The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States

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PREFACE

In the second half of the twentieth century, alongside the evolution of the global economy, modern technology, rapid transportation and multinational enterprises, there was an increased demand for dispute resolution mechanisms that meet the needs of traders, international trade and economic policy-makers. Arbitration as an alternative dispute resolution has significantly gained in popularity in the Arab Gulf states over the past two decades or so. This is no doubt reason enough to take a closer look at the main themes that define arbitration in this region. We are grateful for the diverse contributions that have been made to this issue by some of the leading scholars and practitioners in this field. Arbitration in the Arab Gulf states is often disparaged as procedurally uncertain. National courts of the Arab Gulf states are invariably seen as not being very arbitration-friendly; some possibly even hostile to arbitration. *Public order* alongside the Islamic legal traditions is seen as an unruly horse and has possibly undermined the development of international commercial arbitration in this region. The contribution in this book will hopefully go some way towards dissipating the concerns that are routinely raised about the procedural and practical soundness of arbitration in the Arab Gulf states. In addition, this book seeks to place arbitration in the Arab Gulf states in their present legal systems, national laws and court practices.

The Arab Gulf states are composed of six states: the Kingdom of Bahrain, Kuwait, Oman, Qatar, the Kingdom of Saudi Arabia, and the United Arab Emirates. This book aims to examine whether the national arbitration laws and court decisions on the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards in the Arab Gulf States are compatible with the best standards of international practice in the field of recognition and enforcement of foreign arbitral awards. In today's practice, the international commercial arbitration system based on the 1958 New York Convention effectively facilitates the resolution of multinational commercial disputes, and contributes to the world's continuing economic development. The Arab Gulf states are on a journey of transformation towards becoming part of an economically diverse and internationally and regionally competitive region.

In the last three decades, international commercial arbitration has gradually emerged as a hot topic in the Arab Gulf states. This might be traced back to the remarkable development of the national economies, which were largely based on the extraction and global sale of oil.[1] In the early 1990s, the world witnessed a boom in oil prices that resulted in the revival of the national economies. 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.[2] Therefore, policy-makers in the Arab Gulf states have embarked on investing in many different sectors in order to diversify the Gross Domestic Product (GDP) rather than solely rely on one source (oil). 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.[3] These investment projects have resulted in an increase in the amount of commercial activities, international commerce, and foreign investments in this region.

From a legal perspective, such development has raised concerns about the need for qualified and acceptable legal support. Arbitration is one of the legal aspects that attracted the attention of the policy-makers and national legislatures of the Arab Gulf 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 Arab Gulf states have gradually recognised arbitration as a means of dispute resolution in their national laws, and are attempting to construct friendly arbitration jurisdictions. The 1958 New York Convention was gradually acceded by the Arab Gulf states during the period 1978–2006.[4] Although the adoption of the 1958 New York Convention might show the states' willingness to accept international arbitration, at the domestic level, however, much uncertainty and many unexpected legal matters remain that

[1] 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.
[2] OPEC, *World Oil Outlook* (2013) issued by OPEC, pages 229–30 (Figures 9.2 and 9.3).
[3] 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.
[4] UNCITRAL official website.

might affect the recognition and enforcement of foreign arbitral awards. The efficacy of the implementation of the 1958 New York Convention in the domestic legal systems of the Arab Gulf states, like virtually all treaties, is dependent on the behaviour of domestic actors (national laws and judicial practices). However, 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. Hence, this book is designed to understand the operation of the 1958 New York Convention alongside the key legal principles of international arbitration in the domestic legal systems of the Arab Gulf states.

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 Centre
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 Centre 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 Organisation
YJIL	Yale Journal of International Law
YBCA	Yearbook of Commercial Arbitration

CHAPTER ONE

INTRODUCTORY CHAPTER

1.1 What is arbitration

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] Redfern in his recent book defined arbitration as a very simple method of resolving disputes. Disputants agree to submit their disputes to an individual whose judgement they are prepared to trust. Each puts its case to this decision maker, this private individual known as the "Arbitrator". He or she listens to the parties, considers the facts and the arguments, and makes a decision. That decision is final and binding on the parties, and it is final and binding because the parties have agreed that it should be, rather than because of the coercive power of any state.[2] Arbitration, in short is an effective way of obtaining a final and binding decision on a dispute, or series of disputes, without reference to a court of law (although, because of national laws and international treaties, that decision will generally be enforceable by a court of law if the losing party fails to implement voluntarily). There is no universal accepted definition of arbitration, either in international treaties or in soft law instruments.[3] 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

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

[2] Alan Refern and others, *Redfern and Hunter on International Arbitration* (sixth edition, Oxford, OUP 2015) at 2.

[3] 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.

the literature; therefore, there is no need to repeat in full this discussion here.[4]

Throughout history, the concept of consensual dispute resolution or private justice has been in existence all over the world and is perceived differently among different nations and civilisations. The most influential historical era of the development of the concept of private justice in commercial activities may have been the medieval era.[5] In this era, merchants settled their disputes through an independent tribunal and according to the medieval body of law known as *lex mercatoria*.[6] Throughout the Middle Ages, merchants would travel throughout Europe engaging in trade at fairs and markets. If disputes arose, it was important that they could be resolved quickly, and in accordance with the customs of the merchants themselves.[7] This central philosophy inspired the development of arbitration as a means of effective dispute resolution in current international trade.

1.2 Arbitration is a necessity for transnational commercial disputes

In the second half of the twentieth century, alongside the evolution of the global economy, modern technology, rapid transportation and multinational enterprises, there was an increased demand for arbitration in the domain of multinational commercial disputes. This is because multinational commercial transactions contain several elements that may make disputes

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[4] 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 llinois Law Review 1-59, Michael Kerr, 'International Arbitration v Litigation' (1980) Journal of Business Law 164, David Holloway and others, *Schmitthoff: The Law and Practic of International Trade* (12th edn, Sweet & Maxwell, London 2012) 586.

[5] Gary Born, *International Commercial Arbitration: Cases and Materials* (Aspen Publishers, New York 2011) at 13.

[6] Paul Sayre, 'Development of Commercial Arbitration Law'(1928) 37:5 Yale Law Journal 595-617, Ole Lando, 'The *lex mercatoria* in International Commercial Arbitration' (1985) 34 ICLQ 752–55. Roy Goode defines *lex mercatoria* "as part of transnational commercial law, which consists of unwritten usage and the customs of merchants, so far as satisfying externally set criteria for validation. This definition excludes written codifications of customs and practices". See Roy Goode and others, *Transnational Commercial Law: Text, Cases, and Materials* (1st edn, OUP, Oxford 2007) at 35–38.

[7] Leon Trakman, 'From the Medieval Law Merchant to E-Merchant Law' (2003) 53 The University of Toronto Law Journal 265-304.

complex to resolve and create uncertainty as to the possible outcomes of their resolution. In an international contract for the sale of goods, for example, the contractual parties may come from different countries, the goods might have to be transported from one country to another, and there may be various national laws that may be considered as possible applicable laws to govern all or some aspects of the contract.[8] In addition, it is frequently the case that more than one contract is involved in a particular business transaction; insurance contracts, carriage contracts and payment systems are part of a net of different obligations between the parties: the arbitration agreement is usually part of one or more of these interrelated contracts, which can all possibly be subject to different legal systems. Thus, if a dispute arises from this type of international commercial contract, arbitration becomes much more effective than litigation in a national court.[9]

The comparative advantages and disadvantages of arbitration as opposed to litigation have been the subject of substantial discussion in the literature.[10] Arbitration has countless more features compared with litigation in national courts. It allows the parties to tailor the process of arbitration to their needs. In arbitration, the parties are free to choose the place of arbitration, and to select an arbitrator who is familiar with the kind of business in which the dispute has arisen. In addition, the arbitration processes are normally flexible and less formal than litigation in national courts. In arbitration, the parties have greater control over the arbitration procedures. In contrast, the court proceedings are normally rigid procedures and cannot be adjusted according to the circumstances of the parties.

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[8] Mert Elcin, *The Applicable Law to International Commercial Contracts and the Status of Lex Mercatoria – With a Special Emphasis on Choice of Law Rules in the European Community* (1st edn, Universal Publishers, United States 2010) 1.

[9] 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/research/index.html> accessed July 2015.

[10] Thomas Stioanwich, 'Arbitration: The New Litigation (2010) 1 University of llinois Law Review 1-59, Michael Kerr, 'International Arbitration v Litigation' (1980) Journal of Business Law 164, David Holloway and others, *Schmitthoff: The Law and Practic of International Trade* (12th edn, Sweet & Maxwell, London 2012) 586.

Moreover, arbitration might be a speedier and cheaper mechanism of dispute resolution than litigation in national courts, but this is not necessarily always the case. The court fees are usually modest, whereas in arbitration the parties are responsible for the arbitrators' fees, which may be more costly than those of litigation in national courts. For example, in institutional arbitration the parties must pay considerable fees to the arbitration institution. In *ad hoc*[11] arbitration, the parties take responsibility for the arbitrator's accommodation and travel expenses, plus the agreed fees.[12] However, the parties to some extent can control the high cost of arbitration if they act reasonably regarding the claiming of these expenses.

The other disadvantage of arbitration is the limited powers available to the arbitrators compared with the powers available to the state courts, such as interim measures procedures and summary proceedings.[13] However, from the information presented above the most commonly identified advantages of arbitration over litigation can be summarised as follows: the flexibility and neutrality of the arbitration proceedings, the freedom of parties to choose a neutral place for the arbitration, members of the arbitral tribunal are experts in the subject matter of the dispute, and the confidentiality of the arbitration proceedings. Therefore, these advantages of arbitration over litigation in national courts have become attractive to commercial parties, who usually prefer the swift closure of disputes.

Hence, arbitration is now the principle method of resolving international commercial disputes involving states, individuals, and corporations. This is one of the consequences of the increased globalisation of world trade and investment. It has resulted in increasingly harmonised arbitration practices by specialised international arbitration practitioners who speak a common procedural language, whether they practise in the east or west or any other parts of the world. The result is an impressive edifice of laws and procedures, supported by treaties such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

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[11] "An *ad hoc* arbitration is one which is conducted pursuant to rules agreed by parties themselves or laid down by the arbitral tribunal. Parties to an *ad hoc* arbitration may establish their own rules of procedure provided that the rules they devise treat the parties with equality and allow each party a reasonable opportunity of presenting its case". Redfern and others, (n 3) at 52.

[12] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP, Cambridge 2012) 4.

[13] Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London 2004) para 1.47.

Awards of 1958, which is often referred to as the New York Convention of 1958 (NYC).[14] The NYC imposes an obligation on national courts around the world to recognise and enforce both arbitration agreements and arbitration awards.

One of the important key features of arbitration that inspired the topic of this book is the finality and easy enforceability of arbitral tribunal decisions on the substance of the dispute (arbitral award) throughout the world.[15] International commercial arbitration would be diminished in value if arbitral awards had no effective enforcement mechanism. Accordingly, many countries have endorsed several regional and international treaties that regulate the recognition and enforcement of arbitral awards. The most important and widely accepted multilateral treaty is the NYC as introduced previously. The NYC was adopted specifically to address the needs of the international business community and this Convention is the subject of examination in this book.

1.3 The 1958 New York Convention

The increase in the 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).[16] 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

[14] 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.

[15] 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 Practic 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.

[16] 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.

ratified the Convention, including most major trading nations and many developing countries from all regions of the world.[17] The NYC has been broadly considered as the most successful convention in international arbitration, if not in international commercial law.[18] It was adopted specifically to facilitate the REFAA worldwide.[19] Despite the brevity of the NYC, (it only includes seven substantive articles) it is now widely regarded as the "cornerstone of international commercial arbitration".[20]

The REFAA does not occur automatically in the state parties to the NYC. National courts retain the authority to refuse the 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 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 were not conducted in accordance with the parties' agreement; and 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; and 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 Arbitration[21] (ML)

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[17] UNCITRAL official website.

[18] Michael Mustill, 'Arbitration: History and Background' (1989) 6:2 Journal of International Arbitration 34-56 at 47, Holloway and others (n 1) at 580.

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

[20] Born (n 1) at 33.

[21] 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).

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 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.[22] 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.

1.4 The 1958 New York Convention and 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).[23] These countries are located in the Arabian Peninsula and overlook the Arabian Gulf Sea.[24] 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 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

[22] 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. 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".

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

[24] "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.

League in 1945.[25] Prior to that, all of the Arab Gulf states experienced more or less the same history and the same legal tradition, that is, the Islamic law tradition.[26] 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.[27] 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).[28] 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.[29] In the present day, these states are referred to as "GCC states" and this term will be used throughout this book.

In the last three decades, international commercial arbitration has gradually emerged as a hot topic in the GCC states.[30] 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.[31] In the early 1990s, the world witnessed a boom in oil prices that resulted in the revival of the national economies of the GCC states. The 2013 official report of the Organisation of the Petroleum Exporting Countries (OPEC) indicates that

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

[26] Khaldoun Al-Naqeeb, *Society and State in the Gulf and Arab Peninsula* (4thedn, Routledge United States 2012) at 11.

[27] Hamad Al-Humaidhi, 'Arbitration in the Arab–Islamic World' (2015) 29:1 Arab Law Quarterly 92–99.

[28] The official website of the Gulf Cooperation Council http://www.gcc-sg.org/eng/ accessed May 27 2015.

[29] "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".

[30] 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.

[31] 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.

the Middle East is currently the key crude oil exporting region and will remain so in the decades ahead.[32] 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.[33] 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 1978–2006.[34] Although the adoption of the NYC by the GCC states might show the states' willingness to accept international arbitration, at the domestic level, however, much uncertainty and many unexpected legal matters remain. In the implementation of the NYC in the GCC domestic legal systems, like virtually all treaties, its efficacy is dependent on the behaviour of domestic actors (national laws and judicial practices).

1.5 Aim and objectives of the book

This book aims 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 the REFAA under the

[32] OPEC, *World Oil Outlook* (2013) issued by OPEC, pages 229–30 (Figures 9.2 and 9.3).
[33] 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.
[34] UNCITRAL official website.

NYC. In today's practice, the international commercial arbitration system based on the NYC effectively facilitates the 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 a 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 book hopes to advance the current debate on the uncertain legal framework regulating the REFAA under the NYC in the GCC states.[35]

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.[36]

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[35] See (n 27).

[36] 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, 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

However, Oman and Bahrain have modernised their arbitration laws and brought them into line with the NYC and ML.[37] 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.[38]

Therefore, this book particularly aims to provide an understanding of the operation of the NYC in the states of Qatar, the UAE and the 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.[39] In addition, the ambiguity and unpredictability of the court decisions on foreign arbitral awards show the difficulty in accepting the NYC as a core treaty that regulates the REFAA in these two states.[40]

In addition, the Saudi Arabia 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 the rules of the Islamic legal tradition that are relevant for arbitration practices in the KSA.[41] Therefore, the book

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of New York Convention Awards in the UAE: The Story Re-Told' (2013) 5 International Journal of Arab Arbitration 19.

[37] UNCITRAL official website.

[38] Rashid AlAnezi, 'Enforcment of Foreign Arbitral Awards in Kuwait' (2014) 1:1 BCDR International Arbitration Review 85–94.

[39] 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.

[40] See (n27).

[41] 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

concerns how the NYC operates in the states of Qatar, the UAE and the KSA, and will shed light on some essential legal matters that pertain to arbitration in this region, compared with the NYC, the ML, and international best practices. To address these legal matters there are solutions available, and these reforms are suggested throughout the book.

1.6 Summary of contents

Chapter two: This chapter reviews the provisions of the NYC and the essential principles of the operation of arbitration as an effective method of dispute resolution in international trade alongside some of the potential points of contention in the existing international system.

Chapter three: The legal system of commercial arbitration within the GCC states is first introduced, discussing how the concept of arbitration as an alternative dispute resolution evolved in this region. Following this, the chapter reviews the GCC national arbitration laws in order to find out how the provisions of the NYC are incorporated. The chapter also clarifies the relationship between Sharia law (Islamic legal traditions) and GCC legal systems, and to what extent Sharia law can be used as grounds which might block the REFAA under the NYC.

Chapters four, five and six: The implementation of the NYC in the states of Qatar, the UAE and the KSA are analysed, with an in-depth coverage of the laws and their application in these states. Numerous legal matters are discussed and identified which correlate with many of the well-known weak points in the system of international commercial arbitration in this region.

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.

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

[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 llinois Law Review 1-59, Michael Kerr, 'International Arbitration v Litigation' (1980) Journal of Business Law 164, David Holloway and others, *Schmitthoff: The Law and Practic 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.

New York Convention[5] (NYC) and the Model Law on International Commercial Arbitration[6] (ML), or is found in the national arbitration laws. Most of the modern national arbitration laws are consistent with the NYC and the ML.[7]

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 some of the GCC states. Therefore, a review of these core principles is essential at the outset of this book, as the implementation of these principles will be analysed in detail in the following chapters.

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 implementation of the NYC in the GCC states.

[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.

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 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 the 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 agreed to refer the dispute to arbitration before the dispute arose. On the other hand, if the arbitration agreement 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 Islamic contract law, called *Gharar*,[15] which may affect the parties' ability

[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.
[11] Holloway and others (n 3) at 581, Tweeddale (n 2) at 34.
[12] Redfern and others (n 4) at 15.
[13] Ibid.
[14] The Islamic legal tradition introduced in chapter three.
[15] Nadhirah Nordin and others, 'contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?' (2014) 10:15 Journal of Asian Social Science

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 the KSA is subject to Islamic law. This is discussed in detail in chapter six.

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:

> 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 contractua1 or not, concerning a *subject matter capable of settlement by arbitration*.

In this provision, three conditions 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 the ML. A comparison will be made in chapters four, five and six 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

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37-47, Reyadh Seyadi, 'Legal Aspect of Islamic Finance' (2015) 29:3 Arab Law Quarterly 285-295 at 288.

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

[17] Tweeddale (n 2) at 109.

[18] Ibid

writing. The reason for imposing the written requirement is self-evident[19] 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 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 "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. A number of different laws potentially govern arbitrability.[23] The first is that the law of the country of the place of arbitration (seat law) 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

[19] Redfern and others (n4) at 89.
[20] Albert 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.
[21] Tweeddale (n 2) at 110.
[22] Born, (n1) at 768, Mistelis and others, (n2) para 9-35, Redfern and others (n4) at 655.
[23] Tweeddale (n 2) at 109.

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 traditions.

2.3 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, ML, and international best practice interpret the form of the written agreement, and this question is examined in detail in chapters four, five and six.

2.3.1 Writing condition

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 moved on, letters and telegrams were almost entirely replaced by new means of communication, such as telex, fax, email and e-contracts, which provide the same basic

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[24] Stavros Brekoulakis and Loukas Mistelis, *Arbitrability: International and Comparative Perspectives* (1st edn, Kluwer Law International 2009) at 97.
[25] Tweeddale (n2) at 25.
[26] Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academic Law Journal 874, Stavros Brekoulakis, '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, Tweeddale (n 2) at 229.