. Published in Abdullsadeq, (n24) at 761.

⁹²Mantilla Serrano, ‘Towards a transnational procedural public policy’ (2004) 20 *Arbitration International* at 333-353, Mark Buchanan, (n11) at 513, Pierre Lalive, ‘Transnational (or truly international) public policy and international arbitration’ at 287, Alan Redfern, (n19) 179. See also *Allsop Automatic Inc v Tecnoskisnc* (1997) XXII YBCA at 725 Italy Court of Appeal. *W v F and V* (1994) Switzerland Court of Appeal. Cited in ILA Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Award’ at 7.

⁹³Pierre Lalive, (n92) at 287.

⁹⁴*Ibid.*

⁹⁵Mark Buchanan, (n11) at 514.

the ‘civilised nations’.⁹⁶ Equally, the Swiss Supreme Court defined public policy under the NYC as follows: The arbitral award is breaching the public policy of the state if the award violates the essential principles of morality and justice that are well-known in all civilised courtiers.⁹⁷

However, the concept of transnational public policy has attracted harsh criticism.⁹⁸ First, Article V (2)(b) of the NYC refers to the law of the forum states and not to the usages and customs of international trade. Goldman states that it is obvious that Article V (2) of the NYC refers to what constitutes public policy according to the law of the enforcing state and not according to the international or common rules.⁹⁹ Second, a truly international public policy might have unlimited scope and would therefore lead to great uncertainty.¹⁰⁰ Third, protecting the virtue of international arbitration does not require such a floating concept, as no national legal system exists which fails to defend the fundamental principles of justice and morality.¹⁰¹ Finally, the concept of transnational public policy might be an ambitious concept, though it floats in meaning. Every state has its own sovereignty, which it aims to protect by applying its individual views in defence of its legal system.

Having discussed the general meaning of public policy defence under the NYC, and how the international jurisprudence, authors, specialised organisations, and courts practices construes the public policy defence narrowly in a way that facilitates the REFAA, the following part will examine the attitudes of the Qatar and UAE courts in their decisions on the REFAA. It is remarkable in these two states that most of the foreign arbitral awards that sought recognition and enforcement were refused because of the procedural public policy that correlates with lack of due process as a ground for refusal.

⁹⁶Decision dated 4 December 1992, reported in (1997) XXII YBCA at 725.

⁹⁷*W v F and V* (1994) Switzerland Court of Appeal. Cited in ILA Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Award’ at 7.

⁹⁸Michael Reisman, (n22) at 850.

⁹⁹Goldman and others, (81) at 953.

¹⁰⁰Michael Reisman, (n22) at 851, Alan Redfern, (n19) at 179.

¹⁰¹Michael Reisman, (n22) at 855.

8.6 Lack of due process and public policy defence in the GCC states

Every modern arbitration statute recognises the concept of natural justice as an indication of the judicial nature of arbitration. It is synonymous with fairness, equality and due process, and it is at the very heart of the arbitral process.¹⁰² It is beyond doubt that the rules encompassed by the concept of public policy can be procedural or substantive. The ILA Report states that public policy may be violated either “on account of the procedures pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)”.¹⁰³ Many national courts refer to the public policy defence as a ground for refusal, either because of procedural issues or substantive issues. There are however various issues that are commonly invoked in practices as violations of public policy under Article V (2)(b).

The substantive public policy defence refers to a breach of mandatory rules or essential doctrines and values that reflect the public policy of the state, such as the Sharia public policy that discussed in the above. The procedural public policy such as the lack of due process or procedural irregularities in the arbitration process, the lack of impartiality of the arbitral tribunal, corruption in the arbitral tribunal or lack of reasons given in the arbitral award are commonly raised under Article V (2)(b) of the NYC. These classifications of the grounds as procedural or substantive are internationally accepted by many authors and court decisions on Article V (2)(b) of the NYC.¹⁰⁴ The Digest of Case Law¹⁰⁵ on the ML, and other guidance on the public policy defence under the NYC provided by specialised non-governmental organisations, considers the above classification as highlighting essential issues that might invoke public policy under the NYC.¹⁰⁶

¹⁰²Emmanuel Gaillard and others, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* at 1713, Di Pietro and M. Platte, (n81) at 184, Hakeem Seriki, ‘Enforcement of Foreign Arbitral Awards and Public Policy - A Note of Caution’ (2000) 3 *Arbitration and Dispute Resolution Law Journal* at 192.

¹⁰³Pierre Mayer and others, (n20) at 252.

¹⁰⁴Tweeddale, (n8) at 425-430, Loukas Mistelis and others, (n20) at 720, Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP 2012) at 228.

¹⁰⁵Digest of Case Law on the Model Law on International Commercial Arbitration 2012, at 183.

¹⁰⁶ICCA, ‘ICCA’S Guid to the Interpretation of the 1958 New York Convention, A Handbook for Judges’ (2011) at 110.

Although Article V (2)(b) – public policy – is the most invoked ground in resisting the enforcement of foreign awards, its invocation is rarely successful. Tweeddale notes that the reason for it being unsuccessful is that many national courts distinguish between domestic and international public policy, as explained earlier.¹⁰⁷ This applies particularly in cases where the arbitral award is challenged on the ground of procedural public policy defence such as lack of due process or procedural irregularities. However, the courts of Qatar and the UAE have provided an arguable, and very broad, interpretation of the procedural public policy, which has failed to distinguish between domestic and international public policy.

8.6.1 The case of UAE

One of the findings in chapter six was that the Dubai courts in some cases have applied a strict consideration to the issues related to fairness and due process as a public policy ground for refusal. The approach applied by the UAE courts may not reflect the standards of international public policy that were discussed above, nor may they reflect the key features of the NYC, that is, narrow interpretation of the grounds for refusal and pro-enforcement bias.

In *International Bechtel Co Ltd (US Company) v Department of Civil Aviation of the Government of Dubai*,¹⁰⁸ the Dubai Court of Cassation refused enforcement on the ground that the witnesses did not pronounce the oath in the same wording provided by the mandatory Article 41(2) of the UAE Law of Evidence.¹⁰⁹ This law is principally promulgated to regulate the statement of oaths in proceedings in national courts. The UAE arbitration law imposes a mandatory provision on the arbitrator to take the oath if there is a witness, which the arbitrator did in the *Bechtel* case. It is accepted within the meaning of public policy defence discussed earlier in this chapter that every state is sovereign within its border and the national court has a wide discretion to determine what violates the state public policy and what may not at the stage of REFAA. At the same time the NYC imposes a policy that favours the

¹⁰⁷Tweeddale, (n8) at 425.

¹⁰⁸*International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai* [2003] 503 Dubai Court of Cassation.

¹⁰⁹UAE Federal Law No 10 for 1992 issuing the Law of Proof in Civil and Commercial Transactions, Article (41) (2) Stated that ‘The witness shall swear on oath, saying that ‘I swear by Almighty God ‘Allah’ that I shall tell the whole truth and nothing but the truth. The oath shall be according to the particular custom of his own religion if he so requests’.

enforcement of arbitration awards, and the refusal occurs only where the breach of due process is substantial.¹¹⁰

The Dubai courts in the *Bechtel* case did not even explain how the use of different words in the oath affected the arbitral award or violated the public policy of the UAE. The court showed strict consideration to the mandatory rules as a public policy ground for refusal that might be detrimental to the development of international arbitration practices in UAE. For example, the ILA Report states, “Every public policy rule is mandatory, but not every mandatory rule forms part of public policy”.¹¹¹ Therefore, excessive judicial involvement under the justification of protecting the state interest is perceived as being detrimental to the arbitral process and militates against the choice of a particular country as the place for arbitration. It is remarkable that many countries extend the application of the principle of party autonomy and respect the parties’ choice in order to attract a greater amount of arbitration to take place in its jurisdiction.

In addition, the words of the oath or the declaration of the oath is an issue related to the religious beliefs of the witness. For example, the oath in Christianity is different from the words of the oath in Islam (the words adopted in the UAE law). The approach adopted by the UAE courts may be justified under the second category of issues that might invoke the Sharia public policy as discussed earlier in this chapter. In this category of issues any breach of mandatory prohibitions in Sharia law violates the Sharia public policy. The oath in Sharia law must pronounce the name of the God ‘Allah’ as adopted by the mandatory rules of the UAE Law of Proof.¹¹² However, in every legal tradition the oath is taken to prove that the party is telling the truth, which is matter of fact and not a matter of law. The competent court still has the discretion to evaluate the witness’s statement.¹¹³ Therefore, the requirement that the arbitrator shall pronounce the witness in an exact local manner might not reflect the purpose of the NYC that is to facilitate the REFAA.

¹¹⁰ICCA, ‘ICCA’S Guid to the Interpretation of the 1958 New York Convention, A Handbook for Judges’ (2011) at 14-16.

¹¹¹Pierre Mayer and others (n20) at 256.

¹¹²See (n109).

¹¹³UAE Federal Law of Proof in Civil and Commercial Transactions 1992, article (46) stated that: “If it appears to the court while hearing the case or when judging the merits of the case that the witness has given a perjured testimony, a minute shall be made to this effect and sent to the public prosecutor to take the necessary criminal actions.”

Again, in *CCI V MOI*¹¹⁴ the Dubai Court of Cassation considered that the lack of court jurisdiction was a matter of state public policy and refused to enforce the arbitral award. The court referred to the mandatory procedural rules that concern the jurisdiction of the UAE courts over the substance of the dispute in court litigation brought before the UAE courts. It is accepted that court jurisdiction is part of the public policy of the state as alleged by the Dubai courts. Yet, these mandatory national rules or ‘local standards’ might apply narrowly to the REFAA under the NYC. This may be justified under the umbrella of distinction between domestic and international public policy discussed in detail above. For example, one leading commentator on international arbitration noted that “if the arbitration concerned matters having no connection to the forum, governed by foreign law, there would ordinarily be no reason to apply the strict consideration to the national rules to claims governed by foreign law”.¹¹⁵

In addition, the NYC provides jurisdiction to the state parties without the requirement that the award debtor shall have a connection in the enforcing state, such as a permanent domicile or business branch. It might be enough that the award debtor has assets in the UAE to assume the UAE court’s jurisdiction to enforce the arbitral award. It is well known in the literature of international arbitration that one of the significant features of international arbitration is the easy enforceability of the arbitration awards worldwide, and the doctrine of forum non-conveniens- certainly hinder the enforceability of the foreign arbitral awards in UAE.

8.6.2 The case of Qatar

Chapter five found that the Qatari courts have refused enforcement through a strict consideration of the issues related to fairness and due process as a public policy ground for refusal. Between 2012–2014, the Qatari courts controversially annulled and simultaneously refused to enforce a number of arbitral awards rendered in the International Chamber of Commerce (ICC) proceedings seated in Paris.¹¹⁶ The Qatari courts in these cases considered

¹¹⁴*Construction Company International v Ministry of Irrigation of the Government of Sudan* [2013] 156/2013 Dubai Court of Cassation.

¹¹⁵Gary Born, (n9) at 3309.

¹¹⁶*Party v party* [2013] 2216 /2013 Qatar Court of First Instance, *Party v party* [2012] Qatar Court of Cassation, Petition No. 64/2012, *ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit. These cases have been highlighted in the Year Book of Commercial Arbitration YBCA (2014), volume XXXIX at 480. See also Sultan Alabdulla, ‘The Legal Nature of Arbitration Awards and the Question of Whether Omitting the Name of the Supreme Authority in the Country from the Award Is a Fundamental Flaw Which Justifies Invalidation’ (2014) 1 BCDR International Arbitration Review 29.

the issuance of the ICC awards without mentioning the name of the Emir (president) of Qatar, as violations of Qatar public policy. The Qatari courts justified these controversial refusals on the mandatory rules that concern the form of the court judgment and not the form of the arbitral award. The position of Qatar in providing extensive approach of domestic public policy as ground for refusal is detrimental to the development of international arbitration in Qatar and presented it as a hostile jurisdiction toward international commercial arbitration.

However, the courts of Qatar did not explain how the public policy of the state had been violated. It is arguable that this strict adherence to procedural forms does not even violate domestic public policy of Qatar, since these ‘reasons’ are purely formalistic and in many jurisdictions this would not in any way amount to a violation of public policy. For example, neither the arbitration law of Qatar nor the Qatari Code of Civil Procedure requires that the arbitral award should be issued under the name of the supreme authority of the State. In addition, even if one argues that the issuance of the arbitral award without mentioning the name of the supreme authority of Qatar are hardly seen as so detrimental to the state’s fundamental principles, this argument might be inappropriate.

First, the Qatari Court did not explain how the fundamental principle of the State is breached if the arbitral award is issued without mentioning the name of the supreme authority of the state. It is commonplace in global judicial practices for the judge to justify how the justice is achieved by clarifying the reasons of the judgment in the wording of the judgment. In the Qatari courts judgments where the arbitral awards refused enforcement because it was not issued under the name of the supreme authority of the state, the court justified the justice by making reference to some mandatory rules that concerned the form of court judgment. The court did not clarify the rationale and inspiration that made the arbitral awards violate fundamental principles of Qatari public policy if it lacked the name of the supreme authority of Qatar (President of Qatar).

Hence, it is thought that the Qatari courts in these cases misapplied the Qatari laws rather than a situation where the issuance of the arbitral award without mentioning the name of the supreme authority of the state violated the fundamental principles of the state public policy. In the court’s view, it violated Qatari public policy because it violated the mandatory rules of the state *that were applied wrongly* by the national courts. The wrong application of the Qatari domestic laws in this context might result from inconsistencies derived from the

overlapping enactments on arbitration in Qatar. This argument is also supported by the recent determination of the Qatar Court of Cassation in its decision on the REFAA.¹¹⁷ In this case the Qatari lower courts refused enforcement because the arbitral award was not issued under the name of supreme authority of the state. However, the Qatari Court of Cassation nullified the lower court's rulings and highlighted *the wrong application* of the Qatari domestic laws by the lower courts. Nevertheless, the position of the Qatari courts can also be traced back to a lack of familiarity with international arbitration generally that is further discussed in chapter nine in the light of the empirical studies that have been conducted.

By looking at the application of the lack of due process as a public policy ground for refusal by the Qatari and UAE courts, it may be easy to ascertain that they reflect a very broad consideration of the public policy defence as a ground for refusal. The courts in these cases did not even explain how the national interest or public policy of the states had been breached. The courts only made a strict reference to the domestic procedural mandatory rules. This may provide an answer for why the interviewed practitioners categorised the public policy of the GCC states as one of the main barriers to REFAA in the GCC states.¹¹⁸

It is recommended that in the states of Qatar and the UAE, the national courts might separate political considerations from the public policy exception as grounds to refuse REFAA. The excessive judicial involvement under the justification of protecting the state interest is perceived as being detrimental to the arbitral process and militates against the choice of a particular country as the place of arbitration. However, policy makers in the GCC states have made significant efforts to attract foreign investment and establish a friendly arbitration hub. It is doubtful whether the attitudes of Qatar and the UAE judiciaries are helpful in this task.¹¹⁹ This may threaten the hope of a friendly arbitration zone, and suggests that the judicial authorities in the GCC states are hampering the flow of international commercial arbitration.

¹¹⁷*ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit, Published in YBCA (2014), volume XXXIX at 480, *ABC LLP v. Joint Venture RST and XYZ* [2013] 826 Qatar Court of Appeal, Minas Khatchadourian, 'A Half-tone Application of the New York Convention by the Qatari Supreme Court' [2014] Kluwer Arbitration Blog. The detailed facts and court judgment is also published in BCDR International Arbitration Review, Volume 1 issue 1 at 143-148.

¹¹⁸Appendix (e).

¹¹⁹Gordon Blanke, "Case Comment: Public Policy in the UAE: The Story about the Unruly Horse That Turned into a Camel" [2012] Kluwer International Arbitration Blog.

8.7 Arbitrability and the public policy of the GCC states

The previous three chapters examined the implementation of the NYC in the states of Qatar, UAE and KSA. One of the conditions to the validity of the arbitration agreement in these three states is that the subject matter of dispute shall be arbitrable according to the national laws of these states. Therefore, this section will examine the arbitrability of the dispute in all GCC states and not just in these three states. This is in order to find out whether the question of arbitrability suggests any difficulties to the REFAA in the GCC states.

Arbitrability in general relates to the subject matter of the dispute and whether it is capable of settlement by arbitration or not.¹²⁰ Article II (1) of the NYC obliges the state parties to recognise the arbitration agreement under the condition that the subject matter of the dispute is capable of settlement by arbitration without indicating which law should determine the question of arbitrability. Again, Article V (2)(a) of the NYC provides that the court in its motion may refuse the recognition and enforcement of an arbitral award if “the subject matter of the dispute is not capable of settlement by arbitration under the law of that country”. For example, what is arbitrable in one state may not be arbitrable in another.¹²¹ National courts may by their own motion set aside the award or refuse its recognition and enforcement if the subject matter of the dispute is not capable of settlement by arbitration under their own law.

It may though be appropriate to ask at the outset of this discussion whether arbitrability simply constitutes one aspect of public policy, and if so, whether non-arbitrability should be listed as a separate ground from public policy under Article V (2)(a)? Many authors have argued that including non-arbitrability as a separate ground for refusing enforcement is superfluous, since the subject matter of the dispute is deemed to form part of the concept of public policy under Article V (2)(b) of the NYC.¹²² The legislative history of the NYC shows that the French delegate objected to the separation of non-arbitrability from public policy on the ground that this could tempt a court to “give international application to rules which were of exclusively domestic validity, and that of incompatibility with public policy was quite

¹²⁰ Tweeddale, (n8) at 107.

¹²¹ Ibid

¹²² Peter Sanders, ‘A Twenty Year’s Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1979) 13:2 *The International Lawyer* 269-287 at 270, Albert Berg, (n14) at 360, Goldman and others, (n81) at 1704, Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) at 149 and 471.

sufficient”.¹²³ Nonetheless, it was decided to retain non-arbitrability as a separate defence under Article V (2)(a) as it is now.

Other commentators are supporting the separation, arguing that the non-arbitrability ground derives from the exclusive jurisdiction of national courts.¹²⁴ As such, Article V (2)(a) aims to provide a type of scrutiny different from those provided by Article V (2)(b). Article V (2)(a) invokes the jurisdiction of a State authority, and constitutes an absolute procedural bar to the recognition of an arbitral award, irrespective of its findings, whereas Article V (2)(b) might be concerned with the merits of awards, and with setting standards to be respected by arbitrators and their awards.¹²⁵ However, the non-arbitrability question relates to both the enforcement of the arbitration agreement and to the enforcement of the arbitral award; therefore, it is thought that there might be no significant difficulties that have occurred as a consequence of separating the non-arbitrability and public policy defences.¹²⁶ The difficulty might arise in relation to the law that governs the arbitrability question within the scheme provided by the NYC.

8.7.1 Law applicable to the question of non-arbitrability

Articles II (1) and V (2)(a) of the NYC require the dispute to be arbitrable at both the pre-award stage in order to enforce the arbitral agreement, and the post-award stage in order to enforce the arbitral award. But while Article II (1) of the NYC merely requires the arbitration agreement to concern ‘a subject matter capable of settlement by arbitration’ without indicating which law should determine the question of arbitrability, Article V (2)(a) provides explicitly that it is a ground for resisting enforcement that “the subject matter of the difference is not capable of the settlement by arbitration under the law of” the country where the enforcement is sought.

Therefore, the arbitrability of the subject matter of the disputes can be raised at two stages of arbitration. It may arise at the beginning or during the arbitral proceedings. For example, at the beginning or during the arbitration proceedings there may be challenges before the court

¹²³UN Documents E/CONF.26/SR.11 at 7.

¹²⁴Homayoon Arfazadeh, (n17) at 83, Albert Berg, (n14) at 369.

¹²⁵Ibid.

¹²⁶Albert Berg, (n14) at 369.

of the seat regarding the validity of the arbitration agreement for non-arbitrability reason. In this instance, under which law should the court examine the non-arbitrability question? Article II (1) of the NYC is silent on this question. However, in this instance the arbitrability of the dispute is usually determined by reference to the law governing the arbitration agreement, or law of the place of arbitration if this is different.¹²⁷ There is almost a consensus that unless the issue of subject matter of the dispute conflicts with public policy where the arbitration takes place, then the arbitration agreement might be enforced.¹²⁸

At the enforcement stage, the parties can also challenge the arbitrability of the dispute pursuant to Article V (2)(a) of the NYC. In this instance, it is unanimously recognised by the courts that the law of the country where the enforcement of the award is sought must be applied to determine the question of arbitrability.¹²⁹ This is also supported by the fact that arbitrability is generally considered part of the state's public policy; it would appear therefore logical that enforcing courts would only apply their national standards to the issue.

However, despite the adoption of the NYC by all GCC states, the arbitration laws of Qatar and UAE are silent on which law governs the arbitrability of the dispute, neither did they list the arbitrability of the dispute as a ground to set aside the award or challenge its enforcement request. This leaves much uncertainty surrounding the question of which law governs the arbitrability of the dispute in these two states. The first assumption is that the arbitrability of the dispute in Qatar and UAE might still be challenged under the public policy of the states according to the mandatory rule (190) of the Qatari arbitration law and mandatory rule (203) of the UAE arbitration law which requires that the subject matter of the dispute should be arbitrable as an essential condition to the validity of the arbitration agreement.

8.7.2 Non-arbitrability in domestic laws

What is the justification for referring the question of arbitrability to the national laws of the country in which the recognition and enforcement is sought? The primary reason appears to be that each country is entitled to determine which disputes must be resolved judicially, to

¹²⁷Tweeddale, (n8) at 25.

¹²⁸Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academic Law Journal 874, Stavros Brekoulakis, 'Law Applicable to Arbitrability: Revisiting the Revisited *lex fori*' (2009) 21 Queen Mary University of London, School of Law, Legal Studies Research Paper No. 21/2009, Karl Heinz, 'Public Policy and Arbitrability' (1986) 3 ICCA Congress Series.

¹²⁹Albert Berg, (n14) at 199.

ensure that essential domestic standards regarding social, moral, political and economy policy are not subject to potential compromise via non-judicial means of dispute settlement.¹³⁰ Of course, this reference to the national law of the enforcing court means that a uniform standard for what matters are or are not arbitrable is missing from the NYC. On the contrary, national laws often impose restrictions on what type of issues can be arbitrated, but those restrictions vary from country to country. Each country has its own concept of what disputes should be the exclusive domain of national courts and which can be referred to and resolved by arbitration. It is suggested in this context to draw up a generally acceptable list of non-arbitrable subject matters in the context of international arbitration to reduce the risk of uncertainty caused by the diversity in the laws of contracting states regarding non-arbitrability, and to establish a uniform international standard for the application of the non-arbitrability defence under Article V (2)(a) of the NYC.

Examples of subject matters that are generally considered as non-arbitrable under national laws are matters of criminal or family law, protection of certain weaker parties, such as children, and the determination of the status (e.g. insolvency or bankruptcy) of an individual or corporate entity. In certain countries one may add issues such as competition and anti-trust law, the determination of intellectual property rights, securities transactions, disputes regarding investment in national resources and disputes involving the state or state entities that are not allowed to arbitrate at all or which require prior authorisation to do so.¹³¹

In some countries, particularly those of a common law background, the issue of non-arbitrability is governed by case law, leading to uncertainty in areas where precedents are lacking.¹³² In other countries, particularly those of a civil law background, the issue is dealt with by statute.¹³³ For example, Article 2060 of the French Civil Code provides that:

“One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning

¹³⁰Ibid.

¹³¹Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP, Oxford 2009) at 149, Loukas Mistelis and others, (n20) paras 9-2, 9-5. Albert Berg, (n14) at 369.

¹³²Russell, Francis and Judith Gill, *Russell on Arbitration* (Sweet & Maxwell, London 2003) at 12-13, Gary Born, (n9) at 246.

¹³³See in general, UN Document, A/CN.9/460 Para 32, Loukas Mistelis and others, (n20) 179 at para 9-19.

public bodies and institutions and more generally in all matters in which public policy is concerned. However, categories of public institutions of an industrial or commercial character may be authorized by decree to enter into arbitration agreements.”¹³⁴

It can be observed that excluding certain issues from the scope of arbitration reflects the fundamental policies of most countries. An example would be a foreign award granting divorce, while other non-arbitrable issues, such as disputes regarding financial provision on divorce, are less fundamentally objectionable.¹³⁵ Similarly, while criminal liability is obviously not capable of private resolution, given the public interest therein, there is no reason why the civil consequences of criminal behaviour should not be arbitrable.¹³⁶ Thus, it has been held that in order to consider a matter as non-arbitrable by the national courts, the special national interest must be more than incidentally involved in the resolution of dispute.¹³⁷

However, if we assume that one of the GCC states is a seat jurisdiction, or that a foreign arbitral award was seeking recognition and enforcement in one of the GCC states, how would the GCC laws regulate the question of arbitrability of the subject matter of the dispute? Unfortunately, none of the GCC arbitration laws or civil codes provides for similar provision as those provided by the French civil code in which it indicates the type of the disputes that cannot refer to arbitration. Therefore, the examination of this question requires a review of different national laws of the GCC states to find out the issues that fall within the exclusive jurisdictions of the national courts and thus cannot be referred to arbitration.

- **Arbitration is not permitted in matters where conciliation is not permissible**

All GCC arbitration laws include a provision requiring the subject matter of the dispute to be legal and arbitrable.¹³⁸ The breach of such a requirement may render the arbitration agreement invalid and the arbitral award unenforceable. However, the arbitration laws of

¹³⁴France Civil Code 2004, article 2060.

¹³⁵ Goldman and others, (n81) at 1706.

¹³⁶ Fraser Davidson, *Arbitration* (2nd edn, W Green publishing, Edinburgh 2012) at 61.

¹³⁷Albert Berg, ‘The Application of the New York Convention by the Courts’ (1998) 9 ICCA Congress Series 25-34 at 27.

¹³⁸ Kuwait arbitration law 1980, article (173), Oman arbitration law 1997, article (11), Bahrain arbitration law 2015, article 36(1)(b)(1).

Qatar and UAE include some outdated provisions that are affected by the heritage of the past. The KSA arbitration law is affected by Sharia law's understanding of arbitration, as seen in the previous chapter. These observations indicate a level of uncertainty to understand the subject matters that are not arbitrable in these three countries.

Qatar arbitration law states that: "Arbitration shall not be permissible in matters in which conciliation is not permissible"¹³⁹An exact articulation followed by the UAE arbitration law.¹⁴⁰ In addition, the KSA arbitration law also provides a similar indication that the matter which cannot be subject to reconciliation cannot be arbitrated.¹⁴¹ The questions raised are why do the arbitration laws of the KSA, UAE and Qatar use the capability for conciliation as the measure of arbitrability, or whether the use of the capability for conciliation as a determining factor of the arbitrability question suggests a different understanding to the fact that the disputes that reflect the public interest of the state cannot be arbitrated?

There is an Islamic jurisprudential background behind the adoption of that criterion, since the schools of Islamic jurisprudence differ on the question of arbitrability.¹⁴² The Hanbali School adopts the view that arbitration is allowed in all disputes that can be resolved by the court since the arbitrator acts in the same way as a judge. But the majority of Islamic jurisprudential schools (Hanafi, Maliki and Shafi) generally agree that any rights that can be subject to compromise, conciliation or forgiveness by people are arbitrable and vice versa.¹⁴³ They generally agree that matters representing the right of God, such as fixed punishments (that come in the words of the Quran and Sunna), are not capable of settlement by arbitration since these matters have a public dimension and thus cannot be subject to compromise, forgiveness or conciliation. According to this opinion, these matters fall within the exclusive jurisdiction of the supreme authority of the state or its representative (i.e. the competent court), whereas matters of purely private right reflect a purely private interest and therefore can be subject to

¹³⁹Qatar arbitration law 1990, article (190).

¹⁴⁰UAE arbitration law 1992, article 203(4).

¹⁴¹KSA Arbitration Law 2012, article (2) states that "The provisions of this Law shall not apply to personal status disputes or matters not subject to reconciliation."

¹⁴²Jalal El-Ahdab and Abdul Hamid El.Ahdab, *Arbitration With the Arab Countries* (3rd edn, Kluwer Law International, Netherlands 2011) at 8.

¹⁴³Ibid, Abdul Majeed, 'The legal effect of arbitration in Sharia law' (2005) 22 Journal of Law and Sharia 101-150 at 145/Arabic.

forgiveness, compromise and conciliation.¹⁴⁴ Their justification is based on the grounds that arbitration is not permitted in matters other than those in which the adversaries may relinquish or compromise their rights.

It seems that Sharia law (Quran and Sunnah) does not impose a series challenge in this regard. Most of the fixed punishments or fixed determinations that are identified by the words of the Quran are related to criminal issues or family matters whereas in fact these issues fall within the exclusive jurisdiction of the GCC national courts of most countries in today's arbitration practices. It seems that the KSA, Qatar and UAE use the capability for conciliation as a determining factor of arbitrability in order to draw attention to the fact that the law follows the approach of Islamic jurisprudential schools regarding the question of arbitrability.

It is thought that there is no need to use such articulation: "Arbitration shall not be permissible in matters in which conciliation is not permissible". This is because it suggests uncertainty to the question of what are the disputes to which conciliation is not permissible? Given that Sharia law is not a written codified body of law, and it is not well known in all parts of the world, such articulation might be therefore be detrimental to the development of international arbitration in these three states. In addition, this argument is supported by the fact that in today's practices, criminal and family disputes fall within the exclusive jurisdiction of the national courts in all GCC states as stipulated by the mandatory rules of law as will be seen in the following section. Therefore, it would be better if these three states amend this provision without the use of the capability for conciliation as a determining factor of arbitrability. It may be enough to require that the subject matter of the dispute shall be arbitrable, similar to Article II (2) and Article V (2)(a) of the NYC.

8.7.3 Disputes that are not arbitrable in the GCC states

There are many mandatory provisions in the GCC laws that prohibit some disputes from being referred to arbitration and which fall within the exclusive jurisdiction of the national courts. Firstly, the general rule as discussed above is that any matter that reflects the public interest of the state cannot be referred to arbitration. The problem is that there is no special law or legal rule in the GCC legal system that explains the matters that reflect the public interest. In this context it might be acceptable that the matter reflects the public interest, such

¹⁴⁴Ibid.

as administrative contracts, criminal law, family law, property and land law, or labour law disputes, may be not able to be referred to arbitration. In the following section the thesis examines some national laws and case law in which it provides for a number of the disputes that are not arbitrable in the GCC states.

There are some disputes that can be understood as private activities which cannot be subject to arbitration agreement in the GCC states. Bankruptcy disputes, whether personal or corporate, cannot be referred to arbitration,¹⁴⁵ and neither can intellectual property disputes such as the protection of patents, trademarks and intellectual property rights.¹⁴⁶ Antitrust and competition claims are also prohibited in the KSA, Kuwait and Qatar.¹⁴⁷ The rest of the GCC states do not have specific laws governing competition, which means that disputes relating to questions of competition law seem to be generally capable of being resolved through arbitration. The GCC states provide a different approach to the arbitrability of disputes arising from commercial agency contracts. The UAE provides that the committee on trade agencies is the sole competent body to consider any dispute that may arise out of trade agencies.¹⁴⁸ Kuwaiti law provides that national courts have exclusive jurisdiction over all claims arising between the parties out of the performance of commercial agency contracts.¹⁴⁹ In the KSA, although the rules regulating commercial agencies do not prohibit the referral of such disputes to arbitration, the competent authority has established a standard form of commercial agency contract, which provides that “any dispute will be brought before the board for settlement of commercial dispute”.¹⁵⁰ Conversely, Oman, Bahrain and Qatar are

¹⁴⁵Bahrain: The Bankruptcy and Composition Law promulgated by Decree No (11) of 1987; Saudi Arabia: The Code of the Settlement Preventing Bankruptcy issued by Royal Decree No (M/16) of 1996; Qatar Commercial Code 2004, article 607; Oman Commercial Code 1990, article 580; UAE Commercial Code, article 645.

¹⁴⁶Kuwait: Law No (3) for 2001 Relating to Patents, Design and Industrial Models; Bahrain: Law No (14) of 2006 in respect of Patents and Utility Models; Qatar Law No (30) of 2006 to issue Patent' Law, Oman: Royal Decree No (67) of 2008 Promulgating the Patent Law; Saudi Arabia: Royal Decree No (M/27) of 2004 Implementing Regulation of the Law of Patents; UAE Federal Law No (17) for 2002 Pertaining to the Industrial Regulation and protection of Patents, Industrial Drawings, and Designs. See also Jacques de Werra, 'Arbitrating International Intellectual Property Disputes: Time to Think Beyond the Issue of (Non)-Arbitrability' (2012) 3 International Business Law Journal 299-318.

¹⁴⁷Royal decree M/24 for 2013 promulgated Saudi Competition law. See Articles 9, 11, 15, 16, Kuwait: Law No (10) for 2007 promulgated the law of the protection of competition, article (24). Qatar: Law No.19 for 2006 promulgated the law of the protection of competition, article (7).

¹⁴⁸See Article 28 of the Federal Act No (14) of 1988 modifying some provisions of the federal Act No (18) of 1981 of 1981 organizing Trade Agencies.

¹⁴⁹Kuwaiti Commercial Code 1980, articles (282) and (285).

more liberal, as the Commercial Agencies Law explicitly provides that in a commercial agency dispute, the parties are free to resort to arbitration.¹⁵¹ It seems that the above explained non-arbitrability disputes do not suggest serious difficulties to the arbitrability question as they may be accepted within the general understanding of arbitrability of the dispute that reflects the state interest and thus falling within the exclusive jurisdiction of the national courts.¹⁵²

The difficulties regarding the non-arbitrability in the GCC states might derive from two factors: The first is whether Sharia law suggests that any types of the disputes are not arbitrable other than those discussed above? Second is whether the national courts of the GCC states will differentiate between domestic and international arbitrability for the REFAA.

8.7.4 The impact of Sharia public policy in limiting the scope of arbitrability

The second category of Sharia public policy discussed in section 8.3.1 concerns the issues that are prohibited by the mandatory provisions of Sharia law. As discussed earlier, Sharia law in commercial and civil activities in the GCC states (except in the KSA) is applied in a hierarchical order in the absence of law and customs. However, there are some prohibitions in Sharia law that cannot be subject to any contractual relation, including arbitration agreements. These prohibitions might affect the arbitrability question, as the GCC laws do not explicitly regulate them or explicitly consider them illegal. The GCC national courts might interpret these prohibitions as invalid subject matter in any contract, including in arbitration agreements, because they violate Sharia law.

All Sharia schools of jurisprudence agree that the matters that are not forbidden by the mandatory rules of Sharia law are capable of being subject to the parties' agreement.¹⁵³ For

¹⁵⁰El Ahdab, (n142) at 634.

¹⁵¹In Oman: article 18 of the Commercial Agency Law (Royal Decree No 26/77 as amended by Royal Decree 37/96); Bahrain: Article 30 of the Decree No (10) of 1992 with respect to the Commercial Agency as amended in certain respects by Decree No (8) of 1998 and Decree No (49) 2002; Qatar: Article 23 of the Law no (8) of 2002 on Organization of Business of Commercial Agents.

¹⁵² Alan Redfern and others, (n131) at 149, Loukas Mistelis and others, (n20) paras 9-2, 9-5. Albert Berg, (n14) at 369.

¹⁵³ El Ahdab, (n142) at 35.

example, the Quran includes some mandatory provisions about the punishments of theft and murder crimes and other mandatory determinations of inherent disputes and family disputes. These matters cannot be subject to any agreement between parties. However, these issues in general do not suggest difficulty, as in most GCC legal systems they fall within the exclusive jurisdictions of the national courts as explained in detail earlier in this chapter.

The difficulty might relate to the non-arbitrability of some issues that might come under the scope of commercial and civil activities, and which are prohibited under the mandatory rules of Sharia law.¹⁵⁴ For example, the Quran includes mandatory rules prohibiting Muslims from drinking alcoholic spirits,¹⁵⁵ and other mandatory provisions prohibit Muslims from eating pork and gambling.¹⁵⁶ Therefore, any contract that concerns pigs, alcohol or gambling cannot be subject to any contractual relation in Sharia law and the effect of this contract might be null and void.¹⁵⁷ There is no doubt that these issues are completely prohibited in KSA, and any arbitral award that includes these types of the disputes is not enforceable in KSA. For example, if the arbitration agreement aims to resolve a dispute concern an import and export of alcoholic spirits or pigs, the arbitral award will be considered null and void, because the subject matter of the dispute violates Sharia public policy. This argument is limited to the KSA as Sharia law forms the state constitution and, of course, Sharia public policy is relevant for all arbitration practices in KSA.

However, there is uncertainty in the rest of the GCC states about how they would interpret these Sharia law prohibitions if they come as a subject matter of the dispute in an arbitration agreement. This uncertainty is because of the uncertain role of Sharia public policy in the GCC states (except KSA) as explained in detail earlier in this chapter. Generally speaking, alcohol, pork and gambling are completely prohibited in Kuwait, Oman and the KSA and

¹⁵⁴Ebrahim Gatorah, *Arbitration in the Light of Islamic Sharia'ah* (Jeddah Chamber of Commerce and Industry, KSA 1994) at 17-20/Arabic.

¹⁵⁵Quran, chapter 2 verse 172 stated that: "O you who believe! Eat of the good things, we have provided for you, and give thanks to God, if it is Him that you serve." Verse 173 stated that: "He has forbidden you carrion, and blood, and the flesh of swine, and what was dedicated to other than God. But if anyone is compelled, without desiring or exceeding, he commits no sin. God is Forgiving and Merciful."

¹⁵⁶Quran, chapter 2, verse 219 stated that: "They ask you about intoxicants and gambling. Say, there is gross sin in them, and some benefits for people, but their sinfulness outweighs their benefit..." See also chapter 5 verse 90 stated that: "O you who believe! Intoxicants, gambling, idolatry, and divination are abominations of Satan's doing. Avoid them, so that you may prosper."

¹⁵⁷Ebrahim Gatorah, (n154) at 101.

cannot be subject to any contractual relation, including arbitration agreements. In Bahrain and Dubai, drinking alcoholic spirits and eating pork is permitted, and alcohol and pork are available everywhere. Qatar allows the consumption of alcoholic spirits and pork in limited circumstances, basically only for foreign non-Muslims. It is still unclear whether or not national courts will recognise pork and alcoholic spirits as valid subject matters in arbitration agreements.

It is thought that as the above countries (Bahrain, Dubai and Qatar) allow the issues that prohibited in Sharia law for consumption in the state, the nearest assumption is that they may be a subject matter of contractual relations including the arbitration agreement. This might be similar to the issue of Riba that was discussed earlier in the chapter, but the difference is that Riba is clearly allowed to be collected in the GCC states by explicit provisions in the commercial codes, while there is a lack of law in the GCC states that expressly prohibit such issues (pork and alcohol spirits) to be subject matter in contractual relations. It is thought that as these issues are allowed in Bahrain, Qatar and Dubai, the arbitral award or foreign arbitral award concerning these issues may not violate the public interest of the state. This argument shall not generalise, as the role of Sharia public policy in the GCC states is not defined (except in KSA). This remains to be tested by the courts practices of Bahrain, Qatar and Dubai.

However, within the above issues identified from the different GCC laws and Sharia law, the question arises as to whether the GCC courts will apply a strict approach to refuse REFAA under the NYC on the ground of non-arbitrability, in accordance with the specific matters mentioned above.

8.7.5 The distinction between domestic and international arbitrability

The NYC makes no distinction between domestic and international arbitrability, as Article V (2)(a) simply refers the question of arbitrability to the national law of the country in which enforcement is sought. Thus, it was generally accepted that contracting countries were entirely free to determine disputes that are not capable of resolution by arbitration in their own realm for the purpose of Article V (2)(a). However, there is an increasing trend in recent times to distinguish between national and international non-arbitrability in order to limit the scope of the latter concept.¹⁵⁸ This means that what national law considers to be non-

¹⁵⁸ Beata Kozubovska, 'Trends in Arbitrability' (2014) 1:2 IALS Student Law Review 20-27.

arbitrable in relation to domestic arbitration would not be necessarily deemed so in relation to international arbitration or REFAA.¹⁵⁹ Thus enforcing courts might interpret the restrictions imposed by national law upon arbitrability narrowly if the arbitration is related to multinational transactions.¹⁶⁰

The underlying rationale of this distinction is that the needs of international trade are different from those of domestic commerce. As discussed above, the exclusion of some matters from arbitrability under national law reflects the political, social and economic prerogatives of the state, and its general attitude toward arbitration. These elements would require a balance between the mainly domestic importance of reserving particular matters to be dealt with judiciary, and the more general public interest of promoting international trade and comity through an effective means of dispute settlement. Such considerations have led to the conclusion that the scope of arbitrability in the context of international arbitration may be wider than the purely national context.¹⁶¹ In addition, this distinguishing between national and international non-arbitrability may be further supported by the fact that such a distinction appears to be one aspect of the recent trend of distinguishing between national and international public policy under Article V (2)(b) of the NYC that was discussed in detail earlier in this chapter.

For example, in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*,¹⁶² the US court held that the issue of arbitrability would be interpreted *more broadly* in an international context than in a domestic context. The court stated:

‘That concerns of international comity, respect for the capacities of foreign and transnational tribunal, *and sensitivity to the need* of the international commercial system for predictability in the resolution of the disputes require that we enforce the

¹⁵⁹Stavros Brekoulakis and Loukas Mistelis, *Arbitrability: International and Comparative Perspectives* (1st edn, Kluwer Law International, Netherlands 2009) at 21.

¹⁶⁰Gary Born, (n9) at 278, Karl Bockstiegal, ‘Public Policy and Arbitrability’ (1986) 3 ICCA Congress Series at 181.

¹⁶¹Loukas Mistelis and others, (n20) at 774, Albert Berg, (n14) at 146, George Bermann, ‘The “Gateway” Problem in International Commercial Arbitration’ (2012) 37:1 *The Yale Journal of International Law* at 12, Tweeddale, (n8) at 107, Karl Bockstiegal, (161) at 182.

¹⁶²*Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* [1985] 473 US 614 (US Supreme Court). Case available at <http://www.newyorkconvention1958.org/> Accessed June 2015.

parties agreement, even assuming that a contrary result would be forthcoming in a domestic context'.¹⁶³

By contrast the Dubai courts in 2011 refused the recognition and enforcement of arbitral awards concerning a dispute about property in the UAE.¹⁶⁴ In this case, the arbitration took place in Dubai under the auspices of the Dubai International Arbitration Centre (DIAC) Rules.¹⁶⁵ The dispute was about a sale agreement between the award creditor (foreign party) and the award debtor (local real estate developer). The award creditor's claim put before the arbitrator was that the agreement was null and void because the purchase had not been registered with the Interim Real Estate Register of Dubai within the determined period, as is otherwise required under Article 3 of Law No 13/2008 regulating the Interim Real Estate Register.

As a result, the arbitrator determined that the purchase agreement was invalid and ordered the real estate developer to return the sale amount and pay interest as well as the other party's arbitration costs. The award debtor (local real estate developer) challenged the arbitral award before the Dubai Court of First Instance on the ground that the arbitrator had exceeded the limits of his jurisdiction and annulled the sale contract. The Court of First Instance rejected this argument and upheld the award. When the case ultimately reached the Dubai Court of Cassation, it annulled the award on the ground of the non-arbitrability of the subject matter of the dispute.¹⁶⁶ Although the arbitral award in this case annulled the sale contract, the Dubai Cassation Court rendered the arbitral award as violating the UAE public policy and thus annulled it because of the reason of non-arbitrability.

More recently, the Abu Dhabi Court of Cassation¹⁶⁷ made a distinction between the circumstances in which the subject matter of the arbitration agreement concerned property in the UAE, but the court determined that the dispute was not related to public interest. In this case, the dispute concerns a sale agreement concern property located in Abu Dhabi. The

¹⁶³Ibid

¹⁶⁴*Party v party* [2012] Appeal No: 180/2011 Dubai Court of Cassation.

¹⁶⁵Official website of Dubai International Arbitration Centre <http://www.diac.ae/idias/> accessed April 2015.

¹⁶⁶*Party v party* [2012] Case No: 180/2011 Dubai Court of Cassation.

¹⁶⁷*Party v party* [2014] Appeal No.55 for 2014 Abu Dhabi Court of Cassation.

respondent/award debtor failed to hand over the property pursuant to the time of handover that the parties had agreed in the purchase contract. The dispute was arbitrated according to the arbitration clause in the underlying contract, and the arbitral award was issued in favour of the claimant, who terminated the contract and refunded the amount paid by the claimant.

However, the lower courts annulled the award on the basis of Article 3 of the Civil Code. This article defines the UAE public policy as discussed in section 8.3. The Abu Dhabi lower Courts held that “the circulation of wealth and the rules of individual ownership are matters of public policy and therefore are non-arbitrable in the UAE”. Nevertheless, the Court of Cassation annulled the rulings of the lower courts and established a new principle in this regard. The court noted that although in principle properties cannot be subject to arbitration agreements because of the public policy reason, the arbitral award in this case related to a dispute that reflected purely private interest and did not relate to the public policy of the state or the issues mentioned in Article (3) of the civil code, such as circulation of wealth or rules of private ownership that constitute the state public policy.

The Abu Dhabi Court of Cassation reasoned that:

‘There is no justification for invoking public policy grounds to apply this mandatory rule of law [Article 3 of UAE Civil Code], which, being unrelated to public policy, *can be the subject of conciliation* and, in turn, a subject matter for arbitration’.¹⁶⁸

It seems that the court gave more weight to the determination of the arbitral award. The arbitral award in this case determined the rights and obligations of the parties, which are arbitrable in the court’s opinion even if the subject matter of the arbitration concerns property located in the UAE. However, it seems that if an arbitral award extends to property itself, then the subject matter of the dispute may be void and non-arbitrable because of the public policy of the UAE. The court also confirmed that the subject matter of the arbitration related to the private interests of the parties in which arbitration was permitted.

This thesis suggests that denying recognition and enforcement where a dispute is considered non-arbitrable under the strict position taken by the GCC laws will not always be the correct approach, and that the issue of non-arbitrability might be narrowly construed. The prevailing

¹⁶⁸Ibid.

view has been to support a distinction between national and international non-arbitrability in order to limit the scope of the latter concept. Under this view, the fact that a specific matter is considered to be non-arbitrable in relation to a domestic dispute does not necessarily mean it is so in relation to international arbitration or the REFAA. The adoption of a similar interpretation to the above-quoted one by the GCC courts would, on the one hand, leave considerable scope for the GCC states to give effect to national policies, and on the other hand, comply with the narrow interpretation of public policy, including the question of arbitrability. However, the question of whether the GCC courts would exercise their discretion to not refuse the REFAA for the non-arbitrable matters discussed above must still be tested by court practices.

8.8 Summary

The analysis in this chapter has demonstrated that there are two potential reasons why the public policy of the GCC states presents a challenge to the REFAA. The first reason is the undefined role of Sharia public policy in the GCC legal systems, except in the KSA where Sharia law forms the state constitution. Sharia public policy plays a subsidiary role in all GCC legal systems (except the KSA) and it may be invoked only in the absence of a law or customs. This argument is limited to civil and commercial transactions, which are usually relevant to arbitration practices. An example of this argument is found in the issue of *Riba* that has blocked the REFAA in the KSA in more than one case for reasons of Sharia public policy. However, *Riba* is now collected and recognised in the rest of the GCC states despite it violating Sharia public policy. Sharia public policy might also be limitedly relevant to the arbitrability question in all GCC states.

However, in light of the current move towards secularisation in the GCC states, it is suggested that the role of Sharia public policy in the GCC legal systems must be clearly identified. For example, there may be an article in the GCC constitutions that clarifies what Sharia public policy is, and in which circumstances it can be invoked. Leaving the question floating about the role of Sharia public policy in the GCC legal systems certainly brings elements of risk and uncertainty, providing no support to the development of international commercial arbitration in the GCC states. This is also evidenced, for example, by the responses of the interviewed practitioners who categorised Sharia public policy as one of the barriers to the REFAA.

The second reason that might present GCC public policy as a barrier to the REFAA relates to the lack of judicial distinction between domestic and international public policy. This argument is evidenced in the states of the UAE, Qatar and the KSA. The Qatari and Dubai courts take into strict consideration the issues related to unfairness and lack of due process as a public policy ground for refusal. The KSA also takes into strict consideration the issue of Sharia public policy as a ground for refusal.

Any sort of proposal to enhance the efficiency of the NYC in the GCC states has to take into account the necessity of relaxing the consideration of public policy as a ground to refuse REFAA in the states of Qatar, UAE and KSA. This sort of consideration should strike a balance between the state interest and the need for the free flow of international trade in the GCC states. This might be achieved by adopting the approach of distinguishing between domestic and international public policy in the domain of international commercial arbitration. The excessive judicial involvement under the justification of protecting the state interest is perceived as being detrimental to the arbitral process and militates against the choice of a particular country as the place of arbitration. It is questionable whether the GCC court jurisprudence is aware of the issue of the narrow interpretation of public policy as a ground for refusal under Article V (2)(b) of the NYC.

The next chapter examines these issues in practice, and reveals an emerging phenomenon whereby the lack of familiarity of the GCC judiciaries with arbitration generally, and with the NYC in particular, has become a barrier to the REFAA under the NYC. The chapter discusses the reasons behind this phenomenon and suggests some possible solutions.

Chapter Nine: Understanding the Jurisprudence of the GCC Courts

9.1 Introduction

One of the claims made in chapter one was that the judges interviewed for this thesis lack familiarity with the New York Convention¹ (NYC) and its role in the world of international commercial arbitration. The case law analysed in chapters 5-7 provides evidence supporting this hypothesis. One of the common findings of chapters five and six was that the Qatari and United Arab Emirates (UAE) judiciaries in a number of cases neglected the state adoption of the NYC in their court decisions on the recognition and enforcement of foreign arbitral award (REFAA). In addition, the Qatari court requirement that the arbitral award has to be issued under the name of supreme authority of the states (president of Qatar) and the Dubai court required that the award debtor should have permanent domicile or a business branch in Dubai. These two principles (local standards) established by the Dubai and Qatari courts absolutely undermine the purpose of the NYC. Chapter seven also suggests a concern about strict consideration to the issue related to Sharia law that have blocked the REFAA in a number of cases. Therefore, this chapter seeks to examine the possible reasons behind the emerging phenomenon² whereby the GCC judiciaries constitute a barrier to the REFAA, and to further discuss the possible solutions that would enhance the GCC judiciaries' familiarity with the NYC. The chapter relies mainly on an analysis of the interview results and a comparative case law approach, with the aim of comparing the judicial practices of developed arbitration jurisdictions with those of the GCC states.

The NYC is at work only in the courtroom, which means that its terms and provisions have to be construed by national judges, and then applied to the facts of a case. The presence of efficient judiciaries capable of interpreting and applying the NYC in a manner compatible with international arbitration norms and standards is an important pillar for the use of

¹ "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739."

² Ahmed Almutawa and A.F.M. Maniruzzaman, 'Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study' [2015] *Transnational Dispute Management*, at section (3.2.2) at 25 and (section 3.3) at 28, Essam Al Tamimi, 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1:1 *BCDR International Arbitration Review* 95-104 at 99.

arbitration in any state.³ But the hypothesis that there is a lack of familiarity of the GCC judiciaries with the NYC is supported by the results of the interview study conducted over the judges from Bahrain and Dubai courts and the case law from Bahrain and Kuwait national courts, as will be analysed in this chapter.

Overall, therefore, there is much evidence that the judicial understanding of the NYC and its requirements might constitute a barrier to promoting the system of REFAA in the GCC states. Failure to confront this barrier might negatively affect the flow of international arbitration in the GCC states.

In response to this hypothesis, the chapter first examines how the NYC is supposed to be implemented in the domestic legal system in all state parties, before then examining the implementation process in the GCC and the uncertainties that this causes. The chapter secondly examines the principle of autonomous interpretation and how this principle works in developed arbitration jurisdictions but is missing in the GCC states. The third part of this chapter examines the important role of taking a comparative approach in applying and interpreting the NYC provisions, which is also missing in the GCC judicial practices concerning the REFAA.

9.2 Understanding the operation of the NYC at the domestic level

This section aims to discuss how the NYC operates in the domestic legal systems of countries which are state parties to the treaty; this is to better understand the type of problem that is tackled in this chapter. It is accepted that the NYC is an international treaty that internationally obliges state parties to recognise and enforce foreign arbitral awards. At the same time, most if not all national arbitration laws include provisions which regulate the REFAA. The wide adoption of the Model Law on International Commercial Arbitration⁴ (ML) as a national arbitration law has also enhanced the consistency between the NYC provisions and national arbitration law in this regard. However, at the domestic level, the incorporation of the NYC provisions in the national arbitral laws takes different forms. It is either found in a domestic law, which makes explicit reference to the NYC, or a

³Jan Paulsson, 'Why Good Arbitration Cannot Compensate for Bad Courts' (2013) 30:4 *Journal of International Arbitration* 345-360, Howard Holtzmann, 'Judicial application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1999) 5 *International and Comparative Law Review* 481-495.

⁴"UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006. General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006)."

domestic law that indirectly incorporates similar provisions to the NYC without reference to the NYC. The fact that the NYC and national arbitration laws regulate the same topic that is REFAA leads in some jurisdictions such as the GCC states to uncertainty about whether the national courts are obliged by the NYC provisions or the provisions of the national arbitration laws in their decisions on the REFAA. This requires further analysis to the relationship between international and domestic law.

9.2.1 The relationship between international law and domestic law

The relationship between international law and domestic law is a much-debated topic.⁵ After the states have fulfilled the formal requirements such as adoption/signature/ratification that make an international treaty legally binding for the state parties, the question of how the state parties should implement such an international treaty, also referred to as international conventions, into their legal systems needs to be answered. For example, if a state ratifies the NYC, does that fact alone suffice to enable the award creditor to ask the enforcing court (ratifying state) to enforce his/her arbitral award against the award debtor and in accordance with the NYC? The answer to this kind of question is thought by international law jurisprudence to depend on whether the state subscribes to the theory of monism, on the one hand, or dualism, on the other.⁶

The monist theory assumes that international law and domestic law constitutes a single system in which international law is applied within a given legal system without the need for it to be transformed into domestic law by legislation.⁷ In a monist legal system, international law is part of the internal legal system without the need for internal legislation to give effect to international law. The dualist theory, by contrast, considers that international law and domestic law operates on different planes, international law governing relations between states, and domestic law relations within a state.⁸ For example, ratification of a treaty by a state would impose obligation upon it at an international level, but would have no effect on

⁵E. Borchard, 'The Relation between International Law and Municipal Law' (1940) 27 Virginia Law Review 1, Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (1st edn, OUP, Oxford 2011) at 3

⁶These two theories are very well known in the literature of international law. See for example Ian Brownlie, *Principles of Public International Law* (7th edn, OUP, Oxford 2011) 31-32.

⁷Ibid at 31-32.

⁸Ibid.

the state's domestic law unless the legislature issued domestic law that gives effect to the adopted treaty in domestic level. In a dualist legal system, international law is independent from national laws and does not have effect on the rights and obligations at the national level, unless domestic legislation was issued to give effect to the international law in internal legal systems.⁹

Throughout the twentieth century, international legal scholarship was divided over whether the international law and domestic legal orders constituted a single system (monism) or whether each domestic legal system was self-contained, separate from others and from the international system (dualism).¹⁰ In present times, these debates seem to have evaporated, as they failed to provide answers to many questions raised by current practices.¹¹ The development of the independent nations, constitutional law and international organisations play a crucial role in this regard.¹²

This is particularly relevant to the way that the NYC has been implemented in domestic legal systems of the state parties. For example, some states parties to the NYC that are categorised as monism state have issued a domestic law that also performs the same purpose of the NYC that is the REFAA. In some dualist states they have issued a domestic law that regulates the REFAA, and at the same time the national courts have interpreted the provisions of this domestic law in the context of the corresponding provisions of the NYC. By contrast, other dualist states such as the GCC states, do not make reference to the NYC in their court decisions on the REFAA, as the recognition and enforcement occurs at domestic level by national laws.

All these practices suggest different understanding to the doctrinal concept of the monism and dualism theories discussed above. It also suggests a level of uncertainty surrounding the

⁹ Hans Kelsen, *Principles of International Law* (3rd edn, Library of Congress Catalog 1959) at 403.

¹⁰ For introduction to the historical debate see Janne Elisabeth, *New Perspectives on the Divide Between National and International Law* (1st edn, OUP, Oxford 2007) 1-56.

¹¹ Ibid at 2.

¹² Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (1st edn, OUP, Oxford 2011) at 1.

ideal interpretative approaches adopted by the national courts in their courts' decisions on the REFAA.

9.2.2 The potential gap in the interpretative approach in the court's decisions on the REFFA

The exact form of implementation adopted in a country is partially predictable. For example, some states (monism states) consider an international treaty as self-executing once the state has ratified it, and hence do not require domestic legislation to implement the treaty. Most of these states consider international treaties to have hierarchical authority over national laws, and their provisions prevail over the texts of national laws in cases of conflict, or in cases where the national law violates the provisions of the international treaty. The best example to explain this scenario is that of France. Although the French constitution¹³ considers international convention as self-executing, it has issued a larger domestic law (Code of Civil Procedure) that indirectly incorporates similar provisions to those of the NYC (without any reference to the NYC). Therefore, in France the REFAA occurs at the domestic level in addition to the state commitment at international level.

In other countries, the constitution requires the issuance of domestic law to give the ratified international treaty binding force in the internal legal system (dualism states). This is, for example, the position adopted by all GCC states. Some of the GCC states issued a dedicated law called the 'NYC implementing decree' that directly incorporate the NYC provisions in which the provisions of the NYC are attached to the law as a schedule as with the states of Qatar and UAE.¹⁴

Other states might incorporate the NYC in a larger text such as an 'Arbitration Law' or 'Code of Civil Procedure'. For example, in the UK Arbitration Act 1996, the NYC is expressly cited within the text of the law.¹⁵ Other states have adequately implemented the NYC by enacting the ML, which contains similar provisions of recognition and enforcement to the NYC but without making explicit reference to the NYC. An example of this scenario is the position

¹³French Constitution 1958, Article 55: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party".

¹⁴Qatar legislative decree No (29) for 2003, UAE Federal legislative decree no (43) for 2006 on implementing the provisions of the NYC.

¹⁵UK Arbitration Act 1996, section (100-104).

taken by Bahrain and Oman. However, according to the UNCITRAL report, the vast majority of NYC states parties have incorporated the provisions of the NYC *indirectly* in their national laws, such as through an Arbitration Act, Code of Civil Procedure or private international law rules.¹⁶ This suggests that the NYC in most state parties operates through domestic law further to the state commitment at international level to implement the NYC to the REFAA.

Following from this situation, a problem that may arise during the operation of the NYC at the domestic level is one related to the interpretative approach that is followed by national courts. On the one hand, the judge is more likely to refer to the international rules of interpretation that are classified for international treaties if he/she has to directly interpret the provisions of the NYC. On the other hand, the judge is more likely to follow the domestic rules of interpretation if he/she has to interpret the domestic law that emerged from the NYC or domestic law that regulates same topic of the NYC (REFAA). In the latter case, the judge might lose sight of the international origin of this domestic law.¹⁷ The judge might also lose sight of the family ties between the NYC provisions and the relevant domestic law, in the sense that both of them regulate the REFAA. This potential interpretation problem appears clearly in the case study of the GCC states, albeit it is not necessarily the case in all state parties to the NYC.

A further problem that can arise with dualist states is that there is no legal obligation for the national courts to interpret the domestic law that regulates the REFAA in the context of the NYC, and to take into account the spirit and purpose of the NYC that is to facilitate the REFAA. This is a potential interpretation problem that also appears clearly in the case study of the GCC states, albeit again it is not necessarily a problem that occurs in all state parties to the NYC. Consequently, it is notable that most of the GCC judgments on the REFAA occur at a domestic level, which is not a problem in itself.

¹⁶See the “Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)” UNCITRAL Documents (2008) A/CN.9/656, page 8 Para 2.

¹⁷Frederic Gelin and Fabien Gelin, ‘From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives’ (2013) published in *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (1st edn Huntington, New York 2013) 261, see also Jacob WF Sundberg, *A Uniform Interpretation of Uniform Law* (Almqvist and Wiksell 1966) at 224, Schreuer C.H., ‘The Interpretation of Treaties by Domestic Courts’ (1971) 45 *The British Yearbook of International Law*, at 255-257, IM Sinclair, ‘The Principles of Treaty Interpretation and Their Application by the English Courts’ (1963) 12 *International and Comparative Law Quarterly*, at 530-543.

The problem that is focused upon in this chapter is related to the fact that most of the GCC judgments on the foreign arbitral awards *do not refer* to the NYC or its internationally-accepted features. This creates a sphere of uncertainty regarding the applicability of the NYC to REFAA in the GCC states. Given that the NYC is a treaty that is correlated with the system of dispute resolution in international trade, having a level of certainty about the judicial acceptance of the NYC, including its internationally accepted features, is of utmost important in developing countries with emerging economies such as the GCC states. The question raised is how can this be achieved?

The hypothesis that is developed in the following discussion is that this may be achieved by the adoption of the principle of autonomous interpretation, and comparative approaches in the GCC court decisions on the REFAA. This is not a unique argument and these two approaches have already been implemented in developed arbitration jurisdictions in their courts decisions on the REFAA. These two approaches (autonomous interpretation and comparative approaches) are remarkably missed in the GCC courts' decisions on the foreign arbitral awards. This is proved through empirical interview study, and GCC case law on the REFAA.

9.3 Summary of the interview results

To support this understanding of judicial practice in the GCC, interviews were conducted with practitioners from the GCC states and judges from the Bahraini and Dubai courts. However, the analysis in this chapter is also relevant to all of the judiciaries of the GCC states. The interviewed practitioners identified the lack of knowledge of GCC judiciaries on arbitration generally, and the NYC in particular, as a barrier to the REFAA in the GCC states.¹⁸ Another recently-published empirical study on a wide number of arbitration practitioners in the GCC states has also found that the GCC judiciaries' lack of knowledge on the NYC as a major barrier to the REFAA.¹⁹

Detailed information on the interview study is attached in the appendices of this thesis and summarised in this chapter. Most of the evidence strongly supports a hypothesis that the judiciary in the GCC are not well equipped to apply the NYC in their work, as will be

¹⁸See the appendices, section (e) / questions for practitioners: question No.9.

¹⁹See (n2).

summarised in the next section which details the responses of judges to a series of questions.²⁰

1. Do you think the judiciary should support the flow of international commercial arbitration in the GCC states?

Most of the judges answered yes to this question, with reservations made regarding the *public policy* defence and the necessity of protecting the state interest. There were two judges who seemed to have an aggressive attitude in terms of supporting the flow of arbitration in their countries. These two judges emphasised the necessity of evaluating how the arbitrator applied the law to the facts of the dispute in order to protect the justice system. They argued that this is premised under the public policy defence.

2. How does the NYC operate in your legal system?

All of the judges from Bahrain and Dubai confirmed that the REFAA occurs at the domestic level through the provisions provided in the arbitration laws (dualism). In the case of a conflict between the provisions of the NYC and the national arbitration law (as is the case in Dubai), *three out of five judges* in the Dubai courts confirmed that they were bound by the texts of the arbitration law, which is inconsistent with the NYC provisions. Only two judges from the Dubai courts confirmed that foreign arbitral awards are subject to the NYC implementing decree (see chapter six, section 6.2 for more details).

3. What is your understanding of the globally-accepted features of the NYC?

Only one judge from the Dubai courts mentioned the feature of exclusive grounds for refusal as one of the purposes of the NYC. The rest of the judges asked me a counter question, enquiring about *what sort of features I was referring to*. I replied that the most commonly known features of the NYC were exclusive grounds for refusal, narrow interpretation of the grounds for refusal and pro-enforcement bias, as these features reflected the spirit and purpose of the NYC. They replied that *they were not bound* to take into account the NYC

²⁰See the appendices, section (e) questions for judges.

features as the REFAA occurs through domestic law (dualism), and they were bound by the texts of the law.

4. How do you interpret the terms and provisions of the NYC/ implementing law?

In response to this question, *only one judge* from the Dubai courts confirmed that he often referred to the preparatory work of the NYC and the guidance materials on the NYC. *The rest of the judges* emphasised that the NYC implementing law was normal domestic law and they interpreted it by referencing to the same interpretative approach that used for interpreting any other domestic law, which is normally based on the legal tradition of the state.

5. Do you think it is important to interpret the provisions of the NYC/implementing law in a way that is compatible with international best practice?

Two judges from the Dubai courts confirmed the importance of interpreting the NYC provisions by consulting the prevailing interpretation in international best practice. *The rest of the judges* emphasised the concept of state sovereignty, and felt there was no need to understand how the provisions of the NYC were interpreted in international best practices.

The judges were also asked a number of other questions that aimed to investigate their level of involvement with the NYC guidance materials²¹ and various court decisions on the NYC that are continuously issued by UNCITRAL. Most of the answers were negative, suggesting no or little direct use of NYC or UNCITRAL material.²² The judges were also asked if they had access to any online databases or journals that published various court decisions on the NYC, or whether there are any educational programmes on the NYC that they have or could have access to. Again, most of the answers were negative, suggesting no or little attempt or obvious opportunity to become more aware of the NYC.²³

²¹The Guidance on the NYC that was issued by UNCITRAL is explained in section 9.6.

²²See the appendices, section (e) questions for judges, question no. (9, 11, 12).

²³Ibid, question no. (13-15).

9.4 The negative role of GCC judiciaries in the context of the interpretative approach

The lack of knowledge of judges in the GCC of the NYC reveals itself in their interpretative approach. The fact that the NYC does not include interpretation criteria within its texts, and also the fact that the REFAA occurs in most NYC state parties by reference to domestic law, creates the potential for tension in some jurisdictions regarding the interpretative approaches that are applied by different national courts.

The case law that was analysed in previous chapters shows the critical position of the GCC national courts, with chapter five in particular revealing that the Qatari judiciary in a number of cases²⁴ has neglected the state adoption of the NYC, despite the fact that the NYC became part of the internal legal system through the domestic law, i.e. the ‘NYC implementing decree’.²⁵ In another cases, the Qatari national courts arguably required that the foreign arbitral award should be issued under the name of the supreme authority of Qatar (president of Qatar).²⁶ These cases may directly show the level of knowledge of the Qatari judiciary on arbitration generally and the NYC in particular.

In addition, in a number of cases the Dubai courts gives less weight to some features and spirit of the NYC, such as the narrow interpretation of the grounds for refusal, pro-enforcement bias, and exclusive grounds for refusal. In the case of *Bechtel*,²⁷ the court provided a very broad interpretation on what constitutes a lack of due process.²⁸ In this case the arbitrator failed to take the oath from the witness in the exact local manner, and thus the court annulled the arbitral award and refused its enforcement on the ground of public policy

²⁴*International Trading and Industrial Investment Company (ITIIC) v. Dyncorp Aerospace Technology* [2006] 1013 Qatar Court of First Instance, [2006] 631 Qatar Court of Appeal, [2008] 33 Qatar Court of Cassation,

²⁵Qatar legislative decree No (29) for 2003, Reza Mohtashami and Merry, ‘The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. DynCorp’ (2012) 29:4 *Journal of International Arbitration* at 429 – 436.

²⁶*Party v party* [2013] 2216 Qatar Court of First Instance, *Party v party* [2012] 64 Qatar Court of Cassation, *ABC LLP v. Joint Venture RST and XYZ* [2014] 45 and 49, Qatar Court of Cassation, Second Civil Circuit. These cases have been highlighted in the YBCA (2014), volume XXXIX at 480. Sultan Alabdulla, ‘The Legal Nature of Arbitration Awards and the Question of Whether Omitting the Name of the Supreme Authority in the Country from the Award Is a Fundamental Flaw Which Justifies Invalidation’ (2014) 1 BCDR International Arbitration Review 29–38 (Arabic).

²⁷*International Bechtel v. Department of Civil Aviation of Dubai* [2003] 503 Dubai Court of Cassation.

²⁸See chapter six (section 6.6.1).

defence.²⁹ Again, in *MOI v CCI*³⁰ the Dubai courts refuse to enforce a foreign arbitral award and established that it lacked the jurisdiction to hear the enforcement request because the award debtor did not have a business branch or permanent domicile in Dubai. However, the NYC does not require the award debtor to have a business branch or permanent domicile in the countries where the arbitral award is seeking recognition and enforcement.³¹

In addition, the judicial practice of the KSA has never referred to the NYC in the texts of the judgments that concern the REFAA in the KSA. For example, the KSA courts continuously refer to Sharia public policy as a ground for refusal without even referring to Article V (2)(b) of the NYC.³²

A commonality between these three states is the lack of distinction between domestic and international public policy regarding the REFAA, as shown in detail in the previous chapters. Therefore, these observations, alongside those of the interview study, suggest that there are worries about the GCC jurisprudences' level of familiarity with the NYC. This argument is not limited to the above outlined cases, but also has relevance to the courts of Bahrain and Kuwait as will be shown in section 9.5.1.

In the following paragraphs, there will be an examination of some case law from developed arbitration jurisdictions, which provides a desirable technique of interpretation in the court decisions on the REFAA. In these cases, although the NYC operates at the domestic level through domestic law, the judiciaries in their judgments on the REFAA often reconcile the provisions of the domestic law and the NYC (corresponding provisions) bearing in mind its international features and its overall purpose. This type of interpretation, defined as

²⁹UAE Federal Law No 10 for 1992 issuing the Law of Proof in Civil and Commercial Transactions, Article (41) (2) Stated that ‘The witness shall swear on oath, saying that “I swear by Almighty God that I shall tell the whole truth and nothing but the truth. The oath shall be according to the particular custom of his own religion if he so requests”’.

³⁰*Construction Company International v Ministry of Irrigation of the Government of Sudan* [2013] 156/2013 Dubai Court of Cassation. [2013] 40 Dubai Court of Appeal, [2012] 489 Court of First Instance

³¹See chapter six (6.6.2).

³²Board of Grievances, *The Audit Committee* (5th edn, Ministry of Justice of Saudi Arabia 2002) 6-9/Arabic decision No: 208/T/2, Board of Grievances, *The Audit Committee* (5th edn, Ministry of Justice of Saudi Arabia 2002) 8 /Arabic decision No: 11/D/F/25, Board of Grievances, *The Audit Committee* (6th edn, Ministry of Justice of Saudi Arabia 2005) 34-48 - Arabic decision No: 32/D/A/9, see also same book decision No. 8/D/F/18 at 53-54, decision No: 36/T/4 at 97-99.

‘autonomous interpretation’,³³ makes the domestic law that incorporates similar provisions to the NYC come to life and gives it meaning, which is notably missing in the GCC court decisions on foreign arbitral awards.

9.5 The principle of autonomous interpretation

The interpretation of domestic law that emerges from an international convention such as the NYC implementing decrees or arbitration laws that regulates the REFAA can have certain special characteristics. An interpretation might be considered as ‘autonomous’ if it distances itself from relying only on the meaning provided in national legal systems.³⁴ This may be referred to as a negative definition. The autonomous interpretation can also be defined in a positive way. In the latter sense, the domestic law that emerges from an international convention and its terms and provisions might be interpreted within the *context of the international convention*.³⁵ In this sense, the autonomous interpretation should indicate the texts and purpose of the international convention to be regarded as autonomous, and not just rely on the domestic understanding of the texts.³⁶

It is accepted that every national court tends to interpret the texts of the law according to its own legal tradition, even in the situation where they are required to interpret and apply a national law that emerged from an international convention.³⁷ Nevertheless, interpreting national laws that emerged from an international convention is not simply a matter of looking at the provisions and construing such provisions according to the domestic principles or domestic literal meaning.³⁸ At the same time, autonomous interpretation does not mean that the classical methods of interpreting the domestic laws, such as their literal meaning in

³³Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (1st edn, OUP, Oxford 2007) at 712-718, Martin Gebauer, ‘Unifrom Law, General principles and Autonomus Interpretation’ (2000) 5:4 Uniform Law Review at 683-704, Michael Sturley, ‘International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation’ (1987) 27 Virginia Journal of International Law 729-802, Christoph Schreuer, ‘The Interpretation of Treaties by Domestic Courts’ (1971) 45 The British Yearbook of International Law 255-301, ICCA, ‘ICCA’S Guid to the Interpretation of the 1958 New York Convention, A Handbook for Judges’ (2011) at 17.

³⁴Martin Gebauer, (n33) at 684.

³⁵Ibid, Goode and others, (n33) at 717.

³⁶Goode and others, (n33) at 713.

³⁷Christoph Schreuer, (n33) at 256.

³⁸Michael Sturley, (n33) at 743.

certain legal traditions, is less important, only that domestic elements alone are not enough to highlight the consistency of the interpretation.³⁹ This may be the core argument that is missed in the GCC judicial courts' decisions on the foreign arbitral awards.

By analysing the attitudes of the courts in some developed arbitration jurisdictions, such as the United Kingdom, European nations and the United States, it is notable how the courts in these jurisdictions make reference to the provisions and features of the NYC (autonomous interpretation), while interpreting the provisions of the domestic law that regulates the REFAA. The courts often start their interpretation by emphasising the NYC provisions, and the aim and features of the NYC. For example, the High Court in England and Wales made an interpretation that goes to the heart of this discussion. In *Diag Human SE v The Czech Republic*,⁴⁰ the court noted that:

“Although the wording of Article V of the Convention [NYC] is reflected in s103 of the 1996 Act, the latter stands as an *independent statutory provision*...the effect is that it directly enacts the relevant part of the Convention and gives effect to it; *and bearing this in mind*, the statutory language *must* of course be *given an autonomous meaning*, which *may* be informed by the *travaux preparatoires*, the decisions on it of foreign courts and the views on it of foreign jurists...”⁴¹

The court in this case highlighted the autonomy of section 103 of the UK Arbitration Act that implemented Article V of the NYC. The court then emphasised the international origin of s103, which should be interpreted by reference to the preparatory work of the NYC or foreign court decisions and not solely by reference to the domestic understanding of the text (s.103). Therefore, the wording of this judgment might be seen as very ambitious within the arbitration community, and confirms that the English court is implementing the NYC, even though the NYC operates in England through domestic law. This type of wording is missing in the GCC states and no consideration is given to the NYC or its features in the wording of judgments in these states, as will be shown in the next section.

³⁹Goode and others, (n33) at 717.

⁴⁰*Diag Human SE v. The Czech Republic* [2014] EWHC 1639 (Comm).

⁴¹*Ibid*, Page 4 Para 9.

In another case, the Paris Court of Appeal noted that:⁴²

“Article 1502 (5) of the France arbitration act (as to the violation of international public policy) is in ‘perfect harmony’ with Article V (2)(b) NYC”.

The position of France differs from that of England in implementing the NYC at the domestic level. The UK arbitration act makes explicit reference to the NYC in the texts of the law (s100-103). The French arbitration law makes no reference to the NYC in the texts of its arbitration law. Despite this, the French courts predominantly highlight the provisions and features of the NYC in the wording of its judgments on the REFAA. This position confirms that the NYC is well implemented in the French legal system even though no direct reference is given to the NYC in the French arbitration law. The court applied the autonomous interpretation that reconciled the French arbitration law with the provisions of the NYC.

In another case, that of *Manufacturer (Slovenia) v Exclusive Distributor (Germany)*,⁴³ the German court noted that:

“According to *German law*, an arbitral award only violates public policy under Act V (2) (b) of the NYC when it violates a norm that regulates state or economic principles or when it is unacceptably at odds with the German principles of justice. This agrees with the opinion held by a large majority that also from the point of view of public policy, the recognition and enforcement of *foreign* arbitral awards is subject to a *less stringent* regime than is the case with domestic arbitral awards, because there is a *distinction* between national and international public policy”.⁴⁴

The German court in this case highlights the norm of distinguishing between domestic and international public policy. Importantly, the NYC does not include explicit reference to international public policy as a ground for refusal, but the court highlighted this feature as it reflects the widely accepted norm as discussed in detail in the previous chapter. Many other courts also highlight other features of the NYC, even though the courts deal with domestic

⁴²*Compagnie française d'études et de construction Technip (Technip) v Entreprise nationale des engrais et des produits phytosanitaires* [1998] 97/6929 Paris Court of Appeal.

⁴³*Manufacturer (Slovenia) v Exclusive Distributor (Germany)* [1999] Germany Court of Appeal published in XXIX Year Book of Commercial Arbitration (2004) 687-696.

⁴⁴*Ibid* at 695.

law that implement the NYC. For example, the England and Wales High Court in *Norsk Hydro ASA v The State Property Funds of Ukraine*⁴⁵ noted that:

“There is an important policy interest, reflected in this country’s treaty obligations ... However, the task of the enforcing court should be as “*mechanistic*” as possible, save in connection with threshold requirements for enforcement and the *exclusive grounds* on which enforcement of a NYC award may be refused...”⁴⁶

The NYC does not state that the grounds for refusal are exclusive, but it is understandable from the spirit and purpose of the NYC. Equally, the Federal Court of Australia held that “...it considered that the *pro-enforcement bias* of the NYC, as reflected *in the Act*, requires that this ground for refusing enforcement not be made available too readily”.⁴⁷

It seems that an autonomous interpretation of this kind involves a specific technique used to interpret the domestic law that emerges from international conventions or domestic law that regulates the same topic of an international treaty ratified by the state. This is particularly relevant to the NYC. The NYC regulates the REFAA. At the same time, most if not all of the NYC state parties issued domestic law that also regulates the REFAA. From the case law that was analysed above, it seems that the autonomous interpretation does not require the traditional methods of interpretation of domestic law to be ignored; rather, it is a combination between the classical method of interpretation and autonomous interpretation.⁴⁸ The autonomy of the interpretation seems to rely on two layers of interpretation. The first is that achieving a domestic understanding of the texts should not be the predominant aim of the interpretation. The second is that the purposes of having such domestic law, and particularly the convention’s purposes, are inherently relevant to the theme of interpretation.⁴⁹ In the following section, an analysis of the interpretation provided by the Bahraini and Kuwaiti courts will be presented; in these cases the foreign arbitral awards have been recognised and enforced according to the domestic law, without any reference to the NYC or its features.

⁴⁵*Norsk Hydro ASA v The State Property funds of Ukraine* [2002] EWHC 2120 (UK QBD Admin Ct)

⁴⁶*Ibid*, para 17.

⁴⁷*Traxys Europe SA v. Balaji Coke Industry Pvt Ltd* [2012] 276 Federal Court of Australia, page 25, para 90.

⁴⁸Goode and others, (n33) at 718.

⁴⁹Martin Gebauer, (n33) at 257.

9.5.1 The lack of autonomous interpretation in the GCC interpretative approach

Although there is only a limited amount of case law on the foreign arbitral awards from the GCC states, the GCC judiciaries seem hesitant to provide an interpretation that refers to the NYC or its internationally-accepted features in a similar way to the above examples of developed arbitration jurisdictions. The previous chapters discussed many problems related to the implementation of the NYC in the states of Qatar, the UAE and KSA. In this section, case law from Bahraini and Kuwaiti courts will be discussed, where a number of foreign arbitral awards have sought recognition and enforcement through the national courts. In the following cases the arbitral awards were recognised and enforced according to domestic laws that are consistent with the NYC.⁵⁰ However, the twist in the debate in this section relates to the lack of autonomous interpretation that would refer to the NYC or highlight the features and spirit of the NYC in the texts of the court judgments.

For example, in one case the Bahrain High Civil Court enforced a foreign arbitral award seated and issued in the UAE.⁵¹ In a memorandum submitted to the court by the award creditor/claimant, he sought to recognise and enforce the arbitral award pursuant to the NYC, and the former Bahraini arbitration law,⁵² which was also based on the ML. The award debtor/defendant challenged the enforcement request and argued that the arbitral award suffered from a lack of due process, arguing that the arbitral tribunal was not given a proper opportunity to present his case.⁵³ The court dismissed this challenge and enforced the arbitral award pursuant to Articles 35–36 of the former arbitration law that mirrored article IV–V of the NYC. Importantly, the court did not make reference to NYC features such as the narrow interpretation of the lack of due process, or pro-enforcement bias, and surprisingly the court did not make reference to the NYC in the texts of the judgment. This kind of interpretation may reflect the lack of autonomous interpretation that was discussed earlier, even though the arbitral award was recognised and enforced.

⁵⁰Kuwaiti Legislative Decree No. (10) of 1978, Bahrain International Commercial Arbitration Act, Law No. (9) for 1994, Published in Bahrain Official Gazette No. 2125 for 1994.

⁵¹*Party v party* [2012] 1470 Bahrain High Civil Court - Chamber 3. This judgement is not published, and the researcher was given the file of the case during the interview study, after the court secretariat edited the names of the parties.

⁵²See chapter four (section 4.6.1).

⁵³See (n51) at 5-6.

In the case of *Saudi Establishment v. Bahraini Limited Liability Company*,⁵⁴ the Gulf Cooperation Council Arbitration Centre (GCCAC)⁵⁵ located in Bahrain issued an arbitral award concerning a dispute between a Bahraini and Saudi party. The arbitration in this case was seated in the KSA, and the arbitral award sought recognition and enforcement through the Bahraini courts. The Bahraini party challenged the enforcement request pursuant to Act Number 6 for 2000 that implements the GCCAC charter and arbitration rules in Bahrain's legal system, and provides for more favourable room for enforcement than the NYC.⁵⁶ The Bahrain Court of Cassation recognised and enforced the arbitral award and confirmed that if an award is issued by the GCCAC, then superiority is given to the GCCAC implementing law.⁵⁷ The texts of the judgment did not make reference to the NYC, particularly Article VII (1) of the NYC that allows national courts to recognise and enforce an arbitral award according to the more favourable national law.

In another case, the Kuwait Court of Cassation enforced a foreign arbitral award issued in Bahrain without making reference to the NYC or its features in the texts of the judgment.⁵⁸ In this case, the arbitral award was issued in Bahrain by the GCCAC and sought recognition and enforcement through the Kuwaiti courts. The award debtor challenged the enforcement request on the grounds that the arbitral award was issued under the name of the Bahraini king and thus the recognition and enforcement of the arbitral award would violate the state public

⁵⁴*Saudi Establishment v. Bahraini Limited Liability Company* (2012) Appeal No. 746 for 2010, published in Year Book for Commercial Arbitration YBCA, Vol XXXVIII for 2013, page 574. See also *party v. party* [2012] Appeal No. 101 for 2010 Bahrain Court of Cassation. For further details see Abdulmawla Taha, 'Extent of Recognition by the Bahraini Court of Cassation of the GCC Commercial Arbitration Centre Arbitral Awards' (2014) 1 BCDR International Arbitration Review 17. (Arabic), Hassan Ali Radhi, 'International Arbitration and Enforcement of Arbitration Awards in Bahrain' (2014) 1 BCDR International Arbitration Review 29.

⁵⁵See official website <http://www.gccac.org/en/> Accessed July 2015.

⁵⁶In 1993 the Gulf Cooperation Council (GCC) established a regional arbitration institution called the Gulf Cooperation Council Commercial Arbitration Centre (GCCAC). The charter and arbitration procedural rules of this arbitration institution have been incorporated in the domestic legal systems of all six GCC states. Some GCC states issued domestic law that implements the GCCAC charter and arbitral procedure, and others have issued government resolutions. Bahrain Legislative Decree No (6) for 2000, in Agreeing on the Accession to the Charter of the GCC Commercial Arbitration Centre, Published in Bahrain Official Gazette No. 2422 for 2000, Kuwait: Law No (14) for 2002. Oman: Council of Ministers resolution No: 10/2000 for 2000. Qatar: Council of Ministers resolution No (29) for 2001. Saudi Arabia: Council of Minister resolution No (102) for 2002. UAE: Council of Ministers resolution No (5) for 2001.

⁵⁷Abdulmawla Taha, (n54) at 25.

⁵⁸*Party v party* [2008] Appeal No.668-2006 Kuwait Court of Cassation. Published in BCDR International Arbitration Review (2014) Volume 1 issue 1 at 85-92.

policy.⁵⁹ However, the Kuwait Court of Cassation held that this reason should not be considered as a ground for refusal under Law No. 14 for 2002, which implements the GCCAC charter and arbitration rules in the Kuwaiti legal system.⁶⁰ The Court of Cassation recognised and enforced the arbitral award without making reference to the NYC, or the feature of exclusive grounds for refusal, or Article VII (1) of the NYC.

It should be noted here that only the Omani courts in a recent case has made an interpretation that might be classified as an autonomous interpretation.⁶¹ In this case the arbitration was seated in Denmark and the arbitral award sought recognition and enforcement through the Omani courts pursuant to the NYC and the Omani arbitration law based on the ML.⁶² The Omani lower courts refused to execute the arbitral award on the basis that there was manifest disregard of the law that was applied by the arbitrator to the substance of the dispute (it is not indicated which law governs the substance of the dispute), and therefore the enforcement would violate the Omani public policy.⁶³ However, the Omani Court of Cassation nullified the lower court's decisions and enforced the arbitral award. Importantly, the words of this judgment made reference to the NYC provisions (Article V) and highlighted one of the NYC *features* that is an exclusive ground for refusal. In this decision, the Oman Court of Cassation established a principle that foreign arbitral awards should be recognised and enforced in Oman according to the NYC, to which Oman is acceded and has ratified.⁶⁴ This decision certainly enhanced the certainty regarding the acceptance of the NYC, including its internationally-recognised features in the Omani legal system, which might not be the case in the rest of the GCC states.

For example, the provisions of NYC do not differentiate between domestic and international public policy; does not mention that the ground for refusal should be interpreted narrowly within the pro-enforcement bias; and does not mention that the ground for refusal listed in

⁵⁹Ibid.

⁶⁰ See (n56).

⁶¹*Party v party* (2011) Cassation No. 280 for 2010, Oman Supreme Court. Published in 'BCDR International Arbitration Review' (2014) volume 1, issue 1, at 149-158.

⁶²The Oman Act of the Arbitration in the Commercial and Civil Disputes, No: 47 for 1997.

⁶³Oman Court of First instance, case No.1064/2009 Commercial Circuit, Oman Court of Appeal, case No. 10 for 2009 - Commercial Circuit.

⁶⁴See (n61) at 157.

Article V of the NYC are the only accepted grounds to refuse recognition and enforcement. All these features are well established in many judicial practices, particularly at developed arbitration jurisdictions in their court decisions on the REFAA, and there are rich case law materials, which makes reference to those features in the wordings of the judgements. Therefore, one could argue that most of the GCC courts decisions on the REFAA occur through reference to domestic laws and that this is not a problem in itself. But the concern is about the applicability of the NYC and its internationally-accepted features to the REFAA.

As explained earlier in this chapter, in most state parties of the NYC, either dualists or monist states, the REFAA occurs by reference to the domestic law, in addition to the state obligation at international level to recognise and enforce the foreign arbitral award. Following from this situation, a problem that may arise during the operation of the NYC at the domestic level is one related to the interpretative approach that is followed by national courts. It seems that in the GCC court decisions on the foreign arbitral awards they lose sight of the family ties between the NYC provisions and the relevant domestic law, in the sense that both of them regulate the REFAA.

Therefore, the lack of autonomous interpretation in the GCC courts decisions on the REFAA makes the NYC appear as an international act which the GCC states are willing to be bound by, without having an impact of the NYC in the judicial decisions on the REFAA. This creates a sphere of uncertainty about whether the GCC states takes into consideration the general purpose of the NYC that is to facilitate the REFAA. It may be important for the GCC national courts to take into consideration the principle of autonomous interpretation in a way that interprets the arbitration law (rules that regulate the REFAA) in the context of the NYC as provided above by means of the autonomous interpretation.

This is because the NYC is a treaty connected with the system of dispute resolution in international trade which is arbitration. This means that highlighting the provisions and features of the NYC in the wording of the GCC judgments would have a positive impact on the level of certainty regarding the acceptance of the NYC in the GCC states. Otherwise, the ratification of the NYC by all GCC states remains an international act whereby a state indicates its consent to be bound to the NYC, without having a legal effect at the domestic level.

In order for the GCC national courts to be capable of providing an autonomous interpretation that takes into account the features and purposes of the NYC, such as the distinction between domestic and international public policy, narrow interpretation of the grounds for refusal, pro-enforcement bias and exclusive grounds for refusal, it is important to make some consideration to the international guidance materials on the NYC. This would enable the judicial jurisprudence of the GCC states to be familiar with international best practice on the NYC. This requires a consideration of the ‘comparative approach’, as will be detailed in the following discussion.

9.6 The role of the comparative approach in the context of the NYC in the GCC states

The primary aim of the comparative approach is to acquire knowledge.⁶⁵ The legal discipline is not only about understanding the texts, principles, and rules of a single legal system, but is about the discovery of models, techniques, and solutions that are more likely to achieve the envisaged justice.⁶⁶ If one accepts this, the comparative approach can provide a much richer range of interpretations and international solutions rather than the domestic solutions provided by a single legal system. A realistic example of domestic solutions provided by the GCC states is the notion that the arbitral award has to be issued under the name of the supreme authority of the state to be valid and enforceable. Another example of domestic solution is that the arbitral award violates the public policy of KSA if it is to include a sum of interest (Riba). These notions are never developed in the world of international arbitration and have found its application solely in Qatari and KSA courts.

However, it is understandable that different global legal systems can offer a greater variety of solutions, even if one international convention and similar national rules are applicable to the dispute. Modern legal comparison is not merely interested in the factual differences or similarities between various legal orders, but in the fit, the predictability, the justice, and the approach of legal solutions to the given problems.⁶⁷

⁶⁵Konrad Zweigert and others, *An Introduction to Comparative Law* (3rd edn, OUP, Oxford 1998) at 15, Goode and others, (n33) at 144.

⁶⁶Ibid.

⁶⁷Konrad Zweigert and Kurt Siehr, ‘Jhering’s Influence on the Development of Comparative Legal Method’ (1971) 19 *American Journal of Comparative Law* 215.

Therefore, most of the modern international conventions concerning international trade include a criterion regarding its interpretation.⁶⁸ This provision emphasises that the national courts should take into account its “international standard” and the need to “promote uniformity” in its application. The mention of the need to promote uniformity indicates that there is a clear directive to take into account when interpreting an international convention or the domestic law that emerges from that convention. Accordingly, the comparative approach as a tool may be able to assist judges who are responsible for dealing with REFAA. It helps judges to understand the objective purpose of the NYC provisions and expands the judges’ horizons and interpretative field of vision. It has been argued that “you get to know yourself better by comparing yourself to others”.⁶⁹ Therefore, UNCITRAL and other organisations produce many guidance materials on the provisions of the NYC and ML that aim to assist the national courts in their interpretation and application of these two key international instruments in the arbitration world. The aim of such guidance materials is to assist the national courts to find out international solutions rather than the domestic solutions in their decisions on the REFAA.⁷⁰

9.6.1 The influence of the guidance materials on the NYC

Arbitration is often used to resolve disputes emerging from multinational transactions. This sometimes requires the national courts at different stages of arbitration to become involved with different laws and rules that govern the arbitration process. The judge might have to engage with the arbitration rules chosen by parties or international treaties or model laws that may be relevant to the arbitration agreement. Importantly, the judge may also have to become involved with the preparatory work of the NYC or different guidance materials on the NYC that provide for the ideal or prevailing interpretations provided by different national courts’ decisions on the NYC.

⁶⁸United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) article 7, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) article 5, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”) article 2, United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) article 14, United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the “Hamburg Rules”) article 3, United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) article 5, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) article 7.

⁶⁹Aharon Barak, *Purposive Interpretation in Law* (1st edn, Princeton University Press 2005) at 169.

⁷⁰UNCITRAL document A /CN.9/814 (2014) Sixty-ninth session, page 19.

UNCITRAL and the International Council for Commercial Arbitration⁷¹ (ICCA) have enacted a number of guidance materials on the NYC and online case law databases. UNCITRAL and ICCA realised the necessity of working on guideline materials after the results gained from a survey conducted by UNCITRAL entitled ‘NYC: Its Interpretation and Application’ that was discussed earlier in chapter three.⁷² The states’ responses to this survey inspired UNCITRAL to embark on work to issue a guide on the NYC provisions to assist the judges in national courts to find out the international solution rather than the domestic solution in their courts decisions on the REFAA.⁷³ In addition, UNCITRAL has established a reporting system for case law on UNCITRAL texts called Case Law on UNCITRAL Texts (CLOUT).⁷⁴ This system is an online database that includes many court decisions on UNCITRAL legislations, including the NYC and ML. UNCITRAL has also issued a model document titled ‘Digest of Case Law on the Model Law’⁷⁵ that includes the prevailing interpretations of the texts and terms of the NYC and ML. The ICCA has also issued a guide entitled ‘ICCA’s Guide to the Interpretation of the 1958 New York Convention – Handbook for Judges’.⁷⁶ This guide was issued in 2011 and was designed to assist the national courts of the state parties to produce decisions that support the uniform application aim.

Peter Sanders, one of the drafters of the NYC, stated that:

“I would recommend relying on harmonisation of the Convention’s [NYC] application and interpretation on those issues on which the Convention falls back *on national arbitration law*”.⁷⁷

⁷¹International Council for Commercial Arbitration <http://www.arbitration-icca.org/> accessed 2 August 2014

⁷²UNCITRAL document No. A/CN.9/656 for 2008, page 11 Para 35-40.

⁷³UNCITRAL document A /CN.9/814 (2014) Sixty-ninth session, page 19.

⁷⁴Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17) Para. 98-109. CLOUT is available online at UNCITRAL official website.

⁷⁵UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration. Available online at UNCITRAL official website.

⁷⁶International Council for Commercial Arbitration ICCA, 'ICCA'S Guid to the Interpretation of the 1958 New York Convention, A Handbook for Judges' (2011) . Available online at ICCA official website.

⁷⁷Peter Sanders, ‘ICCA’S Guide to the Interpretation of the 1958 New York Convention’ [2011] International Council For Commercial Arbitration ICCA, A Handbook for Judges’ at VI, Peter Sanders, ‘The making of the Convention’ [1999] paper presented in New York on 10 June 1998 to celebrate the 40th Anniversary of the convention, United Nation Publication, ISBN 92-1-133609-0, p. 3.

However, the real question that needs to be answered in this discussion is how can the comparative approach work effectively in practice? This has been an ongoing problem in several jurisdictions for decades that some legal systems have engaged in the comparative approach, which represented benefits for international commercial arbitration. For example, in 1998, a symposium was held by UNCITRAL that included a bench entitled ‘Judicial Application of the NYC.’⁷⁸ There was a panel of judges from different national courts who were asked to share their views on how to achieve consistency and predictability in the judicial application of the NYC. Judges were asked to focus on the following questions: (1) “When a national court is seized of a case concerning the [NYC], is it useful and appropriate to look at decisions of courts in other countries?” (2) “If a national court considers decisions of foreign courts or guidance material provided by the UNCITRAL relating to the [NYC], what weight should the national court give to these materials?”⁷⁹ A brief explanation of this event provides an insight into international best practice, as compared to the judiciaries of the GCC.

9.6.2 Judges’ perspectives

All the participating judges in this UNCITRAL panel agreed on the necessity to take some consideration of the different courts’ decisions on the NYC or international guidance materials on the NYC for the sake of finding international solutions rather than domestic solutions in applying the NYC.⁸⁰ This approach contrasts considerably with the responses of most of the interviewed judges in this thesis.⁸¹

For example, they have been asked if they normally refer to the NYC preparatory work or any guidance materials on the NYC issued by UNCITRAL. Only one judge out of seven judges responded positively. Another question asked what was their understanding of the guidance materials issued by UNCITRAL on the NYC? Six out of seven interviewed judges confirmed that these materials were educational materials, which were not necessarily looked

⁷⁸UNCITRAL, ‘Enforcing Arbitration Awards under the New York Convention: Experience and Prospects’, This colloquium was held in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention (United Nations Publication 1999) Sales No. E.99.V.2 at 27-35.

⁷⁹Ibid.

⁸⁰Howard Holtzmann, (n3) at 481.

⁸¹See the appendices, section (e), question no (11).

at for comparative purpose in their court's decision on the REFAA. They also confirmed the principle of state sovereignty as a logical reason for this answer. The judges were also asked if they looked to other foreign decisions on the NYC, seeking to find an international solution rather than a domestic solution. All the answers were negative.

The important question that will be discussed in the following discussion is to what extent the judges in national courts are obliged to adopt the prevailing judicial interpretations of the NYC provisions, or to what extent the judges in national courts are obliged to take into account the guidance materials provided by specialised non-governmental organisations, especially UNCITRAL.

9.6.3 The difficulty of knowing the exact impact of the comparative approach

The problem of the comparative approach in the context of the NYC correlates with the absence of an international legal framework organising the use of the comparative approach. This means that the comparative tool faces the difficulty of knowing the exact impact of prevailing interpretations or international guidance materials in a particular legal system. Some judges that participated in the UNCITRAL panel made the argument that a distinction might often be appropriate depending on the *number of times* the interpretive issue has arisen. If, for example, there exists one, or even two, decisions of another jurisdiction construing a term or phrase of the NYC in a consistent way, a court of the *next jurisdiction* might feel free to make a different interpretation. On the other hand, if a *consistent interpretation* has been reached by many jurisdictions, a court of the next jurisdiction that faces the same issue may follow what has by then become the *settled* interpretation.⁸² This may be a good suggestion in the theoretical sense, but it is not guaranteed to oblige the national court to follow the settled interpretation. Critically, many countries, including the GCC states, may consider it as an attack on their sovereignty.⁸³ In fact, many countries would be hesitant to accept any control over the way in which they apply and interpret the terms and provisions of the NYC or the domestic laws that implement the NYC.⁸⁴

⁸²See (n78) at 31.

⁸³Carlos Fernande, *Sovereignty and Interpretation of International Norms* (1edn, Springer, United Kingdom 2007) at 3-14.

⁸⁴See the 'Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' UNCITRAL document (2008) A/CN.9/656,

Judge Newman from the United States, who participated in the UNCITRAL panel, made a useful comment:

“I do not see the choice as between *whether we give controlling weight or merely take guidance*. I think a national court will never say that it has surrendered its authority to the courts of other jurisdictions, unless they are above us in a hierarchical sense. We will always phrase it in terms of taking guidance. The question is how often will we take that guidance?”⁸⁵

It is accepted that the national courts will never surrender their authority to the guidance materials provided by non-governmental organisation such as UNCITRAL, or the interpretations provided by foreign courts of other jurisdictions.⁸⁶ This is accepted under the doctrine of state sovereignty. To bring a balance between the doctrine of state sovereignty and the importance of the ‘comparative approach’ in the context of the judicial applications of the NYC, the comparative approach might be said to have the force of persuasive effect. This persuasiveness can be guaranteed by directing judges to refer to the international materials and various court decisions on the NYC without binding them to follow the settled interpretation or solutions provided in the guidance materials on the NYC provisions. This may happen through the addition of an interpretation clause to the arbitration law or the NYC implementing decree in the case of the GCC states.

This approach might not attack state sovereignty, as judges still have the power to evaluate the appropriate interpretation without the international guidance materials having a binding effect. However, there would still be no guarantee that national courts will refer to the settled interpretation of the NYC provisions. The success of the ML solution might be dependent on the willingness of the judiciary of the state to provide an interpretation that is consistent with the settled interpretation, or an international solution rather than a domestic solution.

page 11, para 34-40. This survey examines the rules of interpretation applied by the different national courts. Most countries refer to the domestic rules of interpretation.

⁸⁵See (n78) at 28.

⁸⁶Carlos Fernande, (n83) at 3-14.

9.7 Judicial internationalism

The role of the national courts in international arbitration is one of the key elements of the development of arbitration practice in any state. This is particularly at the stage of recognition and enforcement of arbitral award, which is regulated by similar laws because of the extensive global adoption of the NYC and ML. It is often argued in the literature on arbitration in the GCC states that arbitration has always existed in GCC states, having been practised historically and recognised under Sharia law.⁸⁷ Yet it is questionable whether, despite this heritage, GCC states are professional in the field of arbitration, and in particular, whether they are a leader in REFAA. The attitudes of the GCC national courts as analysed in this thesis suggests a worry about the GCC judicial jurisprudence in relation to the international arbitration in general, and the NYC in particular.

This might threaten the successful implementation of the NYC in the GCC states, and could also motivate international commerce and foreign investments to avoid the GCC region. This assumption occurs because of the lack of adequate interpretation that is competing with international best practice in the sense that neither the NYC nor its internationally-accepted features appear in the wordings of the GCC judgements on the REFAA. Although the legislature in any state is responsible for putting in place an advanced arbitration law that competes with the standards of international commercial arbitration practices, the judiciary has a key role in fostering and advancing arbitration practice.

The notion of “judicial internationalism” or the “international interpretive approach” is one of the emerging topics in the discipline of international commercial arbitration.⁸⁸ It means that the judge may refer to foreign or international normative sources to find out the internationally-prevailing interpretation or ideal solution rather than relying on the domestic solution.⁸⁹ The international interpretive approach is not about specific rules of interpretation that ought to be followed by national courts, but about the operation of

⁸⁷See chapter four.

⁸⁸Frederic Bachand, ‘Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism’ (2012) Volume 2012 issue1 Journal of Dispute Resolution 84-100, Jenny Martinez, ‘Towards an International Judicial System’ (2003) 56:2 Stanford Law Review 429-529, Frederic Bachand and Fabien Gelinas, (n17) at 231, Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) at 458, Jan Paulsson, (n3) at 242.

⁸⁹Frederic Bachand and Fabien Gelinas, (n17) at 240.

comparative tools and an autonomous interpretative approach, which all depend on a judge's understanding and awareness.⁹⁰

It is highly recommended for the states with emerging economies where the national courts might not be well qualified to engage with the international materials and foreign decisions on the NYC, such as in the case of the GCC states, to add an interpretation clause to their arbitration laws. Bahrain is the only state in the GCC that has recently added an interpretation clause to its new arbitration law.⁹¹ This approach would allow the national courts to refer to the international origin of this law, and to find out international solutions rather than domestic solutions in their court decisions on the REFAA. It still needs to be examined whether the Bahraini national courts will refer to the provisions and features of the NYC in its future court decisions on the REFAA. Thus, the emerging concept of judicial internationalism might also be one of the key factors that would promote the GCC 'judicial jurisprudence', accompanied with the hope of establishing a friendly arbitration hub in the GCC region.

9.7.1 Practical difficulties in the GCC judiciaries

The question that might arise is whether the GCC judicial jurisprudence is capable of engaging with the above outlined guidance materials on the NYC? There may be some practical difficulties, as revealed from the responses of the interviewed judges. These difficulties need to be addressed first in order to pave the way to the hope of judicial internationalism or international interpretative context.

Judges were asked if their courts (library of the courts) subscribed to any international journals, such as the Year Book of Commercial Arbitration, or any other journal or online databases specialising in international arbitration. All answers were negative. They were also asked whether they thought it was desirable to encourage programmes for further familiarisation with issues relating to the application and interpretation of the NYC; all answered "yes". But when asked if there were programmes in their respective countries to

⁹⁰Jenny Martinez, (n88) at 441.

⁹¹Law No (9) for 2015 promulgates the Bahrain arbitration law. Published in Official Gazette No. 3217 July 2015. Article 2A states that

1. "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith".
2. "Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based".

accomplish this, most responded that no such organised educational efforts existed. The judges answered that they had few programmes concerning the role of courts regarding international commercial arbitration. The same questions were asked to the secretary general for Gulf Cooperation Council Arbitration Centre, as this centre organises an education arbitration programme in the GCC region along with its main task as an alternative dispute resolution centre. The answer was that they were currently working on these programmes, but such a programme had not been carried out to date.

Another difficulty might arise from linguistic barriers, since most of the rich material on the NYC is published in English, and it cannot be assumed that GCC judges have to be qualified as English speakers. The GCC laws stipulate Arabic as the working language of the GCC national courts. However, given the global spread of the English language, it would not be difficult for GCC courts (the circuit tasked to deal with international arbitration) to appoint judges qualified in both languages, Arabic and English. There are currently only two journals in the Arab world that publish various courts' decisions on the NYC in Arabic. First is the Journal of Arbitration, which is not subscribed to by the Bahrain and Dubai Courts,⁹² and the second is the Bahrain Chamber for Dispute Resolution (BCDR) International Arbitration Review, which was newly-established in September 2014.⁹³

In summary, there is a necessity in the GCC states for professional programmes aimed at familiarising GCC judges with the UNCITRAL works, such as the CLOUT System, Digest Case Law on ML, preparatory works of the NYC, different court decisions on the NYC, aim and purpose of the NYC, various journals specialising in international arbitration, and also an increase in the judicial knowledge about the important role the NYC plays in the free flow of international arbitration practices in the relevant countries.

⁹²The official website of Journal of Arbitration <http://journalofarbitration.com/arabic/default.asp> accessed 5 April 2015.

⁹³The official website of BCDR International Arbitration Review <http://www.bcdraaa.org/en/publications/bcdr-international-arbitration-review> accessed 5 April 2015.

9.8 Summary

This chapter discussed the level of familiarity of the GCC judiciaries with the NYC. The data that supports the argument of GCC judiciaries' lack of familiarity with the NYC is mainly derived from the case law analysis and the results obtained from the judges' interviews. In most of the GCC case law on the REFAA, neither the NYC nor its internationally-accepted features were highlighted in the texts of these judgments. This contrasts with most of the developed arbitration jurisdictions where the NYC also operates at the domestic level through domestic laws; the judiciaries in these countries have commonly adopted an autonomous interpretation and interpret the domestic law (arbitration law) in the context of the spirit and purpose of the NYC. This type of autonomous interpretation is missing in the GCC judgments on the REFAA. This in itself leaves the question of the acceptance of the NYC as an essential international treaty in the world of arbitration with an uncertain answer, with no help being given to the flow of international arbitration as a means of dispute resolution in the GCC states. The clash between applying the local law or the NYC to the REFAA is not only unacceptable; it also damages the private sector, and weakens the operation of arbitration in the GCC states.

The judiciary of any state plays a significant role in the success of the international commercial arbitration practice. It is the gateway for arbitration to enter any country and flourish. Although policymakers in GCC states show willingness towards being friendly arbitration hubs, the judiciaries of the GCC states seem to be hampering this ambition. The judges seated in states that have indicated their ambition to support the flow of international commercial arbitration, such as GCC states, may make consideration to the relevant materials of the NYC, such as the NYC preparatory works, UNCITRAL works and various court decisions on the NYC, particularly those of developed arbitration jurisdictions. That is to say, it is necessary to consider the relevant international interpretative context in order to find an international solution rather than a domestic solution. Therefore, any sort of proposal to enhance the system of REFAA in GCC states must take into account the critical factor of the level of familiarity of the GCC judiciaries with arbitration generally and the NYC in particular.

Chapter Ten: General Conclusion

10.1 Introduction

This thesis set out to examine two main issues concerning the implementation of the New York Convention¹ (NYC). First, whether the different judicial interpretations of the NYC provisions might weaken the legal framework that regulates the recognition and enforcement of foreign arbitral awards (REFAA). Second, the challenges relating to the implementation of the NYC, taking the GCC states as a case study. A summary of the findings is included at the end of each chapter; therefore, there is no need to repeat them in detail here. This chapter attempts to outline the findings in a general discussion, with the purpose of answering the central thesis questions. Within the discussion of the findings, the researcher developed a number of recommendations to alleviate the problems discussed and analysed in this thesis.

Arbitration today is regulated by international and domestic legal frameworks of law. This combined approach provides the arbitration model of justice with the ability to interact with a globalised economy and respond to the rapid growth of multinational commercial transactions. Unlike litigation in national courts, arbitration gives parties' extensive control and wide autonomy to tailor the process of arbitration to their needs. The speed in which disputes can be resolved, confidentiality involved, the parties' freedom to choose the place of arbitration and the easy enforceability of arbitral awards throughout the world, constitute significant features that make arbitration particularly attractive to the commercial community, as it usually prefers the swift closure of disputes. In addition, the family ties between the NYC and Model Law on International Commercial Arbitration² (ML) provide a significant degree of harmonisation, allowing arbitration to function effectively across state boundaries. Despite these claimed benefits of arbitration, the first central research question was: Do the different judicial interpretations of the NYC provisions hinder the overall purpose of the international legal framework in arbitration?

The different judicial interpretations of the NYC provisions do not necessarily hinder the purpose of the well-structured frame of law that regulates the REFAA. The thesis found out

¹ "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS, No. 4739"

² UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006. General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006).

that only in a limited number of cases do the different judicial interpretations of the NYC provisions raise concerns about the overall purpose of the international legal framework in arbitrations. But where they do occur, they can be detrimental to the development of arbitration practices and affects the efficient development of the framework of law that regulates international arbitration.

10.2 Problematic different judicial interpretations

The NYC is designed to interact with different national laws, and up to a certain extent its provisions open doors to the deployment of 'local standards'. However, when the judicial interpretations of the NYC provisions result in a different understanding of the well-established international standards and legal framework regulating the REFAA, this disharmony cannot not be ignored. This is because such disharmony might weaken the efficiency of the NYC, which may by its development negatively affect the use of arbitration as an effective dispute resolution mechanism that supports the flow of international commercial transactions. Two examples of such conflicts were examined in this thesis, which result in a different understanding to the legal framework that regulates the REFAA under the NYC. These two examples were:

- Where arbitral awards that were annulled by the country of origin have been enforced in other countries under the scheme of the NYC;
- Where national courts interpret Article III of the NYC as a justification for adding additional grounds for refusal than those listed in Article V of the NYC;

Firstly, chapter three discussed the situation where arbitral awards that were annulled by the country of origin have been enforced in other countries under the scheme of the NYC. For example, the judicial practices in France have suggested the local standard that the international arbitral awards are not anchored to any legal system, including the country of the place of arbitration as seen in the *Hilmarton* case. However, the power of the country of the place of arbitration (seat theory) is that it provides a certain legal system instead of being floating arbitration; the arbitration is firmly anchored to a specific legal system. The laws and court of the place of arbitration shall govern any acts occurring in its territory including the arbitration.

In addition, the US courts, in a number of cases, adhered to the notion of international and national annulments standards to evaluate the reasons of the annulment decision that was issued by the court of the seat. The US courts suggests that if the annulment decision that was issued by the court of seat was based on the local standard (i.e. domestic public policy) then the enforcement of the arbitral award was permissible, while if the annulment reason was based on international standards then the US courts would refuse to enforce the annulled arbitral award. However, neither the NYC nor ML or the legislative history of the NYC, suggests that arbitral awards annulled by the country of origin can be enforced in other countries. Therefore, it might be hard to accept the local standards suggested by courts in France and the US under the legal framework regulating international arbitration as developed by the NYC and ML.

Secondly, chapter six discussed the situation where some national courts interpret Article III of the NYC as a justification for adding additional grounds for refusal – for example, the common-law doctrine of *forum non-conveniens* – than those listed in Article V of the NYC. Article III of the NYC was designed to oblige the states parties to enforce the arbitral award according to its own national rules of procedure, unless one of the grounds for refusal listed in Article V of the NYC was in existence. Some national courts, such as those in the US and Dubai, referring to Article III of the NYC, controversially invoke their own procedural rules (the mandatory procedural rules that relate to court's jurisdiction in litigation) to consider itself as possessing a lack of jurisdiction to hear the enforcement request over foreigners who do not have a domicile or business branch in the country.

However, the NYC provides jurisdiction to the state parties without the requirement that the award debtor shall have a connection in the enforcing state, such as a permanent domicile or business branch. It might be enough that the award debtor has assets in the enforcing states for that state to assume jurisdiction to enforce the award. It is well known in the literature of international arbitration that one of the significant features of international arbitration is the easy enforceability of arbitration awards worldwide, and the doctrine of *forum non-conveniens* certainly deprives international commercial arbitration from this feature; by its development it might hinder the enforceability of foreign arbitral awards worldwide.

The above-discussed two forms of problematic different judicial interpretations of the NYC provisions that are accompanied with an expanded approach of local standards raised a concern about the following issues in the practice of REFAA under the NYC:

- The local standard suggested by French courts that the arbitral award is not anchored to the legal system of the country of the place arbitration (seat theory) is opposite to what suggested by the Article V (1) of the NYC. The seat theory is recognised in Article V (1) of the NYC, which refers to the laws, and courts of the country of the place of arbitration for certain functions. One of these functions is that Article V (1)(e) of the NYC which considered the setting aside the arbitral award by the court of the seat is a ground to refuse its enforcement in other countries. When parties directly or indirectly choose a seat of arbitration, this choice implies an agreement to submit the arbitration to the *lex arbitri* and the supervisory powers of the judicial system at the seat. Enforcement of annulled arbitral award ignores this choice, making it completely unpredictable where an award may be seen to be valid or not. The enforcement of annulled arbitral award obviously eliminating the steering effect of a “primary” jurisdiction to which the NYC gives the power to determine the international validity of an award. The seat jurisdiction is a direct or indirect choice of the parties. If parties have chosen a country that is not arbitration friendly, enforcement courts are not there to rescue such a choice.
- The local standards suggested by US and Dubai courts that the award debtor should have permanent domicile or business branch in the country where enforcement is sought certainly deprive international commercial arbitration from one of its significant features that is easy enforceability of the arbitral award worldwide.
- The expanded approach of local standards might weaken the efficacy of the NYC as it has led in some cases to conflict courts decisions on the NYC for the same arbitral award as seen in *Dallah* case discussed in detail in chapter two.
- The expanded approach of local standards might cause a crisis of legal disharmony in the implementation of the NYC by creating a national set of enforcement standards for foreign awards that, in effect, bypasses the NYC, namely, the international

harmonisation of the rules pertaining to the enforcement of arbitral awards. The development of such approach might result in weaken the structural integrity of arbitration.

10.2.1 The proposal for reform

In response to the above-discussed “problematic judicial interpretations of the NYC provisions” the thesis suggests a number of recommendations that are not exclusive, but which might be influential in alleviating the legal disharmony in the implementation of the NYC:

1. Amend the provisions of Article 36(1)(a)(v) of the ML that correspond to section (e) of Article V (1) of the NYC.

Although section (e) of Article V (1) of the NYC lists the annulment decision that was issued by the court of the seat as a ground to refuse enforcement in other countries, the literal reading of Article V and Article VII (1) of the NYC seems to provide room to enforce the arbitral award despite the presence of one of the grounds for refusal such as Article V (1)(e) of the NYC. Therefore, the local standards such as that the international arbitral award is not anchored to any legal system including the country of the place arbitration (France courts) or the differentiations between national and international annulment reasons (US courts) might also be accepted according to the literal reading of Article V and Article VII (1) of the NYC. This approach by its development might affect the structural integrity of arbitration, and result in legal disharmony in the judicial practices relating to the REFAA under the NYC. Therefore, the thesis suggests the following recommendations in relation to the recognition and enforcement of an annulled arbitral award under the scheme of the NYC.

- The possible incorporation of section (e) of Article V (1) of the NYC under the mandatory languages that would direct the states party of the NYC to refuse enforcement if the arbitral award has been annulled by the court of the seat. The thesis does not suggest issuing a ‘new NYC’ in this context (see chapter three 3.4.1). The amendment platform could start by amending the provisions of Article 36(1)(a)(v) of the ML that corresponds to section (e) of Article V (1) of the NYC. This is to alleviate the use of discretionary power that derives from the verb may at the opening line of

Article V as a justification to enforce the arbitral award that have annulled by the court of the seat.

By amending the provisions of Article 36 (1)(a)(v) of ML it would first inspire the states party of the NYC to incorporate such amendments into their national arbitration laws. Secondly, it would inspire the national courts of the NYC states party to not use the discretionary power that derives from the verb ‘may’ at the opening line of Article V (1) of the NYC to the extent that results in ignorance of the annulment decision issued by the court of seat [Article V (1)(e)]. In so doing, one could implicitly renew Article V (1)(e) of the NYC without risking the stable balance of the NYC by issuing another ‘new NYC’. Reaching agreement between the states regarding the new NYC is not an easy task compared with the current NYC achievement.

2. Issue guidance material by UNCITRAL to clarify the level of liberality that is allowed to be practised by the national courts under Article VII (1) of the NYC.

Article VII (1) of the NYC is designed to make possible the enforcement of foreign awards in the greatest number of cases possible. Therefore, Article VII might be seen as in favour of facilitating the REFAA within the policy of the NYC pro-enforcement bias. However, Article V provides the minimum grounds for recognition and enforcement that should be met by the arbitral award in order to be enforced. Article V of the NYC leaves no room for doubt that the drafter of the NYC aimed to put the minimum conditions for setting aside the awards or refusing its enforcement. The states have discretion to act more liberally than the NYC under Article VII (1), but not to ignore or omit one of the minimum grounds listed in Article V of the NYC. Therefore, Article VII (1) of the NYC might be interpreted within the limitation of the words ‘only if’ that comes in the opening line of Article V of the NYC. It might be useful to issue guidance material by UNCITRAL that clarifies the level of liberality that is allowed to be practised by the national courts under Article VII (1) of the NYC. It is recommended that this guidance may explain the extent of this liberality to not enforce the arbitral awards that have been annulled by the court of the seat, Article V (1)(e).

3. The states parties of the NYC may add interpretation criterion to the domestic law (arbitration law) that regulates the REFAA.

The states parties of the NYC may add interpretation criterion to the domestic law (arbitration law) that regulates the REFAA. This interpretation criterion could direct the national courts to take into account the ‘international standards’ and sake of uniform application on their decisions on the REFAA. The best interpretation criterion in this regard is Article 2A of the ML.³ The REFAA occurs in most states at a domestic level through domestic laws (arbitration law). In the presence of an interpretation criterion (Article 2A of the ML) within the text of the arbitration law the national courts may have to take into account the sake of uniform application in their decisions on the REFAA. Under this interpretation criterion (Article 2A of the ML) the courts also may take into account the international standards rather than the local standards in their decisions on the REFAA.

This suggestion is also relevant to the case study of the GCC states. Chapter nine of this thesis presents an analysis that proved neither the NYC nor its internationally accepted features appear in the texts of the GCC courts’ decisions on the REFAA. The case study of the GCC states presents a situation where the NYC has been adopted by the states, but the judges remain unfamiliar with the NYC, and the prevailing interpretations of the NYC provisions, or the spirit and purpose of the NYC have not been ideally recognised. In addition, the interviewed judges from the GCC states also confirmed that there was no need to make reference to the NYC or its features because they were obliged to act by the texts of the domestic law regulating the REFAA (dualism approach). These practices can be mitigated by adding an interpretation criterion to the domestic law (arbitration law) that regulates the REFAA in the GCC states. This may not be limited to the case study of the GCC states and might be true of many other states in the developing world.

³ML 1985 as amended in 2006 Article 2A states that: “(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”

10.3 Main findings and suggestions for reform in the case study of the GCC states

The second central research question of this thesis was to examine the main difficulties that need to be addressed to enhance the successful implementation of the NYC in the legal systems of the GCC states. The analysis in this thesis shows that there are fundamental challenges in the GCC states that frustrate the very purpose of the NYC, which is to facilitate the REFAA. Three fundamental challenges have been identified and discussed in this thesis.

These are:

- Concerns that the arbitration legislations of the states of Qatar, the UAE, and KSA are still affected by the heritage of the past, which in some aspects violate the NYC provisions, and also neglects the most globally accepted features of the operation of arbitration as an effective dispute resolution mechanism. The KSA arbitration law is in a better position than the arbitration law of Qatar and UAE in terms of accepting the essential features of arbitration, as seen in chapter seven of this thesis.
- The extensive use of the public policy defence as a ground for refusal in the states of Qatar and the UAE that has blocked the enforceability of the foreign arbitral awards in most cases where the foreign arbitral awards sought recognition and enforcement in these two states. This challenge is also correlated with the undefined role of Sharia public policy in all GCC legal systems, except in the KSA where extensive use of Sharia public policy has blocked the REFAA in a wide number of cases.
- The lack of familiarity of the GCC judiciaries with the important role that the NYC plays in enhancing the flow of international arbitration in the GCC states.

10.3.1 The urgent need for new arbitration laws in the states of Qatar and the UAE

The first recommendation for reform is to propose to the legislatures of Qatar and the UAE that they should issue a modern and integrated arbitration law that regulates domestic and international arbitration, and also regulates the REFAA. Having a modern arbitration law is the basis upon which to establish a friendly arbitration hub in these two countries. The Qatar and UAE arbitration laws are in drastic need of reform to bring them into line with the international legal framework developed by the NYC and ML. Adopting the ML as a benchmark for arbitration in Qatar and the UAE is likely to improve efficiency and

effectiveness. The longer that arbitration laws in Qatar and UAE remain outdated and riddled with black holes, the more difficult it will be for Qatar and the UAE to establish a friendly arbitration hub. The lack of proper arbitration laws in these two states (based on the ML) results in a legal vacuum, provides no assistance to the judicial system, and definitely establishes uncertainty regarding the REFAA, even after the adoption of the NYC.

The analysis in chapters five and six demonstrated how Qatari and UAE arbitration laws lack most of the essential principles needed for arbitration to operate as an effective dispute resolution mechanism. The current legal regime that regulates the REFAA is uncertain and misleading despite the adoption of the NYC.

- There are two domestic laws regulating the REFAA in these two states. First is the ‘NYC implementing decrees’ and second is the arbitration law. Both these laws are inconsistent with each other and provide no help in understanding how the REFAA is regulated in these two countries. However, Article 238 of the UAE arbitration law and Article 383 of the Qatari arbitration law provide room to accommodate this overlapping if applied ideally by the national courts.
- There is an additional requirement to the validity of the arbitration agreement than those imposed by Article II of the NYC. The subject matter of the dispute shall be determined in the arbitration clause (if possible) or during the arbitral proceedings; otherwise the arbitration agreement will be null and void.
- The form of writing agreement is not defined in the arbitration law of Qatar and UAE. However, the national courts in a number of cases showed a positive attitude in accepting the modern means of writing agreement, such as electronic means of communication. The arbitration parties shall also take into account the mandatory rules of the laws that regulate the electronic transactions in these two states.
- The principle of separability of the arbitration agreement is not recognised in the arbitration laws of these two states. However, the national courts of UAE show a positive attitude in accepting the principle of separability of the

arbitration agreement. The national court of Qatar shows a hesitant attitude. In both states, the implementation of the principle of separability of the arbitration agreement is still correlated with vagueness and uncertainty. This is because the law is silent and the matter depends on the discretion of the national courts.

- The principle of competence-competence (the right of the arbitral tribunal to rule on its jurisdiction) is not recognised in the arbitration laws of Qatar and UAE. There is a lack of published case law on the competence question. Therefore, the assumption is that the arbitral tribunal may not rule on its jurisdiction for arbitration to take place in these countries.
- The arbitration laws of Qatar and UAE do not differentiate between domestic and international arbitration. However, Qatari courts in a recent case established that if the arbitration takes place in Qatar and is subjected to arbitration rules other than those imposed by Qatari arbitration law, the recognition and enforcement is subject to the ‘NYC implementing decree’.
- Qatari arbitration law provides the possibility for annulling the arbitral award on its merits, mistake of facts, or question of law. This deprives arbitration from one of the most significant features which is the finality of the arbitral award in its merits.
- The principle of party autonomy in choosing the law and rules that govern the arbitration process is not clearly recognised in these two states. The arbitration laws of these two states are silent about the law governing the capacity question, arbitration agreement, and merits of dispute. Neither law is clear about the parties’ right to choose any institutional rules or international rules to govern the arbitration procedures.

10.3.2 The difficulties deriving from Islamic legal tradition and Sharia public policy

In the last two or three decades it has been noticeable that the region of the GCC states has become an attractive zone for investment, particularly for western multinational enterprises. This can be attributed to the economic change in the GCC states and the need for outsourcing

experts who would fuel this change. There has been a growing number of commercial interactions between western companies and companies from the GCC states over the last few decades. The international commercial activities in the GCC states are now not limited to oil extraction contracts or raw materials. It has evolved to cover many other sophisticated commercial transactions that relate to different areas of commercial activities beyond oil and gas exploration. However, the presence of modern legal systems in the GCC states may have a positive impact in supporting the flow of international trade, including the arbitration practices in the GCC states. This argument is not without limitations, and some criticism could be suggested about some of the vagueness and uncertainty in the GCC states' legal systems that might not provide any help to arbitration practices in the GCC states.

- **Relationship between Sharia law and arbitration practices in the GCC region**

Sharia law is a divine law designed to regulate not only the religious and personal life of Muslims, but also to regulate civil, commercial, criminal, and political matters and all aspects of life, as explained in detail in chapter four. In the past few decades, and before the formation of the modern legal systems (1960-1971), Sharia law was the dominant legal tradition in the GCC region. However, despite the modernisation of the GCC legal systems, chapter four shows how Sharia law still plays an undefined role in the GCC legal systems except in KSA where Sharia law still constitutes the State Constitution and is the only source of law. Sharia law provides its own sources that are mainly the *Quran* (God's words) and *Sunnah* (the prophet's statements and acts) as two primary sources of Sharia law, and *Ijtihad* (mental efforts of qualified jurists) as secondary sources of Sharia law. In addition, Sharia law provides for a unique methodology and technique for evaluation and interpretation that allows it to coexist with emerging topics such as the case of arbitration practice as seen in the KSA arbitration law that were analysed in detail in chapter seven. However, the following points clarify the findings about the relationship between Sharia law and arbitration practices in the GCC states, and to what extent the Sharia public may affect the REFAA under the NYC in this region.

- Sharia law is the only source of law in KSA and it forms the state constitution. Therefore, Sharia public policy is a strict ground for refusal in KSA and it has affected the REFAA in more than one case.
- The Sharia law requirement to the validity of the arbitration agreement is a ground to refuse REFAA in KSA. The arbitral award that granted a sum of interest *Riba*

(compound interest) is not enforceable in KSA, because it violates the Sharia public policy. In this regard it is recommended for the parties that sought to REFAA in the KSA to request the arbitrators to include the amount representing the sum of interest within the main sum of the award without identifying it separately as interest.

- The arbitration parties who arbitrate according to the KSA arbitration law may clearly determine the subject matter of the dispute, and the applicable laws in the wordings of the arbitration clause (if that possible). This is in order to avoid the annulment of arbitral award or refuses its enforcement under the Sharia law prohibition known as *Gharar*, which refers to the uncertainty of the subject matter of the contract.
- The arbitration parties in KSA may choose any law or rules governing the arbitral procedures, subject to this choice not violating the rules of Sharia law. However, there are no substantial differences between due process in Sharia law and the international notion of fairness and due process.
- The KSA arbitration law require that the arbitrator must be qualified as a lawyer with law degree or a Sharia law degree. If the arbitral tribunal is composed of three arbitrators, it is sufficient for only the chairman to meet such requirement. This can be traced back to the Sharia jurisprudence debate on the capability of the arbitrator to act as arbitrator. It is still to be tested if the Saudi courts consider this mandatory provision as a Sharia public policy in relation to the REFAA.
- The role of Sharia public policy in the GCC legal systems needs to be clearly identified. There may be an article in the GCC constitutions that clarify what Sharia public policy is, and in which circumstances it may be invoked. Currently, Sharia law is one of the principle sources of law in the GCC legal systems as stipulated in the constitutions of the GCC states.
- The role of Sharia public policy in the GCC states (except KSA) is uncertain. The GCC legislatures have enacted some national legislation that violates Sharia law, which means there are elements of vagueness and uncertainty regarding the role of Sharia public policy in the GCC legal systems.
- Sharia law plays subsidiary role in relation to the commercial and civil activities in all GCC states (except KSA), and it may be invoked only in the absence of law and customs. This argument is limited to commercial and civil activities, which are usually relevant to arbitration practices and REFAA under the NYC in the GCC states.

- The arbitral award that includes a sum of interest *Riba* are enforceable in all GCC states (except KSA) only if it has emerged from a commercial dispute, which is common in the practice of international commercial arbitration. This is subject to the sum of interest not exceeding the interest rate provided by the commercial codes or monetary agencies of the GCC states.
- The Sharia law prohibitions such as alcohol spirits, pigs and gambling cannot be subject to all contractual relations in KSA including the arbitration agreement because they are prohibited by mandatory rules of the *Quran*. In the rest of GCC states these prohibitions might also affect the arbitrability question, as the GCC laws do not explicitly consider them illegal. The GCC national courts may interpret these prohibitions as invalid subject matter of the arbitration agreement. This still to be tested by the GCC national courts.
- Sharia public policy has categorised by the interviewed practitioners for the purpose of this thesis as one of the barriers to the REFAA. Given the increasing number of commercial activities in the GCC states between the west and their GCC counterparts, it is recommended that western lawyers and arbitration professionals have a reasonable grasp of the general principles of Sharia law as it is a source of law of varying degrees in GCC states.

10.3.3 The public policy bar should be interpreted narrowly and applied exceptionally

Any sort of proposal to enhance the efficiency of the NYC in the GCC states has to take into account the necessity of relaxing the consideration of public policy as a ground to refuse REFAA. However, it is accepted that the nature of the public policy defence imposes an obligation upon the national courts to safeguard the state interest, including the political, social, cultural, moral, religion and economic dimensions. This sort of consideration should strike a balance between the state interest and the need for the free flow of international trade in the GCC states, as discussed in detail in chapter eight. This might be achieved by adopting the following approach:

- **There is a necessity to distinguish between domestic and international public policy in the domain of international commercial arbitration.**

International public policy means that the public policy of the state shall be applied narrowly. Although international public policy is not independent of the standards of the domestic

public policy of the state, it reflects only a restricted version of these standards. The case law analysis in this thesis revealed that the public policy of the GCC states might not itself be a barrier to the REFAA. This argument is not without limitations, however, and one of the limitations of this thesis is that it has not analysed all aspects of GCC public policy as this is out of its scope. In relation to the case law on the foreign arbitral awards analysed in this thesis, it is thought that there are two key reasons that present the public policy of the GCC states as a barrier to the REFAA.

The first is the lack of judicial distinction between domestic and international public policy. Chapters five and six revealed that there seems to be more in common between Qatar and the UAE in terms of providing strict consideration to the issue related to unfairness and lack of due process as a ground for refusal. It is recommended that in the states of Qatar and the UAE, the national courts may separate political considerations from the public policy exception as grounds to refuse REFAA. The excessive judicial involvement under the justification of protecting the state interest is perceived as being detrimental to the arbitral process and militates against the choice of a particular country as the place of arbitration. The second is the critical issue of the lack of familiarity of the GCC judiciaries with the significant role that the NYC plays in developing the acceptance of arbitration in the GCC states.

10.3.4 Enhancing the efficiency of the GCC judiciaries in their application of the NYC

One of the key challenges facing the successful implementation of the NYC is the lack of familiarity of the GCC judiciaries with the role that the NYC plays in supporting the flow of international arbitration. The judicial authorities in any state play a major role in supporting and strengthening the practice of arbitration, whether in terms of knowledge, experience, or venue. Now might be the time to make substantial reforms to enhance the familiarity of GCC judicial jurisprudence with arbitration generally and the NYC in particular. The clash between applying the local law or the NYC to the REFAA is not only unacceptable; it might also have a negative impact on the private sector and weaken the operation of arbitration in the GCC states.

This thesis found that fact the NYC operates in all GCC legal systems through domestic laws has resulted in a gap in the interpretative approach. This is not limited to the case study of the GCC states, and is even evidenced by UNCITRAL in a survey conducted on 108 state parties that monitored the rules of interpretation used by the national courts to interpret the provisions

of the NYC.⁴ In GCC states, it is notable that in most of the GCC judgments on the foreign arbitral awards neither the NYC nor its internationally- accepted features are highlighted in the wordings of the judgments. Unlike the judgments on foreign arbitral awards in developed arbitration jurisdictions, where the NYC also operates at a domestic level through domestic law, the judiciaries in these countries have commonly interpret the provisions of the domestic law in the context of the corresponding provisions of the NYC, that has led to highlighting the provisions and features of the NYC in the wordings of their judgments. In this context the thesis suggests two factors that would promote the judicial applications of the NYC in the GCC states:

- **The principle of autonomous interpretation**

This thesis suggests that employing an autonomous interpretation enabling the domestic law that regulates the REFAA in the GCC states to be interpreted within the *context of the NYC* should enhance the efficiency of the GCC judiciaries on the application of the NYC. There is a necessity in the GCC states to see the NYC and its internationally-accepted features in the wordings of the judgments on the REFAA. This would confirm the applicability of the NYC, including its spirit and purpose regarding the REFAA. In addition, it would also enhance the business community's reliance on the operation of the NYC in the GCC legal systems, which would greatly benefit the development of arbitration practices in the GCC states. Otherwise, the ratification of the NYC by all GCC states remains an international act whereby a state indicates its consent to be bound to the NYC without having a legal effect at the domestic level, either in the arbitration laws of states or in the texts of judicial rulings on foreign arbitral award in all GCC states.

- **The preparatory work of the NYC and international guidance materials**

Arbitration is often used to resolve disputes emerging from multinational transactions. This sometimes requires the national courts at different stages of arbitration to become involved with different laws and rules that govern the arbitration process. The judge might have to engage with the arbitration rules chosen by parties or international treaties or model laws that may be relevant to the arbitration agreement. Importantly, the judge may also have to become

⁴ UNCITRAL document No. A/CN.9/656 for 2008, page 11 Para 35-40.

involved with the preparatory work of the NYC or different guidance materials on the NYC that provide for the ideal or prevailing interpretations provided by different national courts' decisions on the NYC.

There is a necessity in the GCC states for professional programmes aimed at familiarising GCC judges with the UNCITRAL works, such as the CLOUT System, Digest Case Law on ML, preparatory works of the NYC, different court decisions on the NYC, aim and purpose of the NYC, various journals specialising in international arbitration, and also an increase in the judicial knowledge about the important role the NYC plays in the free flow of international arbitration practices in the relevant countries.

10.4 Scope for further research

Chapter three of this thesis examined the extent to which the different judicial interpretations of the NYC provisions might weaken the efficacy of the NYC. The chapter focused on one form of this problem, which was the recognition and enforcement of annulled arbitral awards which have led to a different understanding of the legal framework established by the NYC. There is also another emerging notion, which is the use of *forum non-conveniens* as a ground for refusal to the REFAA. This notion may be another platform for different judicial interpretations of the NYC provisions that may also lead to different understandings of the legal framework regulating the REFAA. There might be an opportunity for further research on this point that could contribute to the current development of international arbitration practice.

Part two of this thesis examined the challenges that face the implementation of the NYC in the GCC states. This thesis can serve as a basis upon which to understand the key problems and difficulties facing the REFAA in the GCC states. One of the limitations of this thesis relates to time and monetary constraints, which meant that the interview study was conducted with a small number of judges and arbitration practitioners in the GCC states. It is perhaps a task that could be tackled by future academic researchers addressing the same issue, and one that might be undertaken from the outset of the research. Another limitation is the fact that courts in all the GCC states do not systematically publish their cases, making it hard to track the progress in terms of the REFAA. Most of the case law that was examined in this thesis was either obtained from the courts secretariats during the interview study – this is limited to

the Bahrain and Dubai courts – or was published in a limited number of journals that specialise in arbitration practices in the GCC states. What remains to be done is to keep track of cases and developments in the GCC states, and perhaps for the GCC states to create an online case reporting system for publishing case law materials including the case law on arbitration and REFAA.

In addition, there is room for additional analysis of some issues that were not covered in this thesis. The thesis did not analyse all aspects of the GCC public policy, that is, for example, the rules of private ownership, matters relating to sovereignty, freedom of trade, and the circulation of wealth and to what extent all these matters might affect the arbitration practices in the GCC states. There are many provisions in the GCC constitutions and different national laws that may reflect how the GCC states tend to protect these principles that might be useful materials for future researches.

In summary:

The NYC has achieved great success in facilitating the REFAA and the process has become a universal instrument adopted by a wide number of the states cross the world. However, the degree of harmonisation in the implementation of the NYC is still relative, since the NYC is designed to interact with different national laws that leave the doors open to the ‘local standards’ to a certain extent. The national courts, including the GCC courts in their decisions on the NYC, shall not expand into local standards to the extent that it supersedes the international standards that regulate the REFAA. The local standards might be accepted only in so far as it is in favour of promoting the purpose of the NYC i.e. to further the REFAA. Although this thesis focused on the implementation of the NYC in the GCC states, its findings are also relevant to the problems facing the operation of arbitration as an effective dispute resolution mechanism in the GCC region. It is hoped that the policymakers of the GCC states will take the initiative to overcome these problems in the near future.

Bibliography

Abusadah, Muhammad 'International Arbitration Contract Principles: Analysis of Middle East Perceptions' (2010) 9:2 Journal of International Trade Law and Policy 148-174.

Affolder, Natasha 'Awarding Compound Interest in International Arbitration' (2001) 12:1 American Review of International Arbitration 45-93.

Al Houti, Dalal 'Arbitration in Kuwait: Time for Reform?' (2015) April Law Update - Issued by Altamimi and Co Legal Firm-UAE.

Al Mulla, Habib, et al, 'Recent Ruling of Dubai Court of Cassation on Enforcement of Foreign Arbitral Awards: Back to Square One It Is' [2013] Kluwer Arbitration Blog.

Al Tamimi, Essam 'Enforcement of Foreign Arbitration Awards in the Middle East' (2014) 1:1 BCDR International Arbitration Review 95-104.

Al Zayed, Nasser, 'Commercial Arbitration in the Gulf States: An Overview' (2010) 2:1 International Journal of Arab Arbitration 37-49.

Al-Humaidhi, Hamad, 'Arbitration in the Arab-Islamic World' (2015) 29:1 Arab Law Quarterly 92-99.

Al-Naqeeb, Khaldoun, *Society and State in the Gulf and Arab Peninsula* (4thedn, Routledge United States 2012).

AlAnezi, Rashid, 'Enforcement of Foreign Arbitral Awards in Kuwait' (2014) 1:1 BCDR International Arbitration Review 85-94.

Alfonso, Claudia, *Recognition and Enforcement of Annulled Foreign Arbitral Awards* (Peter Lang Gmbh, Netherlands 2010).

Alnasair, Mohamed and Bantekasllias, 'The effect of public policy on the enforcement of foreign arbitral awards in Bahrain and UAE' (2013) 13:3 International Arbitration Law Review 88-96.

Alsheikh, Essam, 'Distinction between the Concepts Mediation, Conciliation, *Sulh*.. and Arbitration in Sharia Law' (2011) 25:4 Arab Law Quarterly 367-400.

Alshikh, Abdullah, *Codification of Islamic Law in Saudi Arabia: A Potential Problem, Or Part of the Solution Toward Building a Nation of Laws?* (1st edn, Harvard Law School, United States 2007).

Alsuwaidi, Ahmed 'Development of the Legal Systems of the Gulf Arab States' (1993) 8:4 Arab Law Quarterly 289-301.

Amin, Jayed 'Middle East Legal Systems' (1987) 3:3 Arbitration International 91-93.

Amro, Ihab, 'Review of a Foreign Arbitral Award by National Courts: A Comparative Study in Common Law and Civil Law Countries' (2011) 24 Hague Yearbook of International Law 391-414.

Arab, Hassan, 'Judicial Attitude Toward Foreign Arbitral Awards in the United Arab Emirates' (2014) 1:1 BCDR International Arbitration Review 1-10.

Arfazadeh, Homayoon 'In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception' (2002) 13 The American Review of International Arbitration 44-65.

Arfazadeh, Homayoon 'Arbitrarability under the New York Convention: The Lex Fori Revisited' (2001) 17:1 Arbitration International 73-88.

Arvind, TT, 'The Transplanted Effect in Harmonisation' (2010) 59:1 International and Comparative Law Quarterly 65-88.

Ayad, Mary 'Harmonization of Custom, General Principles of Law, and Islamic Law in Oil Concessions' (2012) 29:5 Journal of International Arbitration 477-518.

Ayub, Muhammed *Understanding Islamic Finance* (1st edn, John Wiley and Sons, United Kingdom 2008).

B.lamm, Carolyn, 'Comment: Comments on the Proposal to Amend the New York Convention' (2009) 14 ICCA Congress Series 697-707.

Baamir, Abdulrahman, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (1st edn, Ashgate Publishing, United Kingdom 2013).

Bachand, Frederic 'Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism' (2012) volume 2012 1 Journal of Dispute Resolution 84-100.

Badr, Gamal 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26:2 The American Journal of Comparative Law 187-198.

Ballantyne, William, *Commercial Law in the Arab Middle East: The Gulf States* (Lloyd's of London Press 1986).

Barak, Aharon, *Purposive Interpretation in Law* (1st edn, Princeton University Press 2005).

Barrett, Jr, 'The Doctrine of Forum Non Conveniens' (1948) 34:7 Virginia Law Review 811-822.

Barriball, Louise 'Collecting data using a semi-structured interview: a discussion paper' (1994) 19:2 Journal of Advanced Nursing 328-335.

Berg, Albert 'Consolidated Commentary' (2003) XXVIII Year Book of Commercial Arbitration 584-587.

Berg, Albert, 'Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam' (2010) 27:2 Journal of International Arbitration 179-198.

Berg, Albert, 'New York Convention of 1958: Refusals of Enforcement' (2007) 18:2 ICC International Court of Arbitration Bulletin 1-35.

Berg, Albert, 'New York Convention v Hypothetical Convention: A closer look at the proposed new New York Convention' (2008) 3:3 Global Arbitration Review 14-21.

Berg, Albert, 'Should the Setting Aside of the Arbitral Award be abolished?' (2014) 29:2 ICSID Review 263-288.

Berg, Albert, 'Striving for Uniform Interpretation' (1998) published in 'Enforcing Arbitration Awards under the New York Convention Experience and Prospects' at 41 (United Nations Publication 1998) ISBN 92-1-133609-0.

Berg, Albert, 'The Application of the New York Convention by the Courts' (1998) 9 ICCA Congress Series 25-34.

Berg, Albert, 'Why Are Some Awards Not Enforceable?' (2005) 12 ICCA Congress Series 291-326.

Berg, Albert, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International, Netherlands 1981).

Berga, Nathan and Jeong-Yoo Kim, 'Prohibition of Riba and Gharar: A signalling and screening explanation?' (2014) 103 Journal of Economic Behaviour and Organization at 146-159.

Bermann, George and Loukas Mistelis, *Mandatory Rules in International Arbitration* (Juris Publishing 2011).

Bermann, George, 'Domesticating the New York Convention: The Impact of the Federal Arbitration Act' (2011) 2:2 Journal of International Dispute Settlement 317-332.

Bermann, George, 'Introduction: Mandatory Rules of Law in International Arbitration' (2007) 18 American Review of International Arbitration 1-27.

Bermann, George, 'The Gateway Problem in International Commercial Arbitration' (2012) 37:1 The Yale Journal of International Law 12.

Bermann, George, 'International Commercial Arbitration: Past, Present, Future' (2015) 33:5 Alternatives to the High Cost of Litigation 65-76.

Billah, Muhammad, 'The Prohibition of Riba 'interest' and the Use of Hiyal 'trick' by Islamic Banks to Overcome the Prohibition' (2014) 28:4 Arab Law Quarterly 392-408.

Blanke, Gordon and Corm-Bakhos, Soraya 'Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure' (2014) 1 BCDR International Arbitration Review 3-28.

Blanke, Gordon and Habib AlMulla, 'Dubai Court of Cassation confirms enforcement of foreign awards under New York Convention: The end of a beginning' Kluwer Arbitration Blog.

Blanke, Gordon and Soraya Bakhos, 'Enforcement of New York Convention Awards: Are the UAE Courts Coming of Age?' (2012) 78:4 Arbitration 359-365.

Blanke, Gordon, 'Case Comment: Public Policy in the UAE: The Story about the Unruly Horse That Turned into a Camel' [2012] Kluwer Arbitration Blog.

Blanke, Gordon, 'Enforcement of New York Convention Awards in the UAE: The Story Re-Told' (2013) 5:3 International Journal of Arab Arbitration 19-36.

Bockstiegel, Karl 'Public Policy and Arbitrability' (1986) 3 ICCA Congress Series 177-204.

Bockstiegel, Karl, 'Public Policy as a Limit to Arbitration and Its Enforcement' (2008) 2 Journal of Dispute Resolution 123-132.

Boehm, John and Mohammed Al-Ghamdi, 'New Saudi Arbitration Law: A Positive Step, but Practical Questions Remain' [2012] Norton Rose Bulletin 3.

Borchard, Edwin 'The Relation between International Law and Municipal Law' (1940) 27:2 Virginia Law Review 137-148.

Born, Gary and Michal Jorek, 'Dallah and the New York Convention' [2011] Kluwer Arbitration Blog.

Born, Gary, *International commercial arbitration in the United States: commentary and materials* (Kluwer Law and Taxation Publishers, California 1994).

Born, Gary, *International Commercial Arbitration: Cases and Materials* (Aspen Publisher, New York 2011).

Born, Gary, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International, Netherlands, 2001).

Born, Gary, *International Commercial Arbitration* (2nd edn, Kluwer Law International, Netherlands 2014)

Brekoulakis, Stavros, 'Law Applicable to Arbitrability: Revisiting the Revisited lexfori' (2009) 21 Queen Mary University of London, School of Law, Legal Studies Research Paper No. 21/2009.

Broches, Aron 'Recourse against the Award: Enforcement of the Award, UNCITRAL Project for a Model Law on International Commercial Arbitration' (1984) 2 ICCA Congress Series 201-227.

Brower, Charles and Jeremy Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97:3 The American Journal of International Law 643-656.

- Brown, Nathan, *The rule of law in the Arab world: courts in Egypt and the Gulf* (Cambridge University Press, 1997).
- Brownlie, Ian, *Principles of Public International Law* (7th edn, Oxford University Press, Oxford 2011).
- Bryman, Alan, *Social Research Method* (4edn, Oxford University press, Oxford 2012).
- Buchanan, Mark, 'Public Policy and International Commercial Arbitration' (1988) 26:3 American Business Law Journal 511-531.
- Changaro, Anil 'International Arbitration - a Consensus of Public Policy Defences?' (2008) 4:2 Asian International Arbitration Journal 143-174.
- Chatterjee, Charles 'The Reality of The Party Autonomy Rule In International Arbitration' (2003) 20:6 Journal of International Arbitration 539-560.
- Crawley, Shaun, 'Does an Extension of Time Clause Prevent a Construction Contract Being Infected by Gharrar ?' (2012) 26:2 Arab Law Quarterly 155-174.
- Cremades, Bernardo, 'Impact of International Arbitration on the Development of Business Law' (1983) 31:3 American Journal of Comparative Law 526-534.
- Cremona, Maries and Ian Fletcher and Loukas Mistelis, *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, United Kingdom 2001).
- Crivellaro, Jacop, 'Conflicting Contrasts in *Dallah v Government of Pakistan*' (2011) 17 The Columbia Journal of European Law 51-70.
- David, Rene, *Arbitration in International Trade* (1st edn, Springer, United Kingdom 1985).
- Davidson, Fraser, *Arbitration* (2nd edn, W Green publishing, Edinburgh 2012).
- Davies, Donald, 'Arbitration: Interest on the Award' (1990) 2 Law for Business. 230-234.
- Davis, Kenneth, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 Texas International Law Journal 43-87.
- Dilemma, Amlon, 'Another Hilmarton Nightmare in International Commercial Arbitration' (2014) 10:3 Canadian Social Science 29-36.
- Di Pietro, Domenico and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron May 2001).
- Diedrich, Frank, 'Maintaining Uniformity In International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8:2 Pace International Law Review 303-338.

Dimitrakopoulos, Antonios, 'Arbitration Practice in the UAE' (2001) 16:4 Arab Law Quarterly 398-403.

Dimolista, Antonias, 'Separability and Kompetenz-kompetenze' in ICCA Congress Series No. 9, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention (Kluwer law international, Netherlands 1999) 217-228.

Donovan, Donald, 'International Commercial Arbitration and Public Policy' (1995) 27:3 Journal of International Law and Politics 645-657.

Dunds, Hew 'Appeals on Questions of Law: Section 69 Revitalised' (2003) 69:3 Arbitration 172-179.

Dworkin, Ronald, *Taking Rights Seriously* (1st edn, Harvard University Press, United states 1977)

Edge, Ian 'The Middle East: Legal System or Legal Vacuum' (1995) 1:4 Middle East Commercial Law Review 127-129.

El-Ahdab, AbduHamid and Ruth Stackpool, 'Arab Arbitration v. International Arbitration? The Case for a Reconciliation' (2008) 25: 2 Journal of International Arbitration 275-288.

El-Ahdab, AbdulHamid 'Saudi Arabia Accedes to the New York Convention' (1994) 11:3 Journal of International Arbitration 87-91.

El-Ahdab, Jalal, and AbdelHamid El-Ahdab, *Arbitration With the Arab Countries* (3 edn, Kluwer Law International, Netherlands 2011).

Esposito, John *The Oxford Dictionary of Islam* (1st edn, OUP 2003).

Expert Views, 'Early Impact of Dallah on the English Courts: Could a Supreme Court Decision Damage the UK's Standing for Enforcing Foreign Arbitral Awards?' (2011) 4 Commercial Dispute Resolution CDR 54-56.

Fazio, Slivia, *The Harmonization of International Commercial Law* (1st edn, Kluwer Law International, Netherlands 2007).

Fernande, Carlos, *Sovereignty and Interpretation of International Norms* (1edn, Springer, United Kingdom 2007).

Finizio, Steven and Christopher Howitt, 'When international arbitration meet Sharia' (2013) Commercial Dispute Resolution 49-52.

Gharavi, Hamid, *International Effectiveness of the Annulment of Arbitral Award* (1st edn, Kluwer Law International, Netherlands 2002)

Gaffney, John and Dalal Al Houti, 'Arbitration in the UAE: Aiming for Excellence' [2014] Law Update - Issued by Altamimi and Co Legal Firm-UAE.

Gaillard, Emmanuel, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14:1 ICSID Review 16-45.

Gaillard, Emmanuel, 'The Urgency of Not Revising the New York Convention' (2008) 14 ICCA Congress Series 689-707.

Gaillard, Emmanuel, et al, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (1st edn, Cameron May 2008).

Gebauer, Martin 'Uniform Law, General principles and Autonomous Interpretation' (2000) 5:4 Uniform Law Review at 683-706.

Gelinas, Frederic and Fabien Gelinas, *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (1st edn Huntington, New York 2013).

Gemmell, Arthur 'Commercial Arbitration in the Islamic Middle East' (2006) 5:1 Santa Clara Journal of International Law 169-193.

Gharavi, Freyer, 'Finality and Enforceability of Foreign Arbitral Awards: From 'Double Exequatur' to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity' (1998) 13:1 Foreign Investment Law Journal 101-123.

Glenn, Patrick, *Legal Traditions of the World* (4th edn, OUP 2010).

Glubb, John, *The Empire of the Arabs* (Hodder and Stoughton, United Kingdom 1963).

Goldman, Berthold, et al, *International Commercial Arbitration* ((Kluwer Law International, Netherlands 1999).

Goode, Roy, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17:1 Arbitration International 19-40.

Goode, Roy, and Herbert Kronke and Ewan Mckendrick, *Transnational Commercial Law: Text, Cases, and Materials* (1st edn, OUP, Oxford 2007).

Gopalan, Sandeep, 'New Trends in the Making of International Commercial Law' (2004) 23 Journal of Law and Commerce 117-142.

Gourgourinis, Anastasios 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2:1 Journal of International Dispute Settlement 31-57.

Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law* (Brill, Netherlands 2007).

Hallaq, Wael, *An Introduction to Islamic Law* (1st edn, CUP 2009).

Hanotiau, Bernard, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academic Law Journal 874-885.

Harb, Jean-Pierre and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Sharia' (2013) 30:2 *Journal of International Arbitration* 113-130.

Harris, Troy, 'Public Policy Exception to Enforcement of International Arbitration Awards under the New York Convention' (2007) 24 *Journal of International Arbitration* 9-24.

Hassan, Abdullah, *Sales and Contracts in Early Islamic Commercial Law* (2nd edn, The Other Press Sdn Bhd, Malaysia 2007).

Hayat, Khan, 'Optimal incentives for Takaful (insurance) operators' (2015) 109 *Journal of Economic Behaviour and Organization* 135-144.

Heidemann, Maren, 'The Autonomous Interpretation Method in International Law with Particular Reference to the Proposed European Sales Law I' (2013) 93 *Journal of Amicus Curiae* 21-30.

Heiskanen, Veijo, 'Dealing with Pandora: The Concept of "Merits" in International Commercial Arbitration' (2006) 22:4 *Arbitration International* 597-611.

Herrmann, Gerold, 'Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture' (1999) 15:3 *Arbitration International* 211-236.

Herrmann, Gerold, 'The 1958 New York Convention Its Objectives and Its Future' (1998) 9 *ICCA Congress Series* 15-24.

Hirts, Alastair 'The Recognition and Enforcement of Foreign Arbitral Awards in the Sultanate of Oman' (2014) 1 *BCDR International Arbitration Review* 61-68.

Hill, Jonathan 'The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958' (2015) *Oxford Journal of Legal Studies* 1-30.

Hill, Jonathan, 'Determining the seat of an international arbitration: party autonomy and the interpretation of arbitration agreements' (2014) 63:2 *International and Comparative Law Quarterly* 517-534 at 517.

Hoellering, Michael 'International Arbitration Agreements: A Look Behind The Scenes' (1998) 53:4 *Dispute Resolution Journal* 64-70.

Hofmann, Nathalie, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22:1 *Pace International Law Review* 145-180.

Holloway, David 'Avoiding Duplicative Litigation about Arbitration Awards within the EU' (2011) 2:2 *Journal of International Dispute Settlement* 435-457.

Holloway, David, and Carole Murray and Daren Timson-Hunt, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell, London 2012)

Holtzmann, Howard 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' 109-114, Published in Martin Hunter, Arthur Marriott, and VV Veeder, *The Internationalization of International Arbitration, The LCIA Centenary Conference* (Graham & Trotman / MartinusNijhoff 1995).

Holtzmann, Howard, 'Judicial application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1999) 5 *International and Comparative Law Review* 481-495.

Hogas, Diana 'Principles of law applicable to the arbitration proceedings' (2014) 4:2 *Juridical Tribune Journal* 128-145.

Hutchinson, Terry, *Research and Writing in Law* (Law Book Co. NSW, Australia, 2006).

Hvidt, Martin 'Economic Diversification in GCC Countries: Past Record and Future Trends' [2013] The London School of Economics and Political Science.

Ibrahim and Frank Harrigan, 'Qatar's Economy: Past, Present and Future' (2012) 1:1 *Qatar Foundation Academic Journal* 2-24.

Iqbal, Muhammad, 'Prohibition of Interest and Economic Rationality' (2010) 24:3 *Arab Law Quarterly* 293-308.

Iqbal, Zamir and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice* (2nd edn, John Wiley and Sons, United Kingdom 2011).

Jarvin, Sigvard, 'Enforcement of an Arbitration Award in Oman' (1985) 2:4 *Journal of International Arbitration* 81-86.

Juratowitch, Ben, 'Forum Non Convenience for Enforcement of Arbitral Awards against States' (2014) 63 *International and Comparative Law Quarterly* 477-490.

K. Ramazani, Rouhollah and Joseph Kechichian, *The Gulf Cooperation Council: Record and Analysis* (1st edn, University of Virginia Press 1988).

Kamali, Mohammed, *Sharia Law: An Introduction* (Oneworld Publications, Oxford 2008).

Kantaria, Saloni, 'The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law' (2012) 15:2 *International Arbitration Law Review* 61-66.

Kaplan, Neil, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' (1996) 12:1 *Arbitration International* 27-46.

Kaufmann, Gabrielle, 'Identifying and Applying the Law Governing the Arbitration Procedure: The Role of the Law of the Place of Arbitration' (1998) 9 *ICCA Congress Series* 363-365.

- Kerr, Michael, 'Arbitration and Courts: The UNCITRAL Model Law' (1985) 34:1 *The International and Comparative Law Quarterly* 1-24.
- Kerr, Michael, 'Concorde and Conflict in International Arbitration' (1997) 13 *Arbitration International* 121-127.
- Kessedjian, Catherine, 'Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?' (2007) 18 *American Review of International Arbitration* 147-161.
- Khan, Mohammad, *The Schools of Islamic Jurisprudence: A Comparative Study* (1st edn, the University of Michigan Press, United States 1991).
- Khatchadourian, Minas 'A Half-tone Application of the New York Convention by the Qatari Supreme Court' [2014] *Kluwer Arbitration Blog*.
- Khatchadourian, Minas, 'A New Bump on the Qatar-New York Road' [2014] *Kluwer Arbitration Blog*.
- Khatchadourian, Minas, 'Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards' [2013] *Kluwer Arbitration Blog*.
- Khatchadourian, Minas, 'The Application of the 1958 New York Convention in Qatar' (2014) 1:1 *BCDR International Arbitration Law Review* 49-60.
- Kleinheisterkamp, Jan 'Lord Mustill and the Courts of Tennis – *Dallah v Pakistan* in England, France and Utopia' (2012) 75:4 *The Modern Law Review* 639-654.
- Koch, Christopher, 'The Enforcement of Awards Annulled in their Place of Origin' (2009) 26:2 *Journal of International Arbitration* 267-292.
- Kozubovska, Beata 'Trends in Arbitrability' (2014) 1:2 *IALS Student Law Review* 20-27.
- Kroll, Stefan, 'Germany: Setting Aside An Award' (2001) 4:4 *International Arbitration Law Review* 26-27.
- Kronke, Herbert and Patricia Nacimiento, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, Netherlands 2010).
- Kutty, Faisal 'The Sharia Factor in International Commercial Arbitration' (2006) 28:3 *Loyola of Los Angeles International and Comparative Law Review* 565-624.
- Laeuchli, Urs, 'Civil and Common Law: Contrast and Synthesis in International Arbitration' (2007) 62:3 *Dispute Resolution Journal* 39-49.
- Lalive, Pierre, 'On the Reasoning of International Arbitral Awards' (2010) 1:1 *Journal of International Dispute Settlement* 55-65.

Lalive, Pierre, 'Transnational (or truly international) public policy and international arbitration' (1986) *Comparative arbitration practice and public policy in arbitration: [VIII th International arbitration congress, New York 257-318.*

Landau, Toby, 'The Requirement of a Written Form for an Arbitration Agreement: When Written Means 'Oral'' (2002) 11 ICCA Congress Series 19-81.

Lando, Ole 'The *lex mercatoria* in International Commercial Arbitration' (1985) 34 *International Comparative Law Quarterly* at 747-768.

Landolt, Phillip 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' (2013) 30:5 *Journal of International Arbitration* 511-530.

Lange, Donald, *The doctrine of Res Judicata in Canada* (2edn, Butterworths 2004).

Legrenzi, Matteo, *Shifting Geo-Economic Power of the Gulf: Oil, Finance and Institutions* (Ashgate Publishing, United Kingdom 2011).

Lew, Julian and Loukas Mistelis and Stefan Kroll, *Comparative international commercial arbitration* (1st edn, Kluwer Law International, Netherlands 2003).

Lew, Julian, 'Achieving the Dream: Autonomous Arbitration' (2006) 22:2 *Arbitration International* 179-204.

Lew, Julian, 'Does National Court Involvement Undermine the International Arbitration Process' (2009) 24:3 *American University International Law Review* 489-537.

Lew, Julian, 'The Law Applicable to the Form and the Substance of the Arbitration Clause' (1998) 9 ICCA Congress Series 114-145.

Russell, Francis and Judith Gill, *Russell on Arbitration* (Sweet & Maxwell, London 2003)

Liebscher, Christoph, *The Healthy Award: Challenge in International Commercial Arbitration* (Kluwer Law International, Netherlands 2003).

Majeed, Nudrat, 'Good Faith and Due Process: Lessons from the Sharia' (2004) 20:1 *Arbitration International* 97-112.

Maleh, Seem, 'Is It Time to Amend the Articles Regulating Arbitration in Qatar?' [2011] *Kluwer Arbitration Blog*.

Malintoppi, Loretta 'Remarks on Arbitrators' Independence, Impartiality and Duty to Disclose in Investment Arbitration' (2008) 7:3 *The Law & Practice of International Courts and Tribunals* 351-356.

Mallat, Chibli, *Introduction to Middle Eastern Law* (1st edn, Oxford University Press, Oxford 2007).

Martinez, Jenny, 'Towards an International Judicial System' (2003) 56:2 *Stanford Law Review* 429-529.

Maurer, Aton, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application* (Juris Publishing, New York 2013).

Mayer, Pierre, 'Mandatory Rules of Law in International Arbitration' (1986) 2:4 *Arbitration International* 274-293.

Mayer, Ulrich, 'The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention' (1998) 3 *Uniform Law Review* 583-599.

Mistelis, Loukas 'The Arbitral Seat: Important Features and the Relevance of Law' (2012) 23:3 *The American Review of International Arbitration* 407-416.

Mistelis, Loukas and Stavros Brekoulakis, *Arbitrability: International and Comparative Perspectives* (1st edn, Kluwer Law International 2009).

Mistelis, Loukas, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform -Some Fundamental Observations' (2000) 34 *International Lawyer* 1055-1069.

Mohammed, Noor, 'Principles of Islamic Contract Law' (1988) 6:1 *Journal of Law and Religion* at 115-130.

Mohtashami, Reza and Merry Lawry, 'The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. DynCorp' (2012) 29:4 *Journal of International Arbitration* 429-436.

Mohtashami, Reza, 'Banishing the Ghost of Lord Asquith's Award: A Resurgence of Arbitration in the Middle East' (2014) 1:1 *BCDR International Arbitration Review* 121-124.

Morris, Caroline and Cian Murphy, *Getting a PhD In Law* (Hart publishing, Oxford 2011).

Moses, Margaret, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP, Cambridge 2012).

Moses, Margaret, 'Arbitration/Litigation Interface: The European Debate' (2014) 35:1 *Northwestern Journal of International Law and Business* 1-47.

Moss, Giuditta 'International Arbitration and the Quest for the Applicable Law' (2008) 8:3 *Global Jurist Article 2*, 1-42.

Munday, Roderick 'The Uniform Interpretation of International Conventions' (1978) 27 *International and Comparative Law Quarterly* 450-488.

Mustill, Michael, 'Arbitration: History and Background' (1989) 6:2 *Journal of International Arbitration* 43-56.

Nassir, Jamal, *The Islamic Law of Personal Status* (2^{edn}, Graham and Trotman Ltd, 1990).

Nazzini, Renato, 'Arbitral Award in the Multiple Interaction of State Legal Systems' (2001) 12:5 *European Business Law Review* 120-144.

Newton, Nigel, 'the use of semi-structured interviews in qualitative research: strengths and weaknesses' [2010] available at the University of Bristol website.

Nordin, Nadhirah, et al, 'contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?' (2014) 10:15 Journal of Asian Social Science 37-47.

O'Reilly, Michael 'Appeal from Arbitral Awards: Should Section 69 Be Repealed?' (2003) 69:1 Arbitration 1-9.

Ostrowsm, Stephen and Yuval Shany, 'Charmalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 New York University Law Review 1650-1693.

Ozumba, Obinna, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?' available at www.dundee.ac.uk.

Park, William and Alexander Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration' (2006) 58 Hastings Law Review 251-295.

Park, William and Yanos, 'Respecting the New York Convention' (2007) 18:2 ICC International Court of Arbitration Bulletin 65-77.

Park, William, 'Determining Arbitral Jurisdiction of Tasks Between Court and Arbitrators' (1997) 8 American Review of International Arbitration 133-145.

Park, William, 'The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?' (1996) 12:2 Arbitration International 137-160.

Park, William, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32:1 The International and Comparative Law Quarterly 21-52.

Paulsson, Jan 'Arbitration in Three Dimesions' (2011) 6:2 International and Comparative Law Quarterly 291-323.

Paulsson, Jan, 'Delocalisation of international commercial arbitration: when and why it matters' (1983) 32:1 International and Comparative Law Quarterly 53-61.

Paulsson, Jan, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment' (1998) 9: The ICC International Court of Arbitration Bulletin, at 14 also published in Asia Pacific Law Review 6:2 (1998) 1-28.

Paulsson, Jan, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' (1998) 9 ICCA Congress Series 574-582.

Paulsson, Jan, 'Why Good Arbitration Cannot Compensate for Bad Courts' (2013) 30:4 Journal of International Arbitration 345-360.

Petrochilos, Georgios, 'Enforcing Awards Annulled in their State of Origin under the New York Convention' (1999) 48:4 International and Comparative Law Quarterly 856-888.

Poudret, Sebastien, *Comparative Law of International Arbitration* (1st edn, Sweet & Maxwell, London 2007).

Radhi, Hassan 'International Arbitration and Enforcement of Arbitration Awards in Bahrain' (2014) 1:1 BCDR International Arbitration Review 29-48.

Radicati, Luca and Di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 American Review of International Arbitration 49-74.

Ramadan, Hisham and Ali Khan, *Contemporary Ijtihad: Limits and Controversies* (Edinburgh University Press Ltd, Edinburgh 2011).

Rashid, Syed, 'Alternative Dispute Resolution in the Context of Islamic Law' (2004) 8:1 The Vindobona Journal of International Commercial Law and Arbitration 95-118.

Redfern, Alan 'Commercial Arbitration and Translational Public Policy' (2006) 13 ICCA Congress Series 871-878.

Redfern, Alan, et al, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004).

Redfern, Alan, et al, *Redfern and Hunter on International Arbitration* (5th edn, OUP, Oxford 2009).

Reisman, Michael 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' (2007) 13 CCA Congress Series 849-856.

Reynes, Victor, 'Forum Non Convenience: A Hidden Ground to Refuse Enforcement of Arbitral Awards in the United States' (2013) 30:2 Journal of International Arbitration 165-175.

Robinson, Paul, et al, 'Codifying Sharia: International Norms, Legality and the Freedom to Invent New Forms' (2007) 2:1 Journal of Comparative Law 1-53.

Roy, Kristin, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?'(1994) 18:3 Fordham International Law Journal 918-958.

Sabater, Anibal, 'When Arbitration Begins without a Seat' (2011) 27:5 Journal of International Arbitration 443-472.

Saif, Ahmed, *Arab Gulf Judicial Structures* (1st edn, Gulf Research Centre, Kingdom of Saudi Arabia 2004).

Saleh, Samir, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1986) 1:1 Arab Law Quarterly 19-31.

Saleh, Samir, *Commercial Arbitration in the Arab Middle East: A Study in Sharia and Statute Law* (Graham & Trotman, New York 2007). Sanders, Peter, 'A Twenty Year's Review of the

Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1979) 13:2 The International Lawyer 269-287.

Sanders, Peter, 'Unity and Diversity in the Adoption of the Model Law' (1995) 11:1 Arbitration International 1-38.

Sanders, Pieter *Quo Vadis Arbitration: Sixty Years of Arbitration Practice: A Comparative Study* (1st edn, Kluwer Law International, Netherlands 1999).

Sayre, Paul, 'Development of Commercial Arbitration Law' (1928) 37:5 Yale Law Journal 595-617.

Schnitzer, Simone *Understanding International Trade Law* (1st edn, Law Matters Limited 2006).

Schreuer, Christoph 'The Interpretation of Treaties by Domestic Courts' (1971) 45 The British Yearbook of International Law 255-301.

Schwebel, Stephen, *International Arbitration: Three Salient Problems* (1st edn, CUP, 1987).

Seniawski, Barbara 'Riba Today: Social Equity, the Economy, and Doing Business under Islamic Law' (2001) 39:3 Columbia Journal of Transnational Law 701-728.

Seriki, Hakeem 'Enforcement of Foreign Arbitral Awards and Public Policy- A Note of Caution' (2000) 3 Arbitration and Dispute Resolution Law Journal 192-207.

Serrano, Fernando, 'Enforcement of Awards Annulled at the Seat of Arbitration and the New York Convention' (2009) 15 International Law Review 15-40.

Serrano, Fernando, 'Towards a Transnational Procedural Public Policy' (2004) 20:4 Arbitration International 333-354.

Seyadi, Reyadh, 'Legal Aspect of Islamic Finance' (2015) 29:3 Arab Law Quarterly 285-295.

Sheppard, Audley 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19:2 Arbitration International 217-248.

Sheppard, Audley and Pierre Mayer 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19:2 Arbitration International 249-263.

Shore, Laurence, 'Applying Mandatory Rules of Law in International Commercial Arbitration' (2007) 18:2 American Review of International Arbitration 91-101.

Sinai, Yuval, 'Reconsidering Res Judicata: A Comparative Perspective' (2011) 21 Duke Journal of Comparative and International Law 353-400.

Sinclair, IM 'The Principles of Treaty Interpretation and Their Application by the English Courts' (1963) 12:2 International and Comparative Law Quarterly 508-551.

Sturley, Michael 'International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation' (1987) 27:4 Virginia Journal of International Law 729-802.

Stioanwich, Thomas 'Arbitration: The New Litigation (2010) 1 University of Illinois Law Review 1-59

Taha, Abdulmawla, 'Extent of Recognition by the Bahraini Court of Cassation of the GCC Commercial Arbitration Centre Arbitral Awards' (2014) 1 BCDR International Arbitration Review 17-28.

Tannock, Quentin 'Judging the Effectiveness of Arbitration through the Assessment of Compliance with Enforcement of International Arbitration Awards' (2005) 21:1 Arbitration International 71-90.

Taok, Mireille and Jacop Grierson, 'Dallah : Conflicting Judgments from the U.K. Supreme Court and the Paris Court of Appeal' (2011) 28:4 Journal of International Arbitration 407-422.

Tarin, Shaheer, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26:1 American Review of International Arbitration 1-24.

Trakman, Leon, 'From the Medieval Law Merchant to E-Merchant Law' (2003) 53 The University of Toronto Law Journal 265-304.

Tarin, Shaheer, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26:1 American Review of International Arbitration 1-24.

Turune, Santtu and MattiKurkela, *Due Process in International Commercial Arbitration* (2nd, OUP, Oxford 2010).

Tweeddale, Keren and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, Oxford 2007).

Yüskel, Burcu, 'The relevance of the Rome I Regulation to international commercial arbitration in the European Union' (2011) 7:1 Journal of private international law 149-178.

Veeder, VV, 'Is there a Need to Revise the New York Convention?' (2010) Oxford Journals, 1:2 Journal of International Dispute Settlement 499–506.

Visser, Hans, *Islamic Finance: Principles and Practice* (1st edn, Edward Elgar, United Kingdom 2010).

Vogel, Frank and Samuel Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Kluwer Law International, Netherlands 1998).

Vogel, Frank, and Peri Bearman and Rudolph Peters, *The Islamic School of Law: Evolution, Devolution, and Progress* (Harvard University Press 2005).

Voser, Nathalie, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 319-347.

Wakim, Mark '*Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East*' (2008) 21:1 *New York International Law Review* 1-51.

Weeramamtry, Romesh, *Treaty Interpretation in Investment Arbitration* (1stedn, Oxford University Press, Oxford 2012).

Weiss, Bernard, *The Spirit of Islamic Law* (University of Georgia Press, United States 2006).

Werra, Jacques de, 'Arbitrating International Intellectual Property Disputes: Time to Think Beyond the Issue of (Non)-Arbitrability' (2012) 3 *International Business Law Journal* 299-318.

Willems, John 'Shutting the U.S. Courthouse Door? Forum Non Convenience in International Arbitration' (2003) 58:3 *Dispute Resolution Journal* 54-59.

Willems, John 'Shutting the U.S. Courthouse Door?: Forum Non Convenience in International Arbitration' (2003) 58:3 *Dispute Resolution Journal* 54-59.

Zahraa, Mahdi 'The Legal Capacity of Women in Islamic Law' (1996) 11:3 *Arab Law Quarterly* 245-263.

Zainal, Yousif 'The Prevalence of Arbitration in the Gulf Cooperation Council Countries' (2001) 18:6 *Journal of International Arbitration* 657-660.

Zaman, Muhammad, 'Islamic Law and Legal System: Studies of Saudi Arabia' (2002) 13:1 *Journal of Islamic Studies* at 51-54.

Zeller, Bruno, *CISG and the Unification of International Trade Law* (1st edn, Taylor and Francis, New York 2008).

Zegers, Jean 'Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia' (2014) 1:1 *BCDR International Arbitration Review* 69-83.

Zweigert, Konrad and Hein Kotz, *An Introduction to Comparative Law* (3rd edn, OUP 1998)

Arabic books and articles

Aldharer, Al Sadiq, 'Gharar in the contracts and its effects in the contemporary transactions' (1993) Islamic Institution of Research and Training, published by Islamic development bank-Jeddah City/Kingdom of Saudi Arabia 1-55.

Abdullsadeq, Ahmed, *The General Reference For Arbitration in Egypt, Arab World and International* (7th edn, The House of Law for Legal Publications, Cairo 2014).

Al Bishry, Emad, *the theoretical and practical concept of public policy: comparison study of public policy in Sharia law and secular law* (Islamic library publications, Saudi Arabia 2005).

Al Jamrah, Khalid, *Arbitration between Islamic rules and secular rules* (Dar Alnashar, Sudan 2002).

Alabdulla, Sultan 'The Legal Nature of Arbitration Awards and the Question of Whether Omitting the Name of the Supreme Authority in the Country from the Award Is a Fundamental Flaw Which Justifies Invalidation' (2014) 1:1 BCDR International Arbitration Review 29-38 (Arabic version).

Albaharna, Husain, *The Arabian Gulf States: Their Legal and Political Status and Their International Problems* (2nd edn, Librairie du Liban, Lebanon 1975).

Albajad, Mohammed, *Arbitration in the Kingdom of Saudi Arabia* (1st edn, Institution of Management, Saudi Arabia 1999).

Albashir, Mohamed 'The clauses of the contract in light of the Sharia law' (2004) 22 Journal of Faculty of Sharia law/Qatar university 57-115.

Aldakhel, Khalid, *Arbitration in Kingdom of Saudi Arabia in accordance with Sharia rules* (King Saud University publications, Saudi Arabia 2004).

Algari, Ibrahim, 'The Formation of the Contract in Islamic Sharia' (2001) 11 Saud Arabia Ministry of Justice Journal 1-13.

Ali, Jawad, *History of Arab before Islam* (3rd edn, Dar Elmalayeen, Lebanon 1970).

Aljohani, Musad, *Arbitration in Sharia Law and in Secular Legislations: Analytical Study* (1st edn, Dar Aleman Library, Saudi Arabia 1996).

Alotaibi, Abdullah, *Public Policy in the Islamic State* (1st edn, Eshbilia Publication Centre Saudi Arabia 2009).

Baqer, Taha, *Introduction to History of Ancient Civilization- Arabic* (2nd edn, Sharkat al Tabh Almahdouda 2005).

Board of Grievances, *The Audit Committee* (5th edn, Ministry of Justice of Saudi Arabia 2002).

Board of Grievances, *The Audit Committee* (6th edn, Ministry of Justice of Saudi Arabia 2005).

Gatorah, Ebrahim, *Arbitration in the Light of Islamic Sharia* (Jeddah Chamber of Commerce and Industry 1994).

Madhi, Abdullah, *Public Policy in Islamic State - Comparative Study* (1st edn, Dar Knose Ishbilih Saudi Arabia 2008)

Mahmoud, Salman, *Arbitration Codes: Comparative study between the arbitration codes of Saudi Arabia, Kuwait and Egypt* (Dar Alkotob Alqanonyah, Saudi Arabia 2007).

Majeed, Abdullah, 'The legal effect of arbitration in Sharia law' (2005) 22 Journal of Law and Sharia 101-150.

Mansor, Ali, *Comparison between Islamic Law and Secular Legislations* (1st edn, Dar AlFath, KSA 1970).

Mohamed, Abaas, *Contract in Sharia Law: Comparative Study* (Islamic study publications, Cairo 1993).

Morand, Marcel, *The idea of juristic personality in the views of Islamic law* (Alexandria publication, Egypt 1992).

Radhi, Hassan, 'Observation on the Practices of International Commercial Arbitration in the Arab States' (2015) 26 Journal of Arbitration and Gulf Laws 31-33.

Taha, Abdulmawla, 'Extent of Recognition by the Bahraini Court of Cassation of the GCC Commercial Arbitration Centre Arbitral Awards' (2014) 1:1 BCDR International Arbitration Review 17-28 (Arabic version).

The Holy Qur'an – (Muslim Bible).

United Arab Emirates, *The Principles and judgments of Dubai Court of Cassation in Arbitration* (2014) Dubai Courts/legal library.

List of Cases

Abu Dhabi Investment Authority v. Citigroup, Inc [2013] 12 Civ. 283 U.S. District Court (Southern District of New York United States).

American Bureau of Shipping v Copropriete Maritime Jules Verne et autres [2002] 17293 Paris Court of Appeal.

American Independent Oil Company (Aminoil) v Kuwait Government (1984) published in 66 International Law Report 518.

Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. & Chevron Corp Inc: Baker Marine (Nig.) Ltd. v. Danos and Curole Marine Contractors, Inc [1999] 191 F.3d 194 2d Cir, Published in 24 YBCA (1999) at 909–914.

Bobbie Brooks Ins v Lanificio Walter Banci SAS (1979) IV YBCA at 289 (Italy Court of Appeal 1977).

Chromalloy Aeroservices v Arab Republic of Egypt [1997] 95/23025 Paris Court of Appeal.

Chromalloy Aeroservices v. The Arab Republic of Egypt [1995] Cairo Court of Appeal published in XXIV YBCA (1999) 263–265.

Chromalloy Aeroservices v. The Arab Republic of Egypt [1996] 94-2339 U.S. District Court, District of Columbia United States.

Compagnie française d'études et de construction Technip (Technip) v. Entreprisenationale des engrais et des produits phytosanitaires (Asmidal) [1998] 97/6929 Paris Court of Appeal.

Corporacion Mexicana de Mantenimiento Integral v. PEMEX [2013] 962 F.Supp 2d 642 (Southern District, New York, 2013).

Companie de Navigation v MSC (1995) Switzerland Supreme Court, published in XXI YBCA (1996) at 690.

Continaf BV v. Polycoton [1985] Switzerland Court of appeal, Published in XII YBCA (1987) at 505.

Czarina LLC v WF Poe Syndicate [2002] 254 F.Supp 2d 1229 (US District Court, District of Florida).

Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan [2010] United Kingdom Supreme Court, UKSC 46.

Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs Government of Pakistan [2011] 09/28533 Paris Court of Appeal.

Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. v. Ras Al Khaimah National Oil Co [1984] 3 WLR 1023, England and Wales Court of Appeal EWCA.

Diag Human SE v. The Czech Republic [2014] England and Wales High Court EWHC 1639 (Comm).

Editions du Seuil v Editions Phidal Inc and Quarto Children's Ltd [2001] France Court of Cassation published in Review Arbitration (2002) at 919.

Egyptian Concrete Company & Hashem Ali Maher v. STC Finance & Ismail Ibrahim Mahmoud Thabet & Sabishi Trading and Contracting Company [1996] 2660/59 Egypt Court of Cassation.

Egyptian Saudi Hotels Company v. Kurt and Daves Corporation [1990] 2994/57 Cairo Court of Cassation.

El Nasr Company for Fertilizers & Chemical Industries (SEMADCO) v. John Brown Deutsche Engineering [2005] 966/73 Cairo Court of Cassation.

Europcar Italia S.p.A. v. Alba Tours International Inc [1997] Ontario Court of Justice, Canada, General Division, Published in CLOUT case 366, issue No. 33.

Excelsior Film TV srl v UGC-PH [1998] 30 France Court of Cassation published in XXIV YBCA (1999) at 643.

Fédération française d'études et de sports sous-marins v Société Cutner & Associates P.C. [2010] 08/22780 Paris Court of Appel.

Figueiredo Ferraz Consultoria e Engenharia de Projeto Ltda. (Brazil) v. Republic of Peru et al [2011] 08 CIV. 492 (WHP) US District Court, Southern District of New York.

Fiona Trust and Holding Corporation and others v Privalov and others [2007] UKHL 40.

Golden Ocean Group Ltd v. HumpussIntermodaTransportasiTbk Ltd and another [2013] EWCA 1220 Civ.

Hilmarton Ltd v Omnium de Valorisation [1994] 92-15.137 French Court of Cassation, published in XX YBCA (1995) at 663.

International Bechtel v. Department of Civil Aviation of Dubai [2005] 07635 Paris Court of Appeal.

International Bechtel v. Department of Civil Aviation of Dubai [2005] 360 F.Supp.2d 136 United States District Court, District of Columbia, published in YBCA (2005): Volume XXX at 1113.

International Trading and Industrial Investment Company v. Dyncorp Aerospace Technology [2010] 09/17405 Paris Court of Appeal.

International Trading and Industrial Investment Company v. Dyncorp Aerospace Technology [2011] 763 F. Supp. 2d 12, US District Court, District of Columbia. Case No 09-791 (RBW).

IPCO v. Nigeria (NNPC) [2005] EWHC 726 (Comm) 2 Lloyd's Rep 326.

Jiangxi Provincial Metal and Minerals Import and Export Corp [China] v. Sulanser Co Ltd [1995] Supreme Court of Hong Kong HKCFI 449.

Jivraj v Hashwani [2011] UKSC 40.

Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors [2013] EWCA Civ 784.

Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara [2001] 387 United States District Court, Southern District of Texas, published in XXVII YBCA (2002) at 814.

Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners [1984] A.C. 426 England and Wales, House of Lords.

Misr Foreign Trade Co. v. R.D Harboties [2008] 64 Cairo Court of Cassation.

Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc [1985] 473 US 614, US Supreme Court.

Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine [2002] 311 F.3d 488 US Court of Appeal, Second Circuit.

Norsk Hydro ASA v The State Property funds of Ukraine [2002] EWHC 2120.

Oil and National Gas Commission v Western Co of North America (1987) 12 Supreme Court of India, published in XIII YBCA (1988) at 473.

Paklito Investments Ltd. v. Klockner East Asia Ltd [1993] 2 HKLR 39, Supreme Court of Hong Kong.

Parsons and Whittemore Overseas v Societe Generale de L'Industrie du Papier (RAKTA)[1974] 508 F.2d 969 US Court of Appeal, second circuit.

Party v party [2007] Appeal No. 824 Cairo Court of Cassation.

Party v party [1984] Appeal No. 714 Cairo Court of Cassation.

Party v party [1998] Appeal No. 26 Cairo Court of Appeal.

Party v Party [2005] Appeal No.29 Cairo Court of Appeal.

Party v party [2006] Appeal No. 125 Cairo Court of Appeal.

Party v party [2009] I-4 Sch 10/09 oberlandesgericht Dusseldorf Germany (Higher Regional Court).

Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam [2001] EWHC 418 (Comm).

Phesco Inc. v. Canac. Inc [2000] 2000-2268, Canada Quebec Superior Court.

Polish Ocean Line v Jolasry [1993] France Supreme Court, Published in XIX YBCA (1994) at 662.

Privilegiata Fabbrica Maraschino Excelsior Girolamo Luxardo SpA v. Agrarcommerz AG [1992] published in XVIII YBCA(1993) at 427.

Richardson v Mellish [1832] Court of Common Pleas 131 ER 562.

Rual Trade Limited (BVI) v UAB Ukio Banko Investicine Grupe and others [2012] A40-105056/10-52-930 Fedral Arित्रazh Court for the Moscow District.

Rual Trade Limited (BVI) v UAB Ukio Banko Investicine Grupe and others [2012] A40-105056/10-52-930 Federal Arित्रazh Court for the Moscow District.

Ruler of Qatar v. International Marine Oil Company Ltd (1953) Published in 20 International Law Reports 534.

Saudi Arabia v. Arabian American Oil Company (1963) published in 27 International Law Report, at 117.

Sheikh of Abu Dhabi v. Petroleum Development (1952) Published in 1 International Comparative Law Quarterly at 247.

Slovenia Manufacturer v Exclusive Distributor (Germany) [1999] 58 Oberlandesgericht (Higher Regional Court) Schleswig, published in XXIX YBCA (2004) 687-696.

Société Egyptian General Petroleum Corporation v Société National Gas Company [2011] 10/16525 Paris Court of Appeal.

Société O.A.O.NPO Saturn v Société Unimpex Enterprises Ltd [2009] 07/17049 Paris court of appeal.

Soleimany v Soleimany [1998] EWCA (Civ) 3WLR 811, [1999] 3All ER 847.

Sphere Drake Insurance PLC v. Marine Towing, Inc [1994] 93-3200 U.S. Court of Appeals, Fifth Circuit United States.

Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460, 3 WLR 972.

Termorio S.A.E.S.P. v. Electranta S.P [2006] 241 F. Supp. 2d 87, United States District Court, District of Columbia, published in XXIII YBCA (2006) at 1457.

Thai-Lao Lignite (Thailand) Co.LTD and Hongsa Lignite (Lao PDR) v. Government of the Lao Peoples Democratic Republic [2014] 10-Cv-5256 United States, U.S. District Court, Southern District of New York.

Uganda Telecom Ltd v. Hi-Tech Telecom Pty Ltd [2011] Federal Court of Australia FCA 206.

Westacre Investments Inc v Jugoinport-SDRP Holding Co Ltd [1999] EWCA, Civ 1401.

X SA v. Z LLC [2012] Federal Supreme Court of Switzerland, 2nd Civil Law Chamber, 5A_754. Published in (2012) XXXVII YBCA at 305.

XL Insurance Ltd v Owens Corning [2001] 1 All ER, Queen's Bench Division, Commercial Court 530.

Case law from Arab Gulf States

ABC LLP v. Joint Venture RST and XYZ [2013] 826 Qatar Court of Appeal, [2014] 45 and 49, Qatar Court of Cassation.

Airmec Dubai v Maxtel International [2012] 132 Dubai Court of Cassation, [2010] 268 Court of First Instance, [2010] 126 Court of Appeal.

Al Reyami Group LLC v. BTI Befestigungstechnik GmbH & Co KG [2014] 434 Dubai Court of Cassation, [2013] 1/2013 Dubai Court of Appeal, [2012] 681Dubai Court of First instance.

Construction Company International v Ministry of Irrigation of the Government of Sudan [2013] 156 Dubai Court of Cassation, [2013] 40 Dubai Court of Appeal, [2012] 489 Dubai Court of First Instance.

Explosive Alaveses SA (Spain) v. United Management Chile Limited [2010] 679 Abu Dhabi Court of Cassation, [2008] 410 Abu Dhabi Court of First Instance [2010] 301 Abu Dhabi Court of Appeal.

International Bechtel v. Department of Civil Aviation of Dubai [2002] 288 Dubai Court of First Instance [2003] 503 Dubai Court of Cassation.

International Trading and Industrial Investment Company (ITIIC) v. Dyncorp Aerospace Technology [2006] 1013 Qatar Court of First Instance, [2006] 631 Qatar Court of Appeal, [2008] 33 Qatar Court of Cassation.

Party v Party [2005] Appeal No.174 Dubai Court of Cassation.

Party v Party [2006] Appeal No. 891 Abu Dhabi Court of Cassation.

Party v party [2007] Appeal No. 265 Dubai Court of Cassation.

Party v party [2008] Appeal No. 146 Dubai Court of Cassation.

Party v Party [1987] Appeal No.166 Kuwaiti Court of Cassation.

Party v Party [1987] Appeal No.86 Kuwaiti Court of Cassation.

Party v party [1991] Appeal No.221 Kuwait Court of Cassation.

Party v party [1994] Board of the Grievance, Kingdom of Saudi Arabia (KSA) Decision No: 155/T/4.

Party v party [1996] Appeal No. 170 Qatar Court of Appeal.

Party v party [1996] The 25th Subsidiary Panel, KSA, decision No. 11/D/F/25.

Party v party [1997] 2nd Reviewe Committee, KSA, decision No. 208/T/2.

Party v party [1997] Appeal No. 80 Kuwaiti Court of Cassation.

Party v party [2000] Appeal No.245 Abu Dhabi Federal Court of Cassation.

Party v party [2001] Appeal No. 1550 Qatar Court of Appeal.

Party v party [2001] Appeal No. 17 Dubai Court of Cassation.

Party v party [2003] 18th Subsidiary Panel, KSA, decision No 8/D/F/18.

Party v party [2004] 4th Reviewe Committee, KSA, decision No 36/T/4.

Party v Party [2004] Appeal No. 209 Dubai Court of Cassation.

Party v party [2004] Appeal No.5 Dubai Court of Cassation.

Party v party [2005] Appeal No. 166 Kuwait Court of Cassation.

Party v party [2005] Appeal No. 225 Dubai Court of Cassation.

Party v Party [2005] Appeal No. 56 Dubai Court of Cassation.

Party v party [2006] Appeal No. 891 Abu Dhabi Court of Cassation.

Party v party [2007] Appeal No. 273 Dubai Court of Cassation.

Party v party [2007] Appeal No.265 Dubai Court of Cassation.

Party v party [2008] Appeal No. 128 Dubai Court of Cassation.

Party v party [2008] Appeal No. 164 Dubai Court of Cassation.

Party v party [2008] Appeal No.668 Kuwait Court of Cassation.

Party v party [2009] 1064 Oman Court of First instance, [2009] Appeal No.10 Oman Court of Appeal-Commercial Circuit.

Party v party [2010] Appeal No. 207 Qatari Court of Cassation.

Party v Party [2011] Appeal No. 280 Oman Court of Cassation.

Party v party [2011] Appeal No. 531 Dubai Court of Appeal.

Party v party [2012] 1470 Bahrain High Civil Court- Chamber 3.

Party v party [2012] Appeal No. 64 Qatar Court of Cassation.

Party v party [2013] 2216 Qatar Court of First Instance.

Party v party [2014] Appeal No.55, Abu Dhabi Court of Cassation.

Party v. party [1997] Appeal No 80 Kuwaiti Court of Cassation.

Party v. party [1987] Appeal No. 166 Kuwaiti Court of Cassation.

Party v. party [1988] Appeal No. 78 Kuwaiti Court of Cassation.

Party v. party [1994] Appeal No.183 Kuwaiti Court of Cassation.

Party v. party [2002] Appeal No. 230 Kuwaiti Court of Cassation.

Party v. party [2004] Appeal No. 202 Kuwaiti Court of Cassation.

Party v. party [2009] 1064 Oman Court of First Instance.

Party v. party [2012] Appeal No. 101 Bahrain Court of Cassation.

Saudi Establishment v. Bahraini Limited Liability Company [2012] Appeal No. 746 Bahrain Court of Cassation.

Shipowners v. Charterers [2010] 35 Fujairah Court of First Instance, Commercial Circuit.

List of International Treaties and International Documents

Charter of the Co-operation Council for the Arab States of the Gulf (Gulf Cooperation Council GCC) with Rules of Procedures of the Supreme Council, of the Ministerial Council and of the Commission for Settlement of Disputes. (Entered into force 25 May 1985) United Nations Treaty Series 1288, Registration No. 21242.

Convention on the Execution of Judgments, Delegations and Judicial Notifications (adopted by Gulf Cooperation Council in 16 December 1995, entered into force 17 March 1996).

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, entered into force 7 June 1959) United Nations Treaty Series 330, Registration No. 4739. 'New York Convention'.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Adopted in 18 March 1965, entered into force 14 October 1966) United Nation Treaty Series 575, Registration No. 8359. 'ICSID Convention'.

Digest of Case Law on the Model Law on International Commercial Arbitration, issued by UNCITRAL 2012 (2012) A/CN.9/SER.C/GUIDE/1/Rev.2.

ICCA'S Guide to the interpretation of the 1958 New York Convention' (2011) A Handbook For Judges, ICCA ISBN 978-90-817251-1-8 issued by International Council for Commercial Arbitration (ICCA).

International Chamber of Commerce (ICC) Arbitration Rules 2012.

The Inter Arab Convention on Judicial Co-operation Known as 'Riyadh Convention' (adopted by League of Arab States, resolution No.1 for 1983, entered into force 30 October 1985)

UNCITRAL Arbitration rules 2012. General Assembly resolution 65/22 (2010).

UNCITRAL Model Law on international Commercial Arbitration 1985 as amended in 2006. General Assembly resolution 40/72 (1985) and General Assembly resolution 61/33 (2006).

Regulation (Europe Council) No 593/2008 of the European Parliament and of the Council of June 2008 on the law applicable to contractual obligations (Rome I), Published in Official Journal of the European Union L177/6.

Vienna Convention on the Law of Treaties (Adopted in 22 May 1969, entered into force 27 January 1980) United Nation Treaty Series 1155, Registration No. 18232.

List of Statutory Instruments

Bahrain Arbitration law 2015, Law No (9) for 2015, Published in official Gazette No. 3217.

Bahrain Civil Transactions Code 2001, Law No (19) for 2001.

Bahrain Commercial Code 1987, Law No (7) for 1987.

Bahrain Constitution 2002.

Bahrain Legislative Decree No (6) for 2000, in Agreeing on the Accession to the Charter of the GCC Commercial Arbitration Centre, Published in Bahrain Official Gazette No. 2422 for 2000.

Canada Commercial Arbitration Act as amended in 2013.

Egypt Arbitration Law 1994, Law No. 27 of 1994 Concerning Arbitration in Civil and Commercial Matters (as amended by Law No. 9 of 1997).

France Arbitration Law 2011, Decree No. 2011-48.

France Constitution 1958.

France Civil Code 2004.

Kingdom of Saudi Arabia, Basic Law of Government 1992, Royal Order No: A/90 for 1992.

Kingdom of Saudi Arabia, Arbitration Law 2012, Royal Decree No: M/34 for 2012.

Kingdom of Saudi Arabia, Law of Execution, Decree no M/53 for 2012.

Kuwait arbitration law 1980, Law No. (38) for 1980, as amended by Law No (38) for 2007.

Kuwait Civil Transactions Code 1980, Law No (67) for 1980.

Kuwait Constitution 1962.

Kuwait Legislative decree No. (14) for 2002, in Agreeing on the Accession to the Charter of the GCC Commercial Arbitration Centre.

Kuwait Legislative Decree No. (10) of 1978 on implementing the provisions of the New York Convention 1958.

Kuwaiti Commercial Code 1980, Law No. 68 for 1980.

Law of Judicial Authority of Qatar 2003, Law No. 10 for 2003.

Oman Act of the Arbitration in the Commercial and Civil Disputes, No. 47 for 1997, as amended by legislative Decree No. (3) for 2007.

Oman Civil Transactions Code 2013, Law No. (29) for 2013.

Oman Commercial Code 1990, Law No. 55 for 1990.

Oman Constitution 1996.

Qatar Civil Transactions Code 2004, Law No (22) for 2004.

Qatar Commercial Code 2004, Law No.27 for 2004.

Qatar Constitution 2004.

Qatar legislative decree No (29) for 2003 on implementing the provisions of the New York Convention 1958.

Qatar Legislative Decree No. (16) of 2010 on the Promulgation of the Electronic Commerce and Transactions Law.

Qatari arbitration law 1990, Law No. 13 for 1990 as amended by Law No (13) for 2005.

United Kingdom Arbitration Act 1996.

United Arab Emirates Federal Law no (1) for 2006 promulgates the law of Electronic Commercial Transactions.

United Arab Emirates Constitution 1971.

United Arab Emirates Federal Arbitration law, Law No. (11) of 1992, as amended by Law No. (10) for 2014.

United Arab Emirates Federal Civil Transactions Code No (5) for 1985.

United Arab Emirates Federal Commercial Transactions Law No (18) of 1993.

United Arab Emirates Federal Law of Proof in Civil and Commercial Transactions, Law No (10) for 1992.

United Arab Emirates, Federal legislative decree no (43) for 2006 on implementing the provisions of the New York Convention 1958.

United States Federal Arbitration Act 1947, Title 9 of the US Code: Arbitration.

List of Reports and Conferences

Ahmed Almutawa and A.F.M. Maniruzzaman, 'Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study' [2015] Transnational Dispute Management.

Albert Berg, 'ICCA Conference Held in Dublin Coincided with a Momentous Event, Namely the 50th Anniversary of the Signing of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 10 June 1958' (2009) 14 ICCA Congress series 649-711.

The International Law Association Committee on International Commercial Arbitration, 'Report on Public Policy as A Bar to Enforcement of International Arbitral Award' Available

at Audley Sheppard and Pierre Mayer 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19:2 *Arbitration International* 249-263.

Peter Sanders, 'The making of the Convention' [1999] paper presented in New York on 10 June 1998 to celebrate the 40th Anniversary of the convention, United Nation Publication, ISBN 92-1-133609-0.

Report of the International Arbitration Club of New York, 'Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions' (2013) 24:1 *American Review of International Arbitration* at 1-26.

Reyadh Seyadi, 'Arbitration and Private International Law Conference', Public Policy as a Ground for Refusal to Enforce Foreign Arbitral Awards in the Arab Gulf States (University of Edinburgh - Conference paper, February 2015).

United Nation, 'Enforcing Arbitration Awards under the New York Convention: Experience and Prospects' (1998) this colloquium was held in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention. Bench title: Judicial application of the Convention 27-35, United Nations Publication ISBN 92-1-133609-0.

UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Excerpt, guide on article VII (2013) Forty-sixth session, document No. A/CN.9/786.

Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' UNCITRAL document (2008) A/CN.9/656.

Official Records of the General Assembly (2014) UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Forty-seventh session, document no. A/CN.9/814.

Official reports issued by the Organization of the Petroleum Exporting Countries (OPEC). Monthly Oil Market Report, OPEC, *World Oil Outlook* (2013)

Websites, Blogs, and Electronic Sources

<http://www.clearquran.com/> The texts of the *Quran* (the main source of Sharia law) is available in English version in this website.

<http://kluwarbitrationblog.com/> Kluwer Arbitration Blog.

<http://www.almeezan.qa/> English version of Qatari arbitration law is available in this website. This is an official website operated by Qatari Ministry of Justice.

<http://www.arbitration-icca.org/> International Council for Commercial Arbitration.

<http://www.diac.ae/idias/> Dubai International Arbitration Centre/ English version of UAE arbitration law is available in this official website.

<http://www.gcc-sg.org/eng/> The Cooperation Council for the Arab States of the Gulf.

<http://www.gccac.org/en> GCC Commercial Arbitration Centre.

<http://www.kluwerarbitration.com/> Kluwer Arbitration.

<http://www.newyorkconvention.org/> This website is an initiative taken by Albert Jan van den Berg that publishes several courts decisions on the 1958 New York Convention.

<http://www.newyorkconvention1958.org> This is an online platform established by UNCITRAL making available case law implementing the 1958 New York Convention from several jurisdictions.

<http://www.uncitral.org/> United Nations Commission on International Trade Law.

<https://mci.gov.sa/en/> Kingdom of Saudi Arabia, official website of the Ministry of the Commerce and Industry/ English version of Saudi arbitration law available in this website.

Appendices

The appendices include five sections that provide detailed information about the interview study conducted by the researcher with judges and arbitration practitioners from the GCC states. These sections are as follows:

- A. Interview methodology**
- B. Participant information sheet**
- C. List of participants**
- D. Interview questions**
- E. Collected data**

A. Interview methodology

The interviews were conducted with twenty judges and arbitration practitioners from the GCC states, with the aim of identifying the source of the challenges facing the recognition and enforcement of foreign arbitral awards under the New York Convention 1958. Arbitration is a private dispute resolution mechanism that is practised by arbitrators and commercial lawyers, and requires the involvement of national courts, particularly at the stages of recognition and enforcement of foreign arbitral awards. Therefore, obtaining insights into the perceptions of practitioners and judges helped to some extent to complement the findings of the literature review and case law analysis presented in this thesis. However, the aim of interviewing judges from GCC states was to examine their knowledge and familiarity with the NYC, and their level of awareness about the important role that the NYC plays in international commercial arbitration. Two factors were examined in the judges' interviews: first, the interpretation method used by judges to interpret the terms and provisions of the NYC and second, their level of involvement with the international materials of the NYC such as the preparatory work and guidance material on the NYC that is continuously issued by UNCITRAL.

The interviews were conducted over a period of two months starting from 1 March to 30 April 2014, and each participant's interview lasted for an average of 40 minutes. Prior to the interviews, all interviewees signed the consent forms. The participants were seven judges out of approximately twenty-four judges in the courts of the civil circuit in Bahrain and Dubai. These judges work in the circuit that is classified as the 'competent court' to hear requests of

recognition and enforcement of foreign arbitral awards in the national courts of Bahrain and Dubai. In addition, thirteen arbitration practitioners from Bahrain and Dubai were interviewed. Most of them are commercial lawyers who have been well known in the field of arbitration practices in the GCC states for a long period of time. The list of the participants is found in section (c) of this appendix.

There were a total of 40 correspondences with lawyers/arbitrators from Bahrain and Dubai, but responses were received from only thirteen participants. Budgetary and time constraints were the main factors that limited the participant sample to be from only two GCC states. The original intention was to interview judges from the Dubai and Qatari courts. However, the Qatari courts did not respond to the researcher's request; therefore, the courts of Bahrain were chosen as an alternative to the Qatari courts as the researcher found they had ready access to the Bahraini courts.

The following information sheet (section B) was sent to the 40-targeted participants through electronic mail as an invitation to participate in this study. The same information sheet was sent to the Dubai and Bahrain courts to request interviews with judges from the Bahrain and Dubai courts. The national courts of Bahrain and Dubai were requested to participate in this interview study through the following channels of communication:

-Dubai Courts

General Manager Office

Telephone: 0097143030202 Fax: 0097144020449

P.O. BOX: 4700, Dubai U.A.E

Email: gmo@dc.gov.ae

The principal employee who corresponded with the researcher to organise the dates and times of the interviews with the judges from the Dubai courts:

Name: Ms Maryam Salem Saeed Bin Hazim Al Suwaidi

Job title: Head of External Knowledge

Telephone: 0097143030805, P.O. Box: 4700, Dubai U.A.E

Email: MSAlsuwaidi@dc.gov.ae

- Supreme Judicial Council of Bahrain

The request to interview judges from the Bahrain national courts was organised through correspondence with the office of the General Secretary of the Supreme Judicial Council, Dr.

Salem Mohammed Al Kuwari. The principal employee who helped the researcher to organise the date and time of the interview was the secretariat of the Bahrain Supreme Judicial Council after the request had been officially accepted by the General Secretary.

Kingdom of Bahrain Diplomatic Area, Manama, P.O. Box 450

Telephone: 0097317513000 Fax: 0097317536343

Email: sjc_pr@moj.gov.bh.

B. Participant information sheet

Title: Invitation to participate in an academic interview concerning arbitration practices in the GCC states

Dear Sir/Madam

My name is Reyadh Mohammed Seyadi and I currently work at the University of Bahrain as a faculty member in the School of Law. The University of Bahrain has granted me a scholarship to do a PhD at the University of Sheffield. I am writing this email to request your participation in an interview study that is part of my PhD thesis. The interview is about the recognition and enforcement of international arbitral awards in the GCC states. I understand that you have a great deal of experience in relation to the arbitration practices in the GCC states, as appears from your distinguished profile and some other publications concerning arbitration practices in the GCC states. As such, your participation will help me to gain a better insight into the recognition and enforcement of international arbitral awards in the GCC states. The interview aims to examine the perspectives of arbitration practitioners concerning the difficulties and barriers that might undermine the recognition and enforcement of international arbitral awards in the GCC states. It also aims to test the extent to which the GCC judicial jurisprudence is familiar with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its important role in the world of international arbitration.

The interviews are planned to be conducted during a period of two months (March–April 2014) and to take an average of one hour or less for each participant. If you consent to participate in this study, please reply to me by email (R.seyadi@sheffield.ac.uk) identifying a date, place and time that is suitable for you to be interviewed within the period of March–April 2014.

The interview will be conducted in accordance with the ethical guidelines on research provided by the University of Sheffield. As such I am required to obtain your consent for the interviews (I will bring copies of the consent form to our meeting).⁵ You may decide to withdraw your consent to participate in the project at any time. You do not have to give a reason. In order to assist me in completing this study the interview will be taped, if interviewees agree; otherwise, notes will be taken. Any notes or recordings taken will be held securely and confidentially and destroyed after the end of the research project.

Thesis title: Challenges in implementing the 1958 New York Convention: A case study of the Arab Gulf states

Name of the researcher: Reyadh Mohamed Seyadi: R.seyadi@sheffield.ac.uk

Name of the supervisors: Dr. Veronica Ruiz Abou-Nigm: V.Ruiz.Abou-nigm@ed.ac.uk

Dr. Richard Kirkham: R.M.Kirkham@sheffield.ac.uk

Student number: 110262822

Organisation: University of Sheffield

Place of the interviews: Bahrain and Dubai

Date: 1 March–30 April 2014

Thank you in advance for your assistance.

Regards

Reyadh Mohamed Seyadi

PhD Candidate / University of Sheffield

Thank you for your time

⁵A copy of the twenty consent forms that signed by the participants is available at the Department of Law - University of Sheffield.

C. Participants:

Judges

	Name	Position	Location of courts
1	Dr. Ali Ibrahim El-Imam	President of Court of Cassation	Dubai Courts
2	Dr. Yosif Alakyabi	High Civil Court	Bahrain Courts
3	Amal Abul	High Civil Court	Bahrain Courts
4	Jamal Mohamed Qtb	Court of Execution	Dubai Courts
5	Ahmed Isa	High Civil Court	Dubai Courts
6	Dr. Hassan Alabyari	Court of Cassation	Dubai Courts
7	Ali Almadhani	Member of Dubai International Financial Court	Dubai International Financial Centre (DIFC Courts)

- Arbitration practitioners from GCC states

	Name	Place of work	Address
1	Haya Rashed Alkhalifa	Bahrain	Attorneys at Law & Legal Consultants http://www.hraklf.com/lawyers.php?lawyer_id=1
2	Ma'awia T. Elnayal	Bahrain	Ma'awia T. El-Nayal & Associates

3	Zeenat Al Mansoori	Bahrain	Zeenat Al Mansoori & Associates http://www.zeenatalmansoori.com/zeenat.html
4	Ahmed Althaker	Bahrain	Althaker Legal Firm
5	Hatem Al Zu'bi	Bahrain	Zu'bi & Partners Attorneys & Legal Consultants http://www.zubipartners.com/expert/hatim-sharif-zubi-hon-g-b-e/
6	Dr. Adel Alabyoki	Bahrain	Legal Consultant at Ministry of Commerce
7	Dr. Hassan Radhi	Bahrain	Hassan Radhi & Associates http://hassanradhi.com/team/member-one-team/
8	Mohamed Alabyoki	Bahrain	Legal Solutions Legal Firm
9	Dr. Habib Al Mulla	Dubai	Baker & McKenzie Habib Al Mulla http://www.bakermckenzie.com/HabibAlmulla/
10	Hassan Arab	Dubai	Lawyer at Al Tamimi & Co – Regional Head of Arbitration http://www.tamimi.com/en/section/our-firm/our-partners-2
11	Zisha Rizvi	Dubai	Lawyer at Sunil Thacker Associates http://www.ama.ae/index.php
12	Ali Alaidrous	Dubai	Ali Alaidrous International Legal Practice http://www.aidarous.com/leading-lawyers.php
13	Ahmed Najem	GCC Arbitration Centre	Secretary General of the GCC Commercial Arbitration Centre http://www.gcac.biz/new/index.php

D. Interview questions:

There are two lists of questions; the first list was designed for the judges and the second list was designed for the arbitration practitioners.

Questions for Judges:

1. How long have you served as a judge in the Dubai/Bahrain courts?
2. On average, how many arbitration cases (domestic/international/foreign) do you deal with during a year?
3. What is your general understanding of international commercial arbitration?
4. Do you think the judiciary should support the flow of international commercial arbitration in the GCC states?
5. How could the judiciary play a positive role in supporting the flow of international arbitration?
6. What is your understanding of the NYC?
7. What is your understanding of the globally accepted features of the NYC?
8. How does the NYC operate in your legal system?
9. How do you interpret the terms and provisions of the NYC implementing law?
10. When asked to apply the implementing law of the NYC to the recognition and enforcement of foreign arbitral awards, do you take into account the international origin of that law, for example, by referring to the preparatory work of the NYC or any guidance on the NYC issued by UNCITRAL?
11. Do you think it is important to interpret the texts of the NYC in a way that is compatible with international best practice?
12. When you interpret and apply the NYC/implementing law, do you normally look to other foreign decisions on the NYC, seeking to find an international solution rather than a domestic solution? If yes, what weight do you give to the foreign decisions?
13. What is your understanding of the Digest Case Law on Model Law (issued by UNCITRAL), the Yearbook of International Commercial Arbitration (YBCA) or the CLOUT System that publishes various courts' decisions on the NYC?
14. Does the judiciary that you serve subscribe to any international or regional journals or online databases that publish various court decisions on the NYC?

15. Does the judiciary that you serve organise educational programmes or courses that seek to familiarise judges with the texts of the NYC and its roles in the world of international commercial arbitration?
16. Do you think that it is desirable to encourage programmes to further familiarise the judges with issues relating to the applications and interpretations of the NYC?

Questions for lawyers/arbitrators

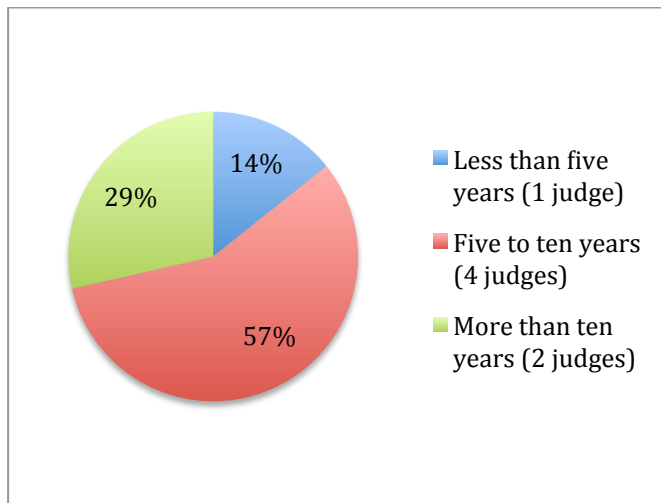
1. What is your profession?
2. Do you practise in the field of arbitration?
3. How many years have you practised in the field of arbitration?
4. Have you ever acted as an arbitrator?
5. Have you acted as a lawyer for the purpose of the recognition and enforcement of foreign arbitral awards/domestic arbitral awards through the national courts of the GCC states?
6. In which countries of the GCC states have you acted as a lawyer for your legal firm for such a purpose?
7. What usually happened in these cases? Were the arbitral awards enforced or was enforcement refused?
8. What were the main reasons for the non-recognition and non-enforcement in these cases?
9. In your opinion, what are the most fundamental challenges for the recognition and enforcement of foreign arbitral awards in the GCC states?
10. Has your firm experienced difficulties in foreign arbitral awards seeking recognition and enforcement through the national courts of the GCC states?
11. What types of difficulties were these?
12. Do you think the NYC is well implemented in the domestic legal systems of the GCC states in terms of domestic legislation and judicial applications?
13. How would you evaluate the extent to which judges in the GCC states are familiar with the literature on the NYC and its international best practices?
14. What is the average length of time for the recognition and enforcement of foreign arbitral awards through the national courts of the GCC states?
15. In your opinion, do you think GCC states are friendly arbitration jurisdictions?

16. Do you generally think that the GCC judiciaries are facilitating the recognition and enforcement of foreign arbitral awards or are they hampering it?

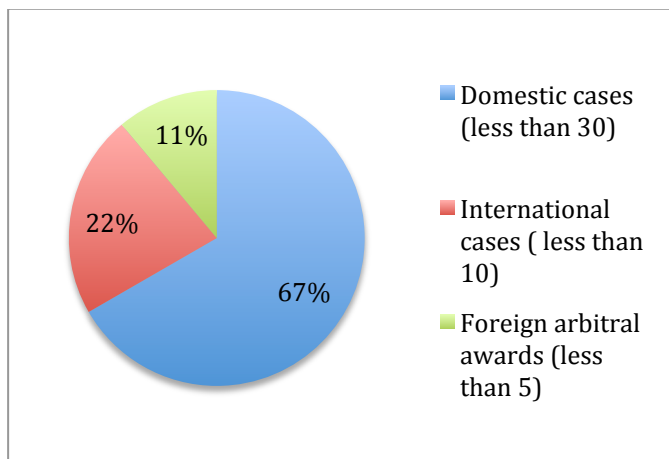
E. Collected data

Judges: The data in the following questions (1-15) are limited to the Bahrain and Dubai Courts.

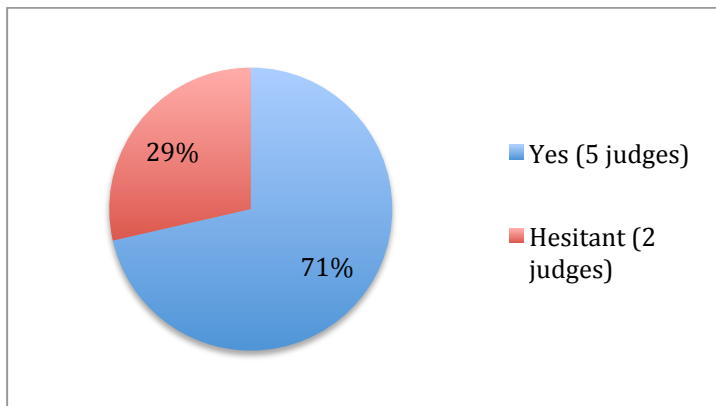
1. How long have you served as a judge in the Dubai/Bahrain courts?



2. On average, how many arbitration cases do you deal with during a year?



3. Do you think the judiciary should support the flow of international commercial arbitration in the GCC states?



Most of the judges answered yes, with reservations made regarding the *public policy* defence and the necessity of protecting the state interest. There were two judges who seemed to have an aggressive attitude in terms of supporting the flow of arbitration in their countries. These two judges emphasised the necessity of evaluating how the arbitrator applied the law to the facts of the dispute in order to protect the justice system. They argued that this is premised under the public policy defence.

4. How could the judiciary play a positive role in supporting the flow of international arbitration?

All of the judges agreed that they could do this by facilitating the recognition and enforcement of international arbitral awards, helping the constitution of the arbitral tribunal, ordering interim measures, and carrying out many other functions provided by the arbitration law. They also emphasised that they are obliged to follow the text of the law that is applicable to all arbitration cases taking place in their countries.

5. What is your understanding of the NYC?

All judges confirmed that the NYC is a multinational treaty that obliges the state to recognise and enforce foreign arbitral awards according to its provisions.

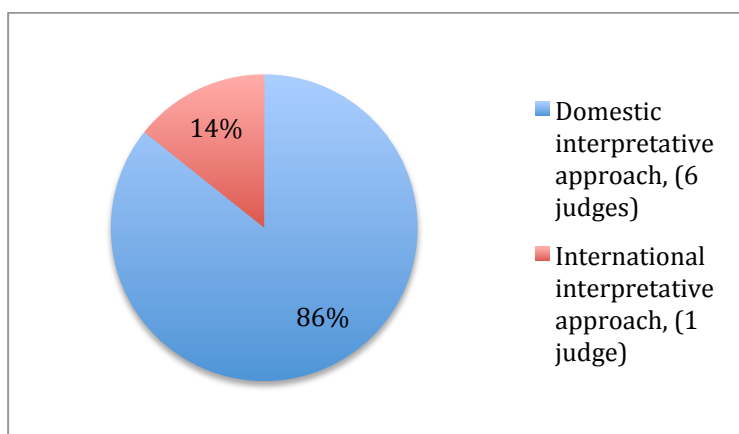
6. What is your understanding of the globally accepted features of the NYC?

Only one judge from the Dubai courts mentioned the feature of exclusive grounds for refusal as one of the purposes of the NYC. The rest of the judges asked me a counter question, enquiring about *what sort of features I was referring to*. I replied that the most commonly known features of the NYC are exclusive grounds for refusal, narrow interpretation of the grounds for refusal and pro-enforcement bias, as these features reflect the spirit and purpose of the NYC. They replied that *they are not bound* to take into account the NYC features as the recognition and enforcement of foreign arbitral awards occurs through domestic law (dualism), and they are bound by the texts of the law.

7. How does the NYC operate in your legal system?

All of the judges from Bahrain and Dubai confirmed that the recognition and enforcement of foreign arbitral awards occurs at the domestic level through the provisions provided in the arbitration laws (dualism). In the case of a conflict between the provisions of the NYC and the national arbitration law (as is the case in Dubai), *three out of five judges* in the Dubai courts confirmed that they are bound by the texts of the arbitration law, which is inconsistent with the NYC provisions. Only two judges from the Dubai courts confirmed that foreign arbitral awards are subject to the NYC implementing decree (see chapter six, section 6.2 for more details).

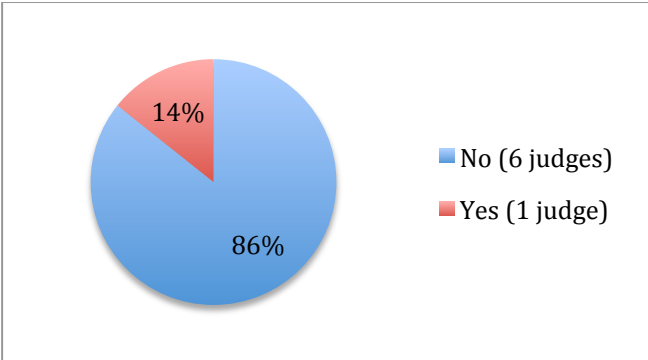
8. How do you interpret the terms and provisions of the NYC implementing law?



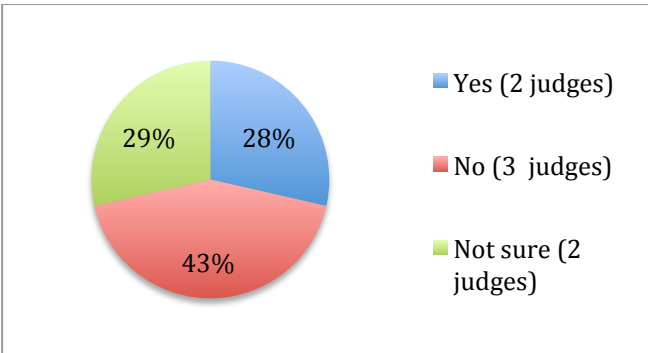
In response to this question, *only one judge* from the Dubai courts confirmed that he often refers to the preparatory work of the NYC and the guidance materials on the NYC. *The rest of*

the judges emphasised that the NYC implementing law is normal domestic law and they interpret it by reference to the same interpretative approach that is used for interpreting any other domestic law, which is normally based on the legal tradition of the state.

9. When asked to apply the implementing law of the NYC to the recognition and enforcement of foreign arbitral awards, do you take into account the international origin of that law, for example, by referring to the preparatory work of the NYC or any guidance on the NYC issued by UNCITRAL?



10. Do you think it is important to interpret the provisions of the NYC in a way that is compatible with international best practice?

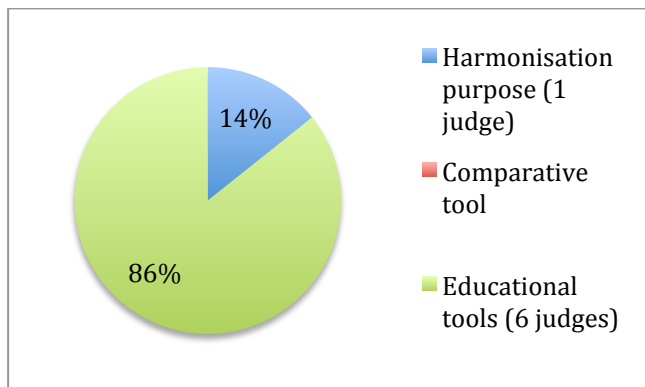


Two judges from the Dubai courts confirmed the importance of interpreting the NYC provisions by consulting the prevailing interpretation in international best practice. *The rest of the judges* emphasised the concept of state sovereignty, and felt there was no need to understand how the provisions of the NYC are interpreted in international best practices.

11. When you interpret and apply the NYC/implementing law, do you normally look to other foreign decisions on the NYC, seeking to find an international solution rather than a domestic solution? If yes, what weight do you give to foreign decisions?

All the answers were negative.

12. What is your understanding of the Digest Case Law (issued by UNCITRAL), the Yearbook of International Commercial Arbitration (YBCA) or the CLOUT System that publishes various courts' decisions on the NYC?



13. Does the judiciary that you serve subscribe to any international or regional journals or online databases that publish various court decisions on the NYC?

All the answers were negative.

14. Does the judiciary that you serve organise educational programmes or courses that seek to familiarise judges with the provisions of the NYC and its roles in the world of international commercial arbitration?

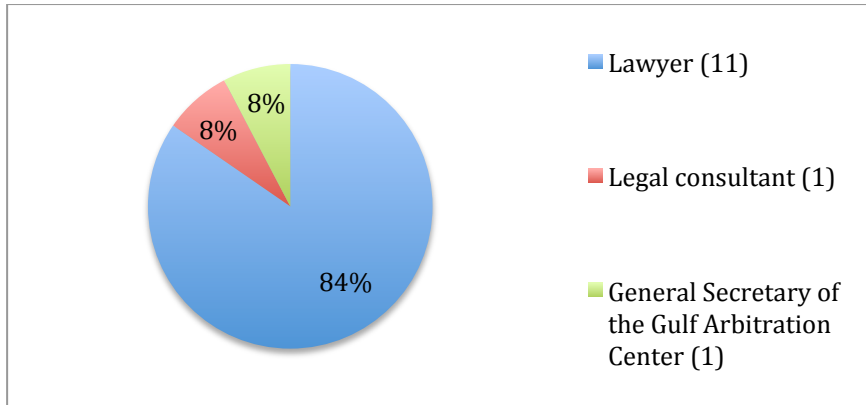
All the answers were negative.

15. Do you think that it is desirable to encourage programmes to further familiarise national judges with issues relating to the applications and interpretations of the NYC?

All the answers were positive.

- Arbitrators/lawyers

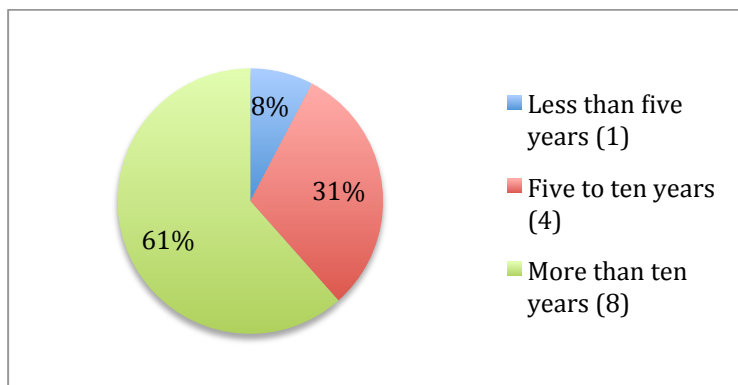
1. What is your profession?



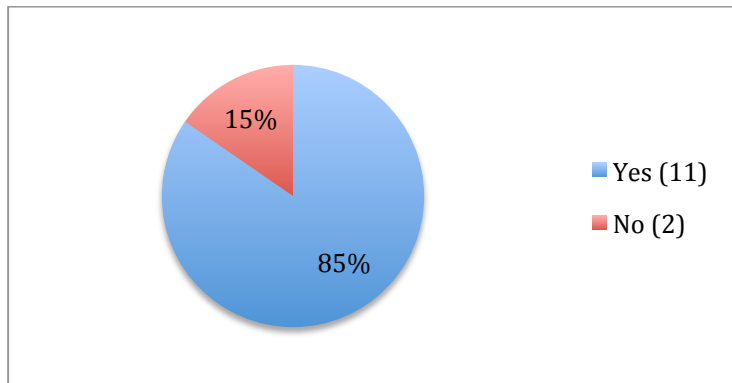
2. Do you practise in the field of arbitration?

All answers were positive.

3. How many years have you practised in the field of arbitration?



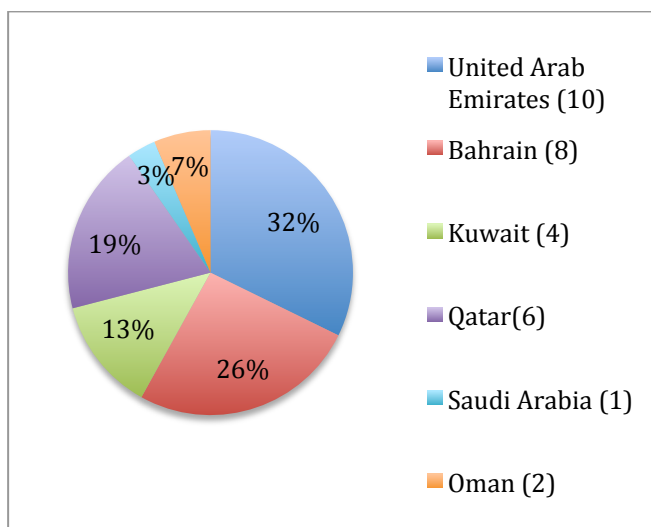
4. Have you ever acted as an arbitrator?



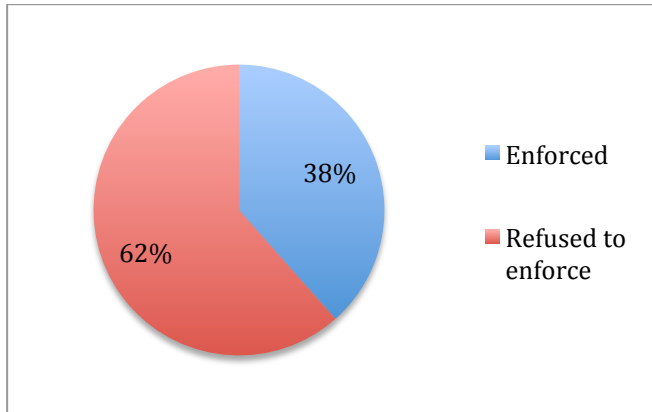
5. Have you acted as a lawyer for the purpose of recognition and enforcement of foreign arbitral awards/domestic arbitral awards through the national courts of the GCC states?

All answers were positive.

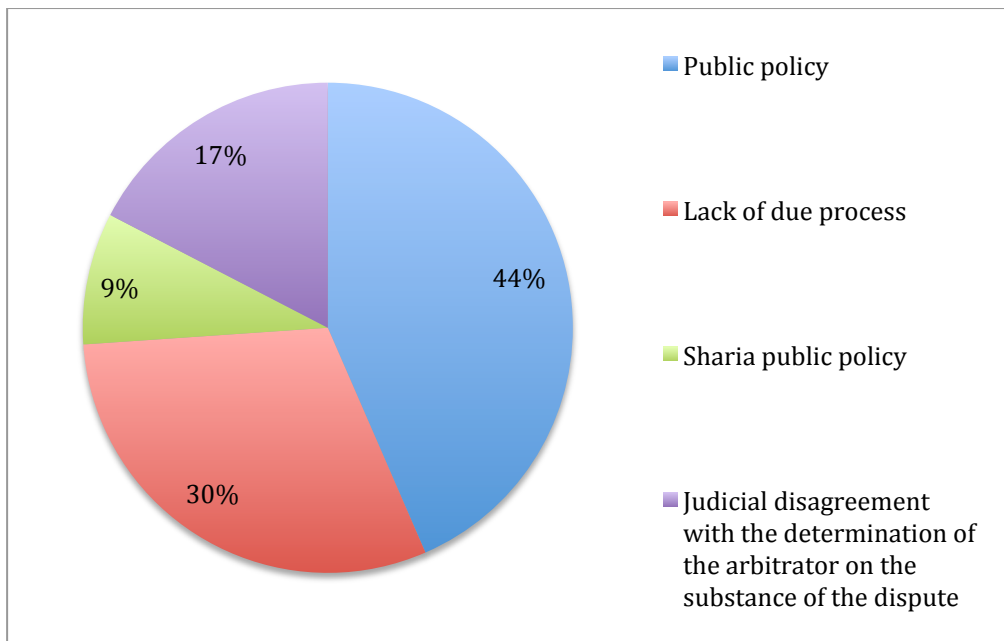
6. In which countries of the GCC have you acted as a lawyer for your legal firm for such a purpose?



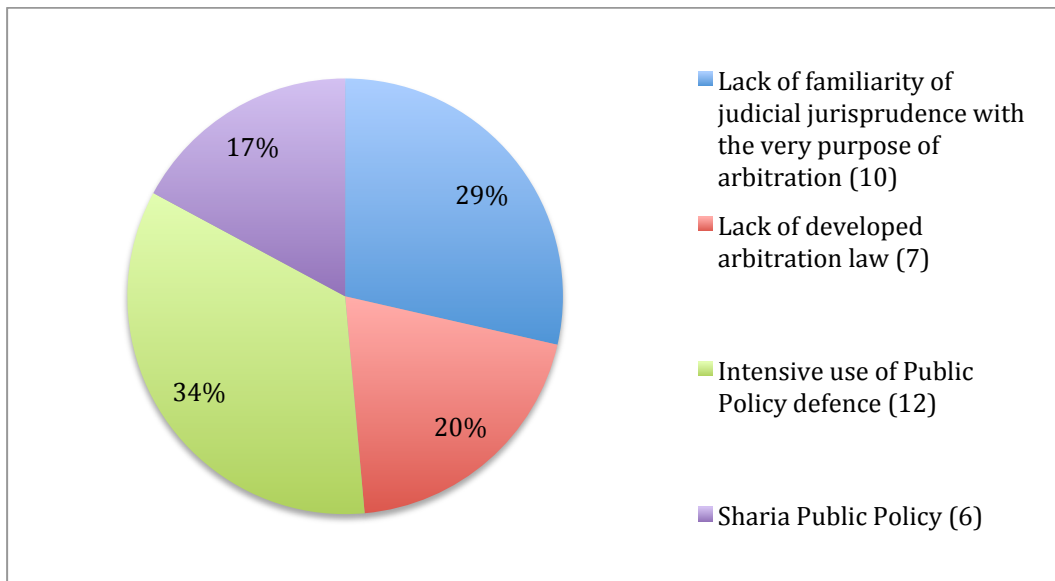
7. What usually happened in these cases? Were the arbitral awards enforced or was enforcement refused?



8. What were the main reasons for the non-recognition and non-enforcement in these cases?



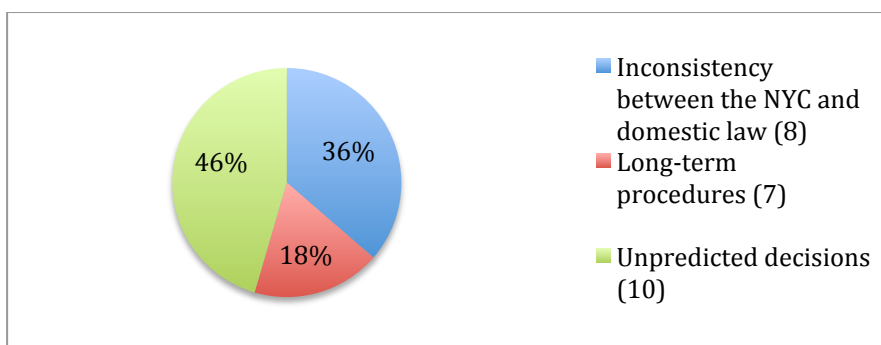
9. In your opinion, what are the most fundamental challenges for the recognition and enforcement of foreign arbitral awards in the GCC states?



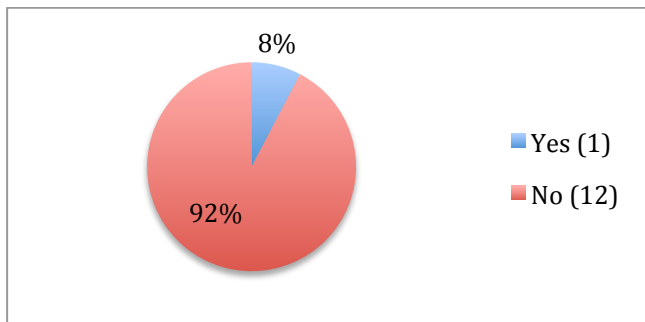
10. Has your firm experienced difficulties in foreign arbitral awards seeking recognition and enforcement through the national courts of the GCC states?

All answers were positive.

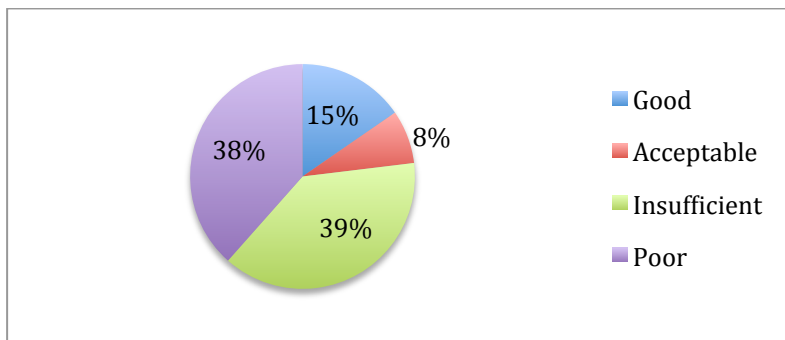
11. What types of difficulties were these?



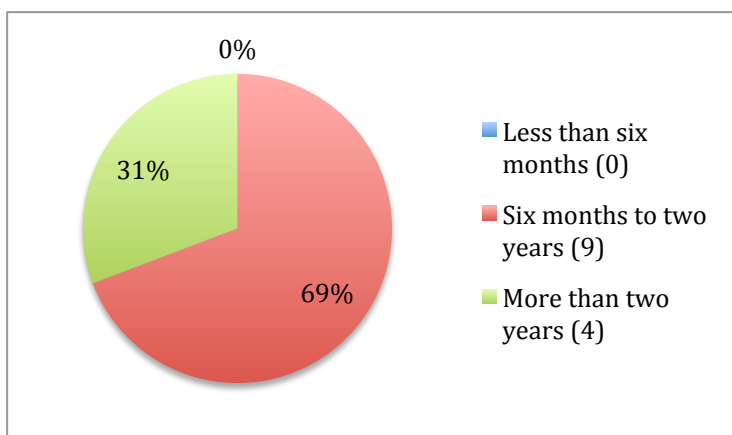
12. Do you think the NYC is well implemented in the domestic legal systems of the GCC states in terms of domestic legislation and judicial applications?



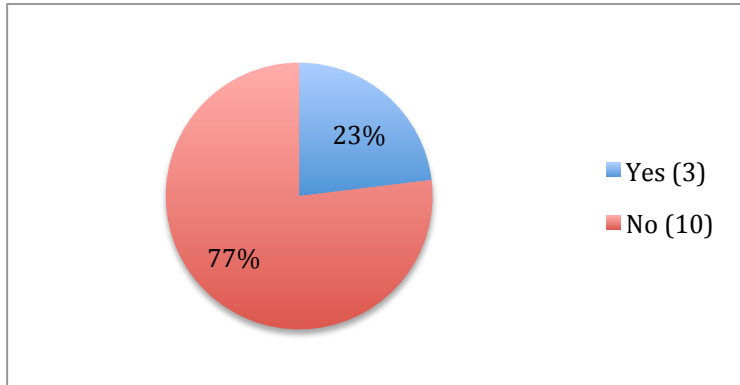
13. How would you evaluate the extent to which judges in the GCC are familiar with the literature on the NYC and its international best practices?



14. What is the average length of time for the recognition and enforcement of foreign arbitral awards through the national courts of the GCC states?



15. In your opinion, do you think the GCC states are friendly arbitration jurisdictions?



16. Do you generally think the GCC judiciaries are facilitating the recognition and enforcement of foreign arbitral awards or are they hampering it?

