



Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries

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Obtenir avec succès une décision de justice - jugement d'un tribunal étatique ou sentence arbitrale - n'est pas nécessairement l'étape finale de la procédure engagée. En effet, des mesures additionnelles visant l'exécution de ladite décision peuvent être mises en œuvre lorsque la partie adverse refuse de s'y conformer. Il est courant que les décisions de justice réglant les litiges du commerce international soient exécutées dans un État autre que celui de leur for. Dans cette hypothèse, le jugement devra être reconnu par l'autorité compétente désignée par l'État dans lequel l'exécution est recherchée (l'État requis). Obtenir la reconnaissance d'un jugement étranger dans un Pays membre du Conseil de coopération du Golfe peut parfois être laborieux. En dépit des ambitions affichées de ces Pays concernant la reconnaissance et l'exécution des sentences arbitrales étrangères, les juridictions locales sont parfois réticentes lorsqu'elles sont confrontées à des jugements étrangers. Cet article propose une synthèse des règles s'appliquant aux jugements étrangers dans les six États du Golfe (Bahreïn, Koweït, Oman, Qatar, Arabie Saoudite et les Émirats arabes unis) et suggère des propositions concrètes visant à résoudre les problématiques posées par ces procédures.

Successfully obtaining a judgment or arbitral award may not be the final step in asserting a claim. Extra enforcement measures may be required when the losing party refuses to abide by the terms of a ruling. In international commerce, rulings must often be enforced in a jurisdiction other than the one where it was made. In this case, the ruling will have to be recognized by the competent authority of the country where enforcement is sought. Obtaining recognition of a foreign ruling in a country that is part of the Gulf Cooperation Council [the GCC] can be laborious. Despite the ambitious strategies of the GCC countries regarding the recognition and enforcement of foreign arbitral awards, their local courts still have many reservations about foreign rulings. This article provides an overview of existing regulations pertaining to foreign rulings in the six GCC countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates), and offers suggestions on strategies to deal with the challenges posed by these regimes.

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I. INTRODUCTION

This article considers issues relating to the recognition of foreign judgments and arbitral awards [foreign rulings] in civil and commercial matters (excluding decisions in family, inheritance and personal status matters) in the Near and Middle East. Particular attention will be given to exequatur procedures in GCC countries.¹ This procedure is the first step taken when seeking enforcement of a foreign ruling. The competent authority will determine whether to recognize a foreign judgment or arbitral award, and thus whether the foreign ruling shall have full legal effect in its jurisdiction.²

The first section will provide an overview of recent developments in struggles for the recognition of foreign rulings in the GCC-Region. The second will describe existing legal regimes of individual GCC countries, which are comprised of international and regional treaties as well as domestic law. It will highlight specific challenges related to recognition posed by the existing legal provisions and court practices; particularly, the inclination of GCC courts to review foreign rulings in an exhaustive manner, their restrictive provisions on jurisdiction, and specific demands typically imposed by the application of Islamic law. In addition, it will examine whether judgments and arbitral awards made in certain Western jurisdictions (Austria, Canada, France, Germany, Switzerland, the United Kingdom [UK], and the United States [US]) can be recognized in the individual GCC countries. Finally, the article will conclude with some suggestions on strategies for drafting dispute resolution clauses and structuring legal action to address the challenges posed by these legal regimes. It will address considerations in choosing between litigation and arbitration, the selection of dispute resolution forums, and factors to be taken into account in award or judgment enforcement proceedings.

II. NEW DEVELOPMENTS

Courts in GCC countries have traditionally taken a restrictive approach in considering whether to recognize foreign judgments. In particular, they assume extensive authority to review foreign judgments. That being said, recent years have brought about some positive developments. Most notably, Saudi Arabia passed a new law governing *inter alia* the enforcement of foreign judgments, which went a long way in unifying the legal regimes of the different GCC countries. Recent legislative trends also show that (most of) the GCC countries may take a less restrictive approach with respect to the question of competing international jurisdiction.

The most significant progress has been made with regard to arbitration. Over the last decade there has been considerable development in the promotion of arbitration as a dispute resolution mechanism. There have also been many advances in the acceptance of international arbitration procedures by the GCC countries. Most notably, with the UAE's accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 in 2006, the most relevant international legislation for enforcing foreign arbitral awards became applicable in the GCC as a

1 However, the article will not discuss the specific challenges arising in connection with recognition and enforcement and the Dubai International Finance Center [DIFC] and the Qatar Financial Center.

2 Should the foreign ruling be recognized, administrative authorities usually take charge of enforcing it. This article will not consider the (administrative) enforcement procedure, but instead focus exclusively on the (judicial) exequatur procedure.

whole.³ Other GCC countries have also amended their arbitration laws significantly over the last few years. They have made considerable efforts to advance their standing as attractive arbitration venues, by setting up a number of arbitration centers throughout the GCC for instance. This started with the opening of the Abu Dhabi Commercial Conciliation & Arbitration Center in 1993,⁴ and has intensified over the past decade with the evolution of numerous arbitration centers in Bahrain,⁵ Qatar,⁶ Dubai⁷ and Kuwait⁸ for example. Nonetheless, as I will now explain, obstacles for recognition of foreign awards still exist, and the recognition of foreign judgments remains comparatively difficult.

III. INDIVIDUAL LEGISLATION

A. Bahrain

i. Foreign Judgments

Verdicts and other decisions of foreign courts [foreign judgments] may be recognized in Bahrain where reciprocal recognition is established between Bahrain and the country of origin by treaty or other means.

aa) Treaties

Provisions regarding the recognition of foreign judgments may be found in specific bi- or multilateral agreements facilitating judicial cooperation, or other more general trade agreements (i.e. free trade agreements [FTA]).

The most relevant example is the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996, which binds all GCC members.⁹ Article 1 of the

³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739 (entered into force on 7 June 1959) [*New York Convention*]; *ibid* (contracting States), online: New York Arbitration Convention <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

⁴ Abu Dhabi Commercial Conciliation & Arbitration Center [ADCCAC] (the ADCCAC opened in 1993), online: ADRResources <adresources.com/adr-institutions/117/Abu-Dhabi-Commercial-Conciliation-Arbitration-Center-ADCCAC>.

⁵ Bahrain Chamber for Dispute Resolution [BCRD-AAA] (the BCDR-AAA opened in 2010), online: Bahrain Chamber for Dispute Resolution <www.bcdr-aaa.org/en/about-us/>.

⁶ Qatar International Center for Conciliation and Arbitration [QICCA] (the QICCA opened in 2006), online: Qatar Chamber <qatarchamber.com/1509>.

⁷ Dubai International Arbitration Centre [DIAC] (the DIAC opened in 2004, replacing the Dubai's Chamber of Commerce and Industry's Centre for Commercial Conciliation created in 1994), online: Dubai International Arbitration Center <www.diac.ae/idias/>; Dubai International Financial Centre and London Court of International Arbitration Joint Arbitration Center [DFC-LCIA] (the DFC-LCIA opened in 2008 and re-launched in late 2015), online: DFC-LCIA Arbitration Center <www.difc-lcia.org>.

⁸ Commercial Arbitration Centre of the Kuwait Chamber of Commerce and Industry [CAC-KCCI] (the CAC-KCCI opened in 1999), online: Kuwait Chamber of Commerce and Industry <www.kuwaitchamber.org.kw>.

⁹ *GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications*, 4 June 1995, 1996:4 Official Gazette of the State of Qatar (entered into force on 6 December 1995), art 1 [*GCC Convention*], see online: <diac.ae/idias/rules/GCC/>; see Steven L Smith, "Enforcement of International Arbitral Awards Under the New York Convention" in Rufus von Thülen Rhoades, Daniel M Kolkey & Richard Chernick, eds, *Practitioner's Handbook on International Arbitration and Mediation*, 3rd ed (Huntington, NY: Juris Publishing, 2007) 285 at 359—360; Kuwait News Agency, News Release, "GCC to update convention on execution of judgments, judicial

convention mandates reciprocal recognition of foreign judgments among the GCC countries. A party seeking recognition of a judgment rendered in another GCC country may therefore make an application to the competent Bahraini court solely on this ground. However the GCC-Convention does not provide a specific procedure for said recognition. Pursuant to article 3(b), recognition procedure is governed by the laws of the country to whom the request is submitted. In the case of Bahrain, it is the Bahrain Civil and Commercial Procedure Act.¹⁰

Recognition of foreign judgments may also be sought pursuant to articles 25 et seq. of the Riyadh Arab Agreement for Judicial Cooperation of 1983, which all GCC members are a party to.¹¹ Unlike the GCC Convention, the Riyadh Convention establishes a specific exequatur procedure *via* its article 32(1). Pursuant to article 25(b), foreign judgments may be recognized under the Riyadh-Convention where:

1. The foreign court was competent under the requested country's *lex fori*.
2. The country of origin's courts do not have exclusive jurisdiction over the subject matter.
3. The judgment is final under the country of origin's law.

However, certain judgments (i.e. judgments against governments or government employees relating to their administrative duties) may not be recognized pursuant to article 25(c). Recognition may be rejected pursuant to article 30(1) if:

1. Recognition would contradict the principles of Islamic law or the constitution and *ordre public* of the requested country.
2. The party against which the judgment is invoked was not duly summoned.
3. The laws of the requested country concerning legal representation of ineligible persons or persons of diminished eligibility were not taken into consideration.
4. The dispute is subject to a final judgement in the requested country, or in a third country, provided that the requested country has already recognized this judgement.
5. The dispute is subject to a case currently being heard by the requested country's courts filed prior to the application for recognition being made.

notifications" (6 september 2015), online: KUNA <www.kuna.net.kw/ArticleDetails.aspx?id=2459034> (according to this news release by the Kuwait News Agency, the GCC Ministers of Justice will seek to draft an amendment to the GCC-Convention, which was made necessary due to changes in the relevant laws of the GCC countries. What these amendments will entail was, however, not released).

¹⁰ *Bahrain Civil and Commercial Procedure Act* (1971), (Law 12/1971) [BHR-CCPA].

¹¹ *Riyadh Arab Agreement for Judicial Cooperation*, 6 April 1983 (entered into force on 30 October 1985), reprinted in UAE Federal Decree 53/1999 [*Riyadh Convention*]; Abd al-Hamid Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries*, 3rd ed (Alphen aan den Rijn: Kluwer Law International, 2011).

In particular, the first requirement calling for compliance with Islamic law and the *ordre public* of the requested country (article 30(1)(a)) may considerably hinder the potential recognition of foreign judgments because it may be difficult to define both the principles of Islamic law and *ordre public* with any significant clarity.

Principles of Islamic law will be particularly relevant in disputes over economic matters where claims for interest, consequential damages and claims based on assigned rights are concerned. The principle of *riba* (ربا) is commonly understood to prohibit charging interest for loans (ربا النسبية), since such interest is often seen as a gain without consideration and is, therefore, an undue profit.¹² While there is some dispute among the different schools of Islamic law on this matter, it appears that *riba* is still widely perceived as prohibiting default interest as well.¹³ Pursuant to article 228(1)(a) of the Bahrain Civil Code any agreement compelling one party to pay interest in consideration of a loan or for delay in settlement of an obligation shall be void.¹⁴ However, the Bahrain Commercial Transactions Law provides some exceptions to this general rule.¹⁵ Article 76(2) BHR-CTL permits agreements on interest in consideration of a loan where the agreement is a commercial transaction for at least one party and the interest rate does not exceed the limits prescribed by the Central Bank of Bahrain (article 76(4) and (5) BHR-CTL). Pursuant to article 81(1) BHR-CTL, interest may be charged for delay of performance of commercial debts provided that the interest does not exceed the principle on which it is charged (article 81(2) BHR-CTL). A foreign judgment may therefore be recognized in Bahrain if it awards interest in the form described above.

Claims that cannot be quantified and substantiated at the time that the underlying agreement was made are void according to the Islamic legal principle of *gharar* (غرر).¹⁶ Since the basis of consequential damages will usually be related to circumstances not definitely determinable at the time the relevant agreement is made, claims for consequential damages are commonly not enforceable under Islamic law. Under Bahraini law however, damages for loss of profit may still be recovered provided that they were sustained due to failure to or delay in performance of an obligation and the claimant was not able to avoid such losses by applying reasonable efforts (article 223 BHR-CC).

The assignment of obligations is recognized by Islamic law under the principle of *hawala* (حوالة) provided that assignee, assignor and original debtor consent to the assignment. Whether assignment of rights is permissible under Islamic law is still somewhat disputed, however. Commentators arguing in favor of the assignment of rights appear to agree that – unlike an assignment of rights under most Western jurisdictions – it requires the consent of the debtor.¹⁷ Under Bahraini law, though, the assignment of rights and obligations is regulated fairly similarly

12 Mohammad Nejatullah Siddiqi, *Riba, Bank Interest and the Rationale of its Prohibition* (Jeddah, Saudi Arabia: Islamic Development Bank & Islamic Research and Training Institute, 2004) at 37–38.

13 Mathias Rohe, *Islamic law past and present* translated by Gwendolin Goldbloom (Leiden: Brill, 2005) at 298ff.

14 *Bahrain Civil Code* (2001) art 228(1)(a), (Law 19/2001) [BHR-CC].

15 *Bahrain Commercial Transactions Law* (1987) (Law 7/1987) [BHR-CTL].

16 See Nicholas Foster, “Owing and Owning in Islamic Law and Western Law” (2005) 10:1 Yearbook of Islamic and Middle Eastern Law Online 59 at 85–86; Wael B Hallaq, *Shari’a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009) at 243–244.

17 See generally Raj Bhala, *Understanding Islamic Law: Shari’a* (New Providence, NJ: LexisNexis, 2011) at 579–580.

to European civil law jurisdictions (see article 287 et seq. BHR-CC). In particular, the assignment of rights can still be valid without consent of the debtor (article 287 BHR-CC).

Finally, Bahraini courts – similarly to courts of other GCC countries – generally make excessive use of the *ordre public* principle to comprehensively review the merits of foreign judgments that parties are seeking to be enforced under their jurisdiction.¹⁸ The required compliance with Islamic law and the tendency of Bahraini courts to conduct this type of review make an exequatur procedure rather complex. That principles of Islamic law as well as Bahraini *ordre public* are not interpreted uniformly is particularly problematic. Not only does this create considerable ambiguity, it also provides the party opposing recognition with considerable room to argue for a prevention or delay in recognition and enforcement. Therefore, in order to succeed in an application for recognition of a foreign judgment, parties will have to consider these central principles carefully in planning for court proceedings.

bb) Domestic Law

Where no treaty is applicable, the recognition of foreign judgment in civil and commercial matters is governed by the BHR-CCPL. An application for recognition must be made to the Bahraini High Court (أعلى محكمة) per article 252(2) BHR-CCPL. In principle, the High Court will recognize judgments of foreign courts under the same conditions Bahraini judgments may be recognized in the country of origin (so-called reciprocity) (per article 252(1) BHR-CCPL). In addition, article 252(3) BHR-CCPL requires that:

1. Bahraini courts did not have jurisdiction and the courts of the country of origin had international jurisdiction over the concerned subject matter pursuant to its *lex fori*.
2. The parties of the law suit were duly summoned and represented.
3. The judgment is valid and legally binding under the country of origin's law.
4. The judgment does not conflict with a prior judgment of a Bahraini court on the same subject matter and the *ordre public* of Bahrain.

Two of these requirements: the lack of jurisdiction of Bahraini courts (article 252(3)(1) BHR-CCPL) and the requirement of compliance with the *ordre public* (article 252(3)(4) BHR-CCPL) are particular problematic. If the requirement of a lack of jurisdiction of Bahraini courts was to be understood as demanding that Bahraini courts had no jurisdiction whatsoever over the relevant subject matter, few foreign judgments with a connection to Bahrain or involving a Bahraini party would be recognized in Bahrain. A restrictive interpretation of article 252(3)(1) BHR-CCPL according to which foreign judgments may be recognized in Bahrain unless Bahraini courts have exclusive jurisdiction over the concerned subject matter may therefore be

¹⁸ Kilian Bälz, “Die Anerkennung und Vollstreckung ausländischer Zivilurteile und Schiedssprüche in den Arabischen Golfstaaten” (2011) 3 RIW 118 at 119 [Bälz, “Den Arabischen Golfstaaten”]; Robert Lutz, *A Lawyer's Handbook for Enforcing Foreign Judgments in the United States and Abroad* (New York: Cambridge University Press, 2007) at 433.

preferable.¹⁹ Furthermore, article 252(3)(4) BHR-CCPL stipulates that a foreign judgment may not be recognized in Bahrain if it conflicts with a prior judgment of a Bahraini court concerning the same subject matter. This provision seems to be redundant: no foreign judgment could be recognized in Bahrain if Bahraini courts had competing jurisdiction. Thus, the regulatory regime established by article 252(3) BHR-CCPL suggests that article 252(3)(1) BHR-CCPL has to be interpreted as excluding foreign judgments from being recognized in Bahrain only where Bahraini courts have exclusive jurisdiction over the concerned subject matter. This interpretation would be in line with the approach taken by Kuwait,²⁰ Oman²¹ and Qatar.²² However, due to a lack of documented practice by Bahraini courts in these particular matters, it is still possible that Bahraini courts would refuse to recognize a foreign judgment where they find that Bahraini courts had jurisdiction over the concerned subject matter. Article 252(3)(1) BHR-CCPL therefore creates a considerable risk that certain foreign judgments will not be recognized in Bahrain and also limits the parties' ability to choose their forum of dispute resolution.

In sum, Bahraini courts will usually consider themselves competent to conduct a *revision au fond* pursuant to article 252(3)(4) BHR-CCPL. A party seeking recognition of a foreign judgment in Bahrain has to be aware that, while the civil and commercial law of Bahrain are not governed primarily by Islamic law, this is nonetheless the principle source of Bahraini law.²³ Courts will therefore consider certain principles of Islamic law as forming part of Bahrain's *ordre public*.

cc) Reciprocity

Where reciprocal recognition is not established *via* treaty, foreign judgments may still be recognized where reciprocity has been established in practice (per article 252(1) BHR-CCPL). A foreign judgment may be recognized in Bahrain if judgments of Bahraini courts are recognized in the issuing country. Under German law foreign judgments may be recognized if reciprocity is established by treaty or practice.²⁴ It is generally accepted that this is the case regarding relations with Bahrain.²⁵

A comparison of the relevant provisions governing the recognition of foreign judgments under Swiss and Bahraini law suggests that reciprocity could be established between the two countries as well. Although Swiss law does not consider reciprocity a requirement for the recognition of foreign judgments,²⁶ it would still have to be established to satisfy the demands of

19 Such as in labour disputes concerning employment in Bahrain, see *Labour Law for the Private Sector* (2012), arts 119 & 120 (Law 36/2012) (Bahrain) [BHR-LLP].

20 See below at: II., 2., a), bb).

21 See below at: II., 3., a), bb).

22 See below at: II., 4., a), bb); however, the law of the UAE (see below at: II., 6., a), bb)) and Saudi law (see below at: II., 5., a), bb)) comprise a provision similar to that of article 252(3)(4) BHR-CCPL.

23 See *Constitution of the Kingdom of Bahrain, 2002*, art 2.

24 *Code of Civil Procedure (Zivilprozessordnung)*, art 328(1)(5) (Germany) [GER-CCP].

25 See Peter Gottwald, in Wolfgang Krüger & Thomas Rauscher, eds, *Münchener Kommentar zur Zivilprozessordnung: ZPO*, 4th ed, vol. 1 (Munich: Beck, 2013) at § 328, marginal number 137; Kilian Bälz, "Bahrain" in Reinhold Krüge & Rolf A Sagittarius, eds, *Internationaler Rechtsverkehr in Zivil und Handelssachen*, 43th ed (Munich: Beck, 2015) at 1015-5 [Bälz, "Bahrain"].

26 Reciprocity is not a requirement comprised in the *Federal Act on Private International Law*, Switzerland 2014, art 25 [SWI- FIPPL] (the list of requirements of article 25 is exclusive); Ramon Mabillard & Robert Däppen, "Kommentar zu Art. 25" in Heinrich Honsel et al, *Basler Kommentar, Internationales Privatrecht*, 3rd ed (Basel:

Bahraini law, and the requirements for recognition stipulated by article 25 SWI-FIPL appear to be conducive to this. Reasons for refusal of recognition provided by article 27 SWI-FIPL are also similar to those of Bahrain. Article 27(2)(b) SWI-FIPL requires that there be compliance with the essential principles of Swiss procedural law, and although this does not have an equivalent in Bahrain law, it is nonetheless an expression of Swiss (procedural) *ordre public*.²⁷ This provision is thus arguably an equivalent to Bahrain's article 252(3)(4) BHR-CCPL. However, in the absence of established practice by Bahraini courts supporting this interpretation, the risk remains that Bahraini courts will refuse recognition of Swiss judgments.

Until recently, no reciprocity was recognized between Bahrain and the US. However, recent US court rulings appear to have moved towards improving their relationship. In a decision dated December 12, 2012, the Supreme Court of New York recognized a judgment obtained by Standard Chartered Bank against Ahmad Hamad Al Gosaibi and Brothers Company in Bahrain.²⁸ The Superior Court of Pennsylvania, under the Uniform Enforcement of Foreign Judgments Act,²⁹ later also followed this ruling.³⁰ No corresponding decisions of Bahraini courts are available to date. These American decisions could very well persuade Bahraini courts that a reciprocal relationship has been sufficiently established. If so, it will be interesting to see whether they will enforce judgments emanating from all US courts, or only those particular states that have ruled in favor of Bahraini awards.

Inversely, Austria and Canada serve as two examples of non-reciprocal relationships. Article 79(2) of the Austria Execution Regulation (*Exekutionsordnung*) requires that reciprocity be established by treaty or regulation. No such treaties or regulations currently exist between Bahrain and themselves.³¹ The Supreme of Canada established the current regime for the recognition of foreign judgments in Canada in *Morguard Investments Ltd v De Savoye*. It held that a foreign judgment could be recognized, provided that there was a real and substantial connection between the foreign court and: (i) the defendant; (ii) the cause of action, or (iii) the subject matter of the action.³² Following *Morguard*, Canadian courts will recognize a foreign judgment where

Helbing Lichtenhahn, 2013) at marginal number 28; Paul Volken, "Kommentar zu Art. 26" in Anton Heini et al., eds, *IPRG Kommentar*, (Zurich: Schulthess Polygraphischer, 1993) at marginal numbers 26ff.

27 Ramon Mabillard & Robert Däppen, "Kommentar zu Art. 27" in Honsel et al., *supra note 26* at marginal number 16; Paul Volken, "Kommentar zu Art. 27" in Heini et al., *supra note 26* at marginal number 25. Compliance with the Swiss "material" *ordre public* is required under article 27(1) SWI-EIPL.

28 *Standard Chartered Bank v Ahmad Hamad Al Gossaibi & Bros. Co. et al.*, 957 NYS (2d) 602 (Ny Sup Ct 2012). The BCDR-AAA tribunal that rendered the initial judgment is a statutory dispute resolution body and not an arbitral tribunal established under the *Legislative Decree no 30 for the year 2009 with respect to the Bahrain Chamber for Economic Financial and Investment Dispute Resolution*, 29 June 2009, 6 et seq. Therefore, the Supreme Court of New York – correctly – considered its ruling to be a judgment of a foreign court rather than a foreign arbitral award and consequently applied NY CPLR §§ 5302 et seq., which govern the recognition of foreign judgments.

29 PA Const 42, § 4306.

30 *Standard Chartered Bank v Ahmad Hamad Al Gossaibi & Bros Co et al*, 226 EDA 2013, (Pa Sup Ct 2014).

31 Execution Regulation (*Exekutionsordnung*) (2011), art 79(2) (Austria).

32 *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1098 (While the decision in *Morguard* was rendered in respect to the recognition of a judgment passed in one Canadian province in another, the Supreme Court of Canada has since applied its ruling to judgments passed outside of Canada); *Beals v Saldhanha*, 2003 SCC 72 at para 19, [2003] 3 SCR 416.

the foreign court had jurisdiction according to Canadian *lex fori*, rather than that of the country of origin.³³ This contradicts Bahraini law, which stipulates that the foreign court's jurisdiction has to be determined pursuant to the law of the country it is located in (article 252(3)(1) BHR-CCPL). These different recognition standards are thus currently a serious obstacle to establishing reciprocity. That being said, there have not yet been any judgments out of the Bahraini courts concerning recognition of a Canadian judgment, so it remains to be seen how heavily Bahraini courts will weigh this consideration.

France serves as another example of a country where reciprocity is likely absent. There is no treaty pertaining to mutual recognition of French and Bahraini judgments, and there is no precedent emanating from either country. Furthermore, Bahraini courts may consider the French regime governing the recognition of foreign judgments to be incompatible with their own. The French *Cour de Cassation* established the regime for recognition of foreign judgments under French law.³⁴ In that decision, the court identified three requirements for the recognition of foreign judgments: (i) compliance with French *ordre public*, (ii) international jurisdiction of the foreign court pursuant to French law, and (iii) absence of fraud in the obtention of the judgment. While the first and third requirements are compatible with Bahraini law (the third requirement essentially being a specific procedural variation of the *ordre public* requirement), the second requirement will likely be problematic. Pursuant to article 252(3)(1) CCPL, the foreign court has to have had international jurisdiction under the provisions on conflict of laws of the country of origin, while the French courts require application of French *lex fori*. Bahraini courts will thus likely refuse recognition of French judgments on similar grounds as those mentioned in the case of Canada. In the absence of jurisprudence, however, we cannot exclude that Bahraini courts might adopt a different interpretation.

In the UK, where no treaty on reciprocal recognition is applicable, British law possesses two regimes governing the recognition of foreign judgments.³⁵ First, judgments rendered in certain jurisdictions may be recognized pursuant to the statutory provisions of the Administration of Justice Act, 1920 and the Foreign Judgment (Reciprocal Enforcement) Act, 1933.³⁶ Where neither of these applies – as in case of all six GGC countries³⁷ – enforcement may only be sought via common law principles. Here, a foreign judgment will not be recognized as such, but instead be treated as if it creates contractual debts between the parties of the dispute. The creditor has to file proceedings for simple debt and obtain a summary judgment in the relevant jurisdiction. Thus, while similar in result, the common law approach does not correspond with the approach taken by Bahraini law. Bahraini courts will, therefore, most likely refuse to recognize judgments issued by

33 See *Moses v Shore Boat Builders Ltd* (1993), 106 DLR (4th) 654, 83 B.C.L.R. (2d) 177 (B.C.C.A.).

34 Cass civ 1re, 20 February 2007, (2007) Bull civ 60, No 05-14082 (This decision repealed Cass civ 1re, 7 January 1964, (1964) Bull civ 15).

35 The relevant provisions apply uniformly to all jurisdictions within the UK (England and Wales, Scotland and Northern Ireland).

36 *Administration of Justice Act, 1920* (UK), 10 & 11 Geo V, c 81 [UK-AJA]; *Foreign Judgment (Reciprocal Enforcement) Act, 1933* (UK), 23 Geo V, c 13 [UK-FJA].

37 For an overview of signatories to the UK-AJA & UK-FJA see Charles Falconer et al., "United Kingdom" in Patrick Doris, ed, *Enforcement of Foreign Judgements in 28 Jurisdictions Worldwide* (London: Law Business Research Limited, 2014) 124.

courts in the United Kingdom.³⁸

ii. Foreign Arbitral Awards

aa) Treaties

Article 255 BHR-CCPL stipulates that – with respect to the recognition of foreign arbitral awards – treaty provisions take precedence over those of domestic Bahraini law. Since Bahrain has declared accession to the New York Convention,³⁹ most foreign arbitral awards will be recognized in Bahrain pursuant to the provisions of this convention. Furthermore, awards rendered in a member of the Arab League may be recognized under the Riyadh-Convention.

Per article V(1) of the New York Convention, recognition may be refused at the request of the party against whom the relevant award is invoked on grounds that:

1. The relevant arbitration agreement is not valid under the law it was subjected to or – in lack of a choice of law – the law of the country of origin.
2. A party to the arbitration agreement was under some form of incapacity.
3. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s), not duly summoned, or otherwise unable to present its case.
4. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission.⁴⁰
5. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement or, in lack of an agreement, was not in accordance with the law applicable at the place of arbitration.
6. The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, it was made.

Furthermore, pursuant to article V(2) New York Convention, recognition may be refused if the competent court finds that:

1. The subject matter of the dispute may not be settlement by arbitration under the law of the requested country.

38 See Muhaamad al-Bashir Muhammad Al-Amine, *Global Sukuk and Islamic Securitization Market* (Leiden: Brill, 2012) at 353ff; “The Kingdom of Bahrain acting through the Ministry of Finance, U.S.\$1,500,000,000 6.125 per cent. Bonds due 1 August 2023 Issue Price: 99.447 per cent”, at 10 at (v), online: <www.ise.ie/debt_documents/Prospectus%20-%20Standalone_d7fd18df-d7b1-4192-b820-95c9926b9aae.PDF>. Furthermore, this interpretation would align with the position taken by Saudi courts; see below at: II., 5., a), cc). However, in the absence of available judgments by Bahraini courts on the recognition of UK judgments, it cannot be ruled out, that Bahraini courts would, nonetheless, recognize a UK judgment.

39 See *New York Convention*, *supra* note 3.

40 Partial recognition is permissible where the decisions on matters submitted to arbitration can be separated from those not so submitted.

2. The recognition of the award would be contrary to the *ordre public* of the requested country.

Bahrain acceded to the New York Convention under the two reservations provided for in article I(3) New York Convention.⁴¹ Firstly, Bahrain will apply the New York Convention only to arbitral awards rendered in a dispute arising out of a legal relationship, which is considered a commercial matter under Bahraini law.⁴² Secondly, Bahrain has limited the application of the convention to arbitral awards rendered within the territory of another party to the New York Convention. Since the New York Convention has 156 member states, the convention is still applicable for the recognition of arbitral awards rendered in most countries. Nevertheless, Iraq and Yemen are two notable countries that are not members of the New York Convention. Arbitral awards rendered in Iraq and Yemen may, however, be recognized in Bahrain pursuant to the Riyadh-Convention under the conditions set out in article 37(1), which allows the reciprocal recognition of foreign awards among the members of the Riyadh-Convention unless:

1. The relevant subject matter may not be subjected to arbitration pursuant to the law of the requested country.
2. The arbitration agreement is void or the award has not become final.
3. The arbitration agreement does not cover the subject matter of the dispute.
4. The parties have not been duly served with the notice of arbitration.
5. The award or any part thereof infringes Islamic law or the *ordre public* of the requested country.

bb) Domestic Law

Where no treaty is applicable, the recognition of foreign awards is governed by the New Bahraini Arbitration Law,⁴³ a piece of legislation implementing the UNCITRAL Model Law on International Commercial Arbitration of 1985 as amended in 2006 [UNCITRAL-Law].⁴⁴ Unlike the Bahraini Arbitration Law that it replaced,⁴⁵ the New BHR-Arb L does not include provisions on the recognition of foreign awards. Furthermore, article 8 New BHR-Arb L repealed article 253 BHR-CCPL, which stated that the provisions on the recognition of foreign judgments shall apply to arbitral awards. Consequently, awards – whether domestic or foreign – may be recognized pursuant to the provisions of the UNCITRAL-Law (article 35 UNCITRAL-Law). Pursuant to article 36, recognition of an award may be refused only under the same condition as set by the New York Convention. Since the New BHR-Arb L came into force only recently however, it remains to be seen how the High Court, to which applications for the recognition of foreign awards must be made (article 3 New BHR-Arb L), will treat the recognition of foreign awards

⁴¹ See *New York Convention*, *supra* note 3.

⁴² Since the subject matter of the vast majority of international arbitrations will be deemed commercial under Bahraini law, this reservation will have little relevance in practice.

⁴³ *Bahraini Arbitration Law*, 2015, (Law 9/2015) [New BHR-Arb L].

⁴⁴ *UNCITRAL Model Law on International Commercial Arbitration*, 11 December 1985, UN Doc A/40/17 (amended in 2006) [UNCITRAL-Law].

⁴⁵ *Bahraini Arbitration Law*, 1994, (Law 9/1994) [BHR-Arb L].

under this new regime.

B. Kuwait

i. Foreign Judgments

aa) Treaties

Kuwait is party to the GCC-Convention as well as the Riyadh-Convention. Judgments made by courts in a GCC country or a party to the Riyadh-Convention may therefore be recognized there pursuant to treaty provisions.

bb) Domestic Law

Where no treaty is applicable, recognition may be sought pursuant to articles 199 et seq. of the Kuwaiti Civil and Commercial Procedure Law on the basis of reciprocity established by practice.⁴⁶ The application for recognition must be filed with the Kuwait Court of First Instance (المحكمة الكلية) (article 202 KWT-CCPL). Pursuant to article 199 KWT-CCPL such an application shall be granted where:

1. Reciprocal recognition is established between Kuwait and the country of origin.
2. The foreign court had international jurisdiction under the *lex fori* of the country of origin.
3. The Parties were duly summoned and represented.
4. The Judgment is final according to the law of the country of origin.
5. No prior judgment of a Kuwaiti court on the same subject matter exists.
6. The Judgment does not conflict with Kuwaiti *ordre public*.

As with the case of Bahrain, Kuwaiti courts will often exercise their competence to review foreign judgments on their merits in terms of their compliance with Kuwaiti *ordre public*, and will consider the fundamental principles of Islamic law as part of the *ordre public* of Kuwait.⁴⁷ Agreements obligating one party to pay interest as consideration for a loan⁴⁸ or against a delay in settlement of an obligation⁴⁹ are thus void in principle under Kuwaiti law. Interest may only be awarded where a loan agreement is part of a commercial transaction for at least one side, provided that the interest rate does not exceed seven percent.⁵⁰ Interest for delay in performance may be charged in commercial transactions.⁵¹

Consequential damages are also treated somewhat restrictively under Kuwaiti law. Loss

⁴⁶ *Civil and Commercial Procedure Law* (1990), arts 199ff (Law 38/1990) (Kuwait) [KWT-CCPL].

⁴⁷ See *Kuwait Constitution of 1962 (reinstated 1992)*, art 2 (providing that Islamic law shall be the main source of Kuwaiti law).

⁴⁸ *Kuwait Civil Code* (1980) art 305(2), (Law 67/1980) [KWT-CC].

⁴⁹ *Ibid* at 305(1).

⁵⁰ *Kuwait Commercial Law* (1980) art 102(1), (Law 68/1980) [KWT-CL].

⁵¹ *Ibid* at 102(2).

of profit may nevertheless be recovered in any civil transaction, provided that such loss is a “natural” consequence of the failure to or delay in performance of the relevant obligation and was foreseeable at the time the underlying agreement was made (article 300(2) KWT-CC). Assigned claims are enforceable in Kuwait under similar conditions as under Bahraini law (articles 364 et seq.).

Competing jurisdiction is less of an issue in Kuwait. Article 199 KWT-CCPL clearly allows recognition of foreign judgments where the courts of the country of origin and Kuwaiti courts have competing international jurisdiction.

cc) Reciprocity

Reciprocity has been established in practice between Kuwait and some developed Occidental countries. This is the case with Germany according to commenters.⁵² The US is another example: in 2012, the US District Court for the Southern District of Ohio recognized a judgment of a Kuwaiti court.⁵³ Kuwaiti law follows the principle of comity, and considers reciprocity to be established where the judgments of Kuwaiti courts will, in principle, be recognized by the courts of the relevant country. Given the recent American decision, reciprocity is thus likely established with the US. Since there are no judgments of Kuwaiti courts on the recognition of judgements of US courts available however, this interpretation is not yet supported by any jurisprudence. It is possible that Kuwaiti courts take the position that, while reciprocity is established between Kuwait and the state of Ohio due to the aforementioned ruling, this precedent is not applicable to the other US States. Swiss and Kuwaiti laws also appear to be compatible for the purpose of recognizing foreign judgments, and Kuwaiti courts would therefore likely recognize reciprocity to be established between their country and Switzerland.

Inversely, relations with other developed nations like Austria, Canada, France, and the UK are unlikely. As mentioned Austrian law requires that reciprocity be established via treaty or domestic law, and of these currently neither exists with Kuwait. As was also discussed, judgments of Kuwaiti courts cannot be recognized in the UK under the UK-AJA or the UK-FJA, and thus common law principles are the only remaining avenue for enforcing a Kuwaiti ruling. Conditions for recognition provided by the common law do not comply with those of Kuwaiti law however, and so a reciprocal relationship is unlikely. No rulings concerning the reciprocal recognition of foreign judgments between Kuwait and Canada or France are available. However, both Canadian and French law concerning the recognition of foreign judgments require that international jurisdiction of the foreign court be established under *lex fori*. Since Kuwaiti law requires that the jurisdiction of the foreign court be established by the *lex fori* of the country of origin, the possibility of reciprocal relationships are also tenuous.

iii. Foreign Arbitral Awards

aa) Treaties

Kuwait assented to the New York Convention under the reservation that the Convention

⁵² Gottwald, *supra* note 25 at 146; Bälz, “Den Arabischen Golfstaaten”, *supra* note 18 at 1075—1078.

⁵³ See *Burgan Express for Gen, Trading & Contracting Co v Atwood*, Case No 2 :12-cv-041 (SD Ohio 26 September 2012).

would be applicable only to awards rendered the jurisdiction of other Convention members.⁵⁴ Kuwait is also a signatory of the Riyadh-Convention. Foreign arbitral awards may therefore be recognized in Kuwait under both treaties. It should be noted however that disputes arising from or in connection to a commercial agency cannot not be resolved via arbitration pursuant to Kuwaiti law.⁵⁵ The recognition of a foreign award, the subject matter of which concerns a commercial agency, will therefore be rejected by the competent Kuwaiti courts pursuant to article V(2)(a) New York Convention or article 37(1)(a) Riyadh-Convention. Furthermore, a special arbitration institute exists that has exclusive jurisdiction over disputes that involve the Kuwaiti government or other government entities.⁵⁶ Foreign awards concerning disputes with the government or government entities are therefore not recognizable in Kuwait under the New York Convention (article V(2)(a)) or the Riyadh Convention (article 37(1)(a)).

bb) Domestic Law

Pursuant to article 203 KWT-CCPL, treaties involving Kuwait that govern the recognition of foreign awards where take precedence over the application of domestic Kuwaiti law. Where no treaty is applicable, the provisions of article 199 KWT-CCPL will apply (article 200 KWT-CCPL). In addition to the requirements outlined in article 199 KWT-CCPL, article 200 KWT-CCPL stipulates that:

1. The relevant subject matter may be subjected to arbitration pursuant to Kuwaiti law.
2. The award is final under the law of the country of origin.

C. Oman

i. Foreign Judgments

aa) Treaties and Domestic Law

Oman is party to the GCC-Convention and the Riyadh-Convention, and thus foreign judgments can be recognized under both Conventions.

Pursuant to article 355 of Oman Civil and Commercial Procedure Law, treaties take precedence over articles 352 et seq. OMN-CCPL.⁵⁷ Where no treaty is applicable, recognition may be sought under the provisions of the OMN-CCPL. An application for recognition must be made to the Court of First Instance (المحكمة ابتدائية), of the jurisdiction where the foreign judgment would be enforced.

Where reciprocity is established, a foreign judgment shall be recognized pursuant to article 352(2) OMN-CCPL, provided that:

⁵⁴ See *New York Convention*, *supra* note 3.

⁵⁵ See *Kuwait Commercial Transactions Law*, 15 July 1964, art 285. It provides that disputes over a commercial agency agreement shall be resolved by the court that has jurisdiction at the place where the agreement is executed. Thus, in case of a commercial agency in Kuwait the courts of Kuwait have exclusive jurisdictions.

⁵⁶ *Law on the Arbitration Institution in Civil and Commercial Matters* (1995), art 2 (Law 11/1995) (Kuwait) [KWT-AICCL].

⁵⁷ *Civil and Commercial Procedure Law* (2002), art 355 (Royal Decree 29/2002) (Oman) [OMN-CCPL].

1. The judgment is rendered by a court competent under country of origin's *lex fori*, is enforceable in the country of origin and was not obtained through deception.
2. The parties were duly summoned and represented.
3. The judgment does not comprise of a claim that conflicts with Omani law.
4. The judgment does not conflict with a prior judgment of an Omani court on the same subject matter or Oman's *ordre public*.
5. Reciprocity is established between Oman and the country of origin.

The requirement of compliance with Omani law (article 352(2)(3) OMN-CCPL) is potentially a substantial hindrance to recognition. It is possible that this provision is understood as entailing a comprehensive review of the concerned judgment under Omani law. Some have argued that article 352(2)(3) Omani CCPL should be understood as a variation of the *ordre public* requirement.⁵⁸ They base this interpretation on a 2015 ruling of the Omani Supreme Court. In this decision, the court held that § 328(1)(1) GER-CCP was stricter than article 352(2)(1) OMN-CCPL in that while article 352(2)(1) OMN-CCPL only requires a review of the international jurisdiction of the foreign court, § 328(1)(1) GER-CCP requires a comprehensive review of the foreign court's jurisdiction under German law. This interpretation is flawed however. The decision regarding the review of jurisdiction did not suggest one way or another how exhaustively a foreign judgment will be reviewed with respect to its merits, which is the actual issue that article 352(2)(3) OMN-CCPL addresses. Furthermore, the interpretation conflicts with article 352(2)(5) OMN-CCPL, which explicitly requires compliance with the Omani *ordre public*. Article 352(2)(5) OMN-CCPL would be redundant if article 352(2)(3) Omani CCPL were understood as a variation of the *ordre public* requirement. Therefore, article 352(2)(3) Omani CCPL must go beyond a mere *ordre public* requirement and be considered as compelling a more comprehensive review of foreign judgments. However, whether this would include a full *revision au fond* can not be said with certainty however, since there is no praxis established by Omani courts in this regard. Still – similar to the courts of the other GCC countries – Omani courts may still choose to review a foreign judgment on its merits via *ordre public* grounds pursuant to article 352(2)(5) OMN-CCPL.

Finally, it should be noted that per article 2 of the Constitution of Oman 1996 the basis of Omani law is Islamic law.⁵⁹ Omani courts will, therefore, consider the fundamental principles of Islamic law as part of Oman's *ordre public*. Oman Civil Code also provides – amongst other things – that the subject matter of a contract shall not conflict with Sharia law.⁶⁰ Where a contract infringes Islamic law, it shall be void.⁶¹ Thus, an agreement compelling one party to pay interest on a loan is void in principle and unenforceable under Omani law. Interest may be charged for commercial loans however, provided that it is within the limits defined by the competent authorities.⁶² Furthermore, interest may be charged for loans given by local and foreign banks

58 See Bälz, "Den Arabischen Golfstaaten", *supra* note 18 at 120.

59 See *Oman Constitution of 1996 (amended 2011)*, art 2 (providing that Islamic Sharia is the basis for legislation).

60 *Oman Civil Code* (2013), art 117, (Royal Decree 29/2013) [OMN-CC].

61 *Ibid* at 121.

62 *Commercial Transaction Law* (1990), arts 79–80, (Royal Decree 55/1990) (Oman) [OMN-CTL].

licensed by the Central Bank of Oman.⁶³ Still, neither the OMN-CTL nor the OMN-BL explicitly permit default interest to be charged.

Omani law does not explicitly exclude consequential damages. However, Omani courts commonly apply them restrictively in accordance with the Islamic law principle of *gharar*. Thus, there must be a nexus between the loss suffered and damages claimed. Furthermore, the fact that damages may be caused as well as their amount had to have been foreseeable at the time the underlying agreement was made.

The assignment of obligations is governed by articles 772 OMN-CC et seq., provided that assignor, assignee and original debtor agree to the assignment. The assignment of rights is, however, not governed by the OMN-CC. The provisions on assignment of obligations may be applied correspondingly to the assignment of rights as is done under UAE law.⁶⁴ Yet, for lack of decisions of Omani courts supporting the corresponding application of articles 772 OMN-CC et seq., there is considerable risk that Omani courts will not recognize a foreign judgment that awards a party something based on a claim assigned to it.

bb) Reciprocity

In its decision of 25 January 2006 the Omani Supreme Court (المحكمة العليا) ruled that reciprocity is not established in respect to Germany. In this decision, the Omani Supreme Court held that reciprocity in respect to Germany was not established due to the standards for reciprocal recognition of foreign judgments set by § 328(1) GER-CCP being much stricter than those set by article 352 OMN-CCPL. The Omani Supreme Court held that § 328(1)(1) GER-CCP calls for a comprehensive review of the foreign court's jurisdiction under German law, while pursuant to article 352(2)(1) OMN-CCPL only its international jurisdiction has to be established. The court found that this constituted a material difference and, therefore, reciprocity is not established.⁶⁵ It should be noted that this decision is based on a false interpretation of § 328(1)(1) GER-CCP. While § 328(1)(1) GER-CCP does refer to "German law", it does not require a comprehensive review of the jurisdiction of the foreign court under German law, but only calls for a review of its international jurisdiction pursuant to the conflict of laws provisions of German law.⁶⁶ Still, until the Omani Supreme Court repeals its decision, judgments of German courts will most likely not be recognized in Oman.

For lack of a treaty or Austrian regulation on reciprocal recognition between Austria and Oman, reciprocity is not established in respect to Austria. Furthermore, Omani judgments will

⁶³ *Banking Law* (2000), art 14, (Royal Decree 114/2000) (Oman) [OMN-BL]. It may be argued that this would conflict with articles 117 and 121 OMN-CC. Article 1 OMN-CC, however, stipulates that specific laws and regulation shall take precedence over the provisions of the OMN-CC. The *Civil Transaction Law* (2013), (Royal Decree 29/2013) (Oman) [OMN CTL] and the OMN-BL are arguably specific laws in respect to the OMN CC, since the OMN CC is the general regulation governing the civil and commercial law of Oman and both the OMN CTL and the OMN BL regulate specific matters of civil and commercial law.

⁶⁴ See below at: II., 6., a), bb).

⁶⁵ Hilmar Krüger, "Länderbricht Oman" in Arthur Bülow et al, eds, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, 48th ed, vol 6 (Munich: Beck, 2015) at 1106—1109; Hilmar Krüger, "Zur Anerkennung ausländischer Entscheidungen in Arabischen Golfstaaten" in Halkur Konuralp & Yayin Kurulu, eds, *Gedächtnisschrift für Haluk Konuralp* (Ankara: Yetkin Yayinlari, 2009) at 638ff.

⁶⁶ Gottwald, *supra* note 25 at 79ff.

not be recognized under the UK-AJA or the UK-FJA and only at common law. Since the regime established by common law is not compatible with Omani law, Omani courts will not recognize judgments rendered by UK courts. The position taken by Canadian and French law on international jurisdiction in respect to the recognition of foreign judgments is not compatible with the position taken by Omani law. Omani courts will in all likelihood not recognize judgments rendered by Canadian and French courts for lack of reciprocity.

Whether reciprocity is established in respect to Switzerland⁶⁷ or the US⁶⁸ remains unclear.

ii. Foreign Arbitral Awards

aa) Treaties

Oman is a signatory of the Riyadh-Convention and assented to the New York Convention without reservation.⁶⁹ Thus, foreign awards may be recognized in Oman pursuant to both Conventions. Under the New York Convention, awards may be recognized regardless of the place of arbitration (article I(1) New York Convention). However, disputes concerning commercial agency may not be resolved by arbitration pursuant to Omani law.⁷⁰ Thus, where the subject matter of an award is a commercial agency, it cannot be recognized in Oman under the New York Convention (article V(2)(a)) or the Riyadh-Convention (article 37(1)(a)).

bb) Domestic Law

According to article 355 OMN-CCPL, treaties governing recognition of foreign awards take precedence over the application of domestic Omani law. Where no treaty is applicable, the provisions of articles 352 et seq. OMN-CCPL govern the recognition of foreign awards (article 353 OMN-CCPL). In addition to the requirements stipulated by article 352 OMN-CCPL, article 353 OMN-CCPL demands that:

1. The concerned subject matter may be subjected to arbitration pursuant to Omani law.
2. The award is enforceable in the country of origin.

D. Qatar

i. Foreign Judgments

aa) Treaties and Domestic Law

Since Qatar is party to the GCC-Convention and the Riyadh-Convention, foreign judgments may be recognized under both Conventions.

⁶⁷ This is due to the same reasons as in the case of Bahrain.

⁶⁸ The US and Oman have concluded a FTA (Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, 19 January 2006 (entered into force on 1 January 2009), online: <www.sice.oas.org/Trade/USA_OMN_FTA_e/USA_OMN_ind_e.asp>). This FTA, however, does not comprise any provisions on the reciprocal recognition of foreign judgements. Moreover, since no rulings of Omani or US courts concerning this matter are available, it cannot be ascertained whether these courts would consider reciprocity to be established.

⁶⁹ See *New York Convention*, *supra* note 3.

⁷⁰ *Commercial Agency Law* (1977), art 18, (Royal Decree 26/1977) (Oman).

Pursuant to article 383 Qatar Civil and Commercial Procedure Law, Law 13/1990 (QAT-CCPL), treaties take precedence over the provisions of the QAT-CCPL as far as it pertains to the recognition of foreign judgments. Where no treaty is applicable, recognition may be sought under articles 379 et seq. QAT-CCPL, provided that reciprocity between Qatar and the country of origin is established by practice (article 379(1) QAT-CCPL). The application for recognition is to be made to the Qatar High Court (إيلعلا ءمكحلا) (article 379(2) QAT-CCPL). Where reciprocity is established, a foreign judgment shall be recognized pursuant to article 380 QAT-CCPL, provided that:

1. Qatari courts do not have exclusive jurisdiction over the concerned subject matter and the foreign court had international jurisdiction pursuant to the country of origin's *lex fori*.
2. The parties were duly summoned and represented.
3. The judgment is enforceable in the country of origin.
4. The judgment does not conflict with a prior judgment of a Qatari court on the same subject matter and it does not infringe the Qatari *ordre public*.

As in the case of the other GCC countries, Qatari courts will generally make extensive use of their competence to review a foreign judgment on its compliance with Qatar's *ordre public* and will consider the central principles of Islamic law to be part of Qatar's *ordre public*.⁷¹ Article 568 Qatar Civil Code generally prohibits interest charged in consideration of a loan.⁷² Unlike Bahraini law however, the Qatar Commercial Transaction Law does not make a general exception from this rule for commercial loans.⁷³ Only the Qatar Central Bank Law explicitly provides for an exception.⁷⁴ Since the QAT-CBL only applies to banks, it is unclear whether interest may be charged for commercial loans given by entities other than banks.

Furthermore, in 2010 the Qatar Court of Cassation (محكمة التمييز) clarified that banks may also charge default interest under Qatari law.⁷⁵ Still, since neither the QAT-CC nor the QAT-CTL explicitly permit default interest, claims for default interest – except when brought by a bank – will likely not be recognized regardless of whether they arise out of private or commercial contracts.

Consequential damages – including loss of profits – may be sought under Qatari law pursuant to article 263(2) QAT-CC, provided that the damages are a result of a failure to or delay in performance of an obligation reasonably foreseeable at the time the underlying agreement was made. The provisions of Qatari law governing assignment of rights and obligations are comparable to those applicable in most Western civil law jurisdictions (see articles 324 et seq. QAT-CC).

bb) Reciprocity

⁷¹ See *Constitution of Qatar*, 30 August 2004, art 1, providing that Islamic law is the principle source of Qatari law.
⁷² *Qatar Civil Code* (2004) (Law 22/2004) [QAT-CC].

⁷³ *Commercial Transaction Law* (2006) (Law 27/2006) (Qatar) [QAT-CTL].

⁷⁴ *Qatar Central Bank Law* (2006), arts 40 & 110 (Law 33/2006) (Qatar) [QAT-CBL].

⁷⁵ See Court of Cassation – Civil & Trade Division, Doha, 28 December 2010, No 184/2010 (Qatar); Court of Cassation – Civil & Trade Division, Doha, 11 January 2011, No 208/2010 (Qatar).

Reciprocity is – for example – established between Qatar and Germany⁷⁶ and the US.⁷⁷ Between Switzerland and Qatar reciprocity is most likely established as the legal regimes for the recognition of foreign judgments of both countries are compatible.

Since no treaty or Austrian regulation establishing reciprocity in respect to Qatar exists, Austrian courts will not recognize Qatari judgments. Consequently, Qatari courts will most likely not recognize Austrian courts due to lack of reciprocity. Qatari judgments will not be recognized under the UK-AJA or the UK-FJA and only at common law. Since the common law regime on recognition of foreign judgments is not compatible with Qatari law, Qatari courts will not recognize judgments rendered by UK courts. Since the position taken by Canadian and French law on international jurisdiction in respect to the recognition of foreign judgments is not compatible with the position taken by Qatari law, Qatari courts will very probably not recognize judgments of Canadian and French courts for lack of reciprocity.

ii. Foreign Arbitral Awards

Qatar is a signatory of the Riyadh-Convention and assented to the New York Convention without reservation.⁷⁸

According to article 383 QAT-CCPL, treaties governing recognition of foreign arbitral awards take precedence over the application of domestic Qatari law. Where no treaty is applicable, the provisions of articles 379 et seq. QAT-CCPL govern the recognition of foreign awards (article 381 QAT-CCPL). In addition to the conditions stipulated by article 380 QAT-CCPL, article 381 QAT-CCPL requires that disputes over the concerned subject matter may be subjected to arbitration pursuant to Qatari law.

E. Saudi Arabia

i. Foreign Judgments

aa) Treaties and Domestic Law

Saudi Arabia is party to both the GCC-Convention and the Riyadh-Convention.

Until 2013 the competent court for the recognition of foreign judgments was the Board of Grievances (ديوان المظالم).⁷⁹ However, in 2013, the Saudi Execution Law, was passed and repealed article 13(g) KSA-BoGL.⁸⁰ The competent authority to hear applications for recognition under the new law is the Execution Department established by the KSA-EL.

Pursuant to article 11 KSA-EL, treaties governing the reciprocal recognition take precedence over the provisions of the KSA-EL. Where no treaty is applicable, foreign judgments may be recognized in Saudi Arabia pursuant to article 11 KSA-EL, provided that:

⁷⁶ Gottwald, *supra* note 25 at 146; Kilian Bälz & Klaiber, “Katar” in Arthur Bülow et al, eds, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, 41th ed, vol 6 (Munich: Beck, 2015) at 1068a-6.

⁷⁷ *Manco Contracting Co v Bezdikian*, 45 Cal Rptr (4th) 192 (App Ct 2008). Since no corresponding decisions of Qatari courts are available, it remains to be seen whether this decision will persuade Qatari courts to consider reciprocity to be established in respect to the US State of California and the US as a whole.

⁷⁸ See *New York Convention*, *supra* note 3.

⁷⁹ *Law of the Board of Grievances* (2007) art 13(g), (Royal Decree M/78/1428H) (Saudi Arabia) [KSA-BoGL].

⁸⁰ *Execution Law* (2012) (Royal Decree M/53/1433H) (Saudi Arabia) [KSA-EL].

1. Saudi courts were not competent to decide on the subject matter and the foreign court had jurisdiction according to the country of origin's *lex fori*.
2. The parties were duly summoned, represented and enabled to present a defense.
3. The judgment is final under the law of the country of origin.
4. The judgment does not conflict with a prior judgment of a Saudi court passed on the same subject matter.
5. The judgment does not conflict with Saudi *ordre public*.

Article 11(1) KSA-EL could be understood as requiring that Saudi courts have no jurisdiction on the subject matter whatsoever. Consequently, no foreign judgment could be recognized in Saudi Arabia in case the foreign court and Saudi courts have competing international jurisdiction. However, this interpretation would conflict with article 11(4) KSA-EL, pursuant to which a foreign judgment will not be recognized in Saudi Arabia where it conflicts with a prior judgment of a Saudi court passed on the same subject matter. Such a conflict could not arise if recognition was not possible in case of conflicting jurisdiction. Therefore, article 11(4) KSA-EL would be redundant if article 11(1) KSA-EL was to be understood as prohibiting recognition in case of competing international jurisdiction. Thus, the legal regime established by article 11 KSA-EL suggests that article 11(1) KSA-EL should be interpreted in a more restrictive manner to exclude recognition only where Saudi courts have exclusive jurisdiction over the concerned subject matter. Still, since the KSA-EL is a rather recent regulation, it remains to be seen how the competent authorities will interpret article 11(1) KSA-EL.

Under the old regime, foreign judgments could be recognized per order of the BoG pursuant to article 6 of the Procedural Rules Before the BoG.⁸¹ Unlike article 11 KSA-EL, article 6 KSA-BoGPR did not require the foreign judgment to comply with Saudi Arabia's *ordre public* but rather called for compliance with the provisions of the Sharia. It remains to be seen whether the competent authorities will consider this change in regulation to have an effect on the standards for recognition. Yet, since the fundamental provisions of the Sharia will almost definitely be considered part of the Saudi *ordre public*, foreign judgments conflicting with (central) provisions of the Sharia will likely not be recognized under the new regulation either.

Saudi courts apply a very strict interpretation of Islamic law. Accordingly, claims for interest – whether accrued for a loan or due to default, will not be enforceable in Saudi Arabia.⁸² Furthermore, claims for consequential damages – such as loss of profit – will not be enforceable in Saudi Arabia.⁸³ Finally, assignment of rights and obligations under Saudi law is somewhat problematic. While there appears to be widespread consent that assignment of obligations is possible where assignee, assignor and original debtor agree to the assignment, commentators

⁸¹ *Procedural Rules Before the BoG*, art 6 (Council of Ministers Regulation 190/1409H) (Saudi Arabia) [KSA-BoGPR].

⁸² Mark Wakim, "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East" (2008) 21 NY Intl L Rev 1 at 46ff.

⁸³ See David J Karl, "Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know" (1991) 25 Geo Wash J Intl L & Econ 131 at 162.

are much more critical with respect to assignment of rights. Those who agree that assignment of rights is permissible under Saudi law agree that such an assignment is only valid where the debtor consents to the assignment.⁸⁴

As in all other GCC countries, Saudi courts should be expected to make quite extensive use of the *ordre public* requirement – as before the Sharia conformity requirement – and conduct a comprehensive review of the foreign judgment with respect to its merits.

bb) Reciprocity

Under Saudi law, a foreign judgment will not be recognized unless reciprocity is established (article 11 KSA-EL). Whether reciprocity has to be established by treaty or may also be established by practice has been subject to some debate. Some commentators argued that reciprocity could only be established by treaties. They base this on the BoG's decision no 4/D/F/20 of 1992 in which the BoG refused to recognize a judgment of the English High Court for lack of reciprocity.⁸⁵

However, the wording of the decision has to be interpreted as allowing recognition where reciprocity is established by practice. The BoG explicitly held that reciprocity may be established by “treaty, diplomatic relations, law or practice, for example where a country gives a foreign judgment certain effect despite the lack of a treaty or law compelling it to do so”. Furthermore, the BoG declined to recognize the judgment of the English High Court based on the provisions of the UK-AJA and the UK-FJA not being applied to judgments of Saudi courts.

This interpretation is further supported by a more recent decision of the BoG. In its decision no. 78/D/F/20 of 2007 it recognized a judgment of the US District Court for the District of Columbia despite reciprocity not being established by a treaty. The BoG found that reciprocity had been established since the applicant had submitted a sworn statement by an American judge to the effect that Saudi judgments will be enforced in the District of Columbia.

Thus, reciprocity is established in respect to the US but not the UK. In addition reciprocity is not established between Saudi Arabia and Austria,⁸⁶ Canada,⁸⁷ France⁸⁸ and Germany.⁸⁹ Whether reciprocity is established in respect to Switzerland remains unclear for the same reasons as in the case of Bahrain.⁹⁰

84 Hilmar Krüger, “Zum Recht der Forderungsabtretung in der arabischen Welt” in Jörn Bernreuther et al, eds, *Festschrift für Ulrich Spellenberg* [Commemoration for Ulrich Spellenberg] (Munich: Sellier European Law Publishers, 2010) 605 at 614.

85 See Hilmar Krüger, “Neues über saudi-arabisches internationales Verfahrensrecht. Zur Anerkennung und Vollstreckung ausländischer Urteile durch den Board of Grievances” in Omaia Elwan et al, eds, *Recht nach dem Arabischen Frühling: Beiträge zum islamischen Recht IX* [After the Arab Spring: Contributions to Islamic Law], vol 32 (Frankfurt: PL Academic Research, 2014) 53 at 60ff. Also see Bälz, who, while stating that the decision of the BoG may be interpreted as allowing the recognition of foreign judgments where reciprocity is established by practice, ultimately comes to the conclusion that reciprocity may only be established by treaty; Bälz, “Den Arabischen Golfstaaten”, *supra* note 18 at 123.

86 For lack of a relevant treaty or Austrian regulation, reciprocity is not established.

87 This is due to the same reasons as in the case of Bahrain.

88 This is due to the same reasons as in the case of Bahrain.

89 Gottwald, *supra* note 25 at 153; Andreas A Haberbeck & Kilian Bälz, “Saudi Arabia” in Arthur Bülow et al, eds, *Internationaler Rechtsverkehr in Zivil- und Handelssachen* [International Legal Relations in Civil and Commercial Matters], 49th ed, vol 6 (Munich: Beck, 2015) at 1119-6.

90 See article 27(2)(b) SWI-FIPL; it emphasizes on the fact that the defendant has to have been enabled to present

ii. Foreign Arbitral Awards

Saudi Arabia is a party to the Riyadh-Convention and assented to the New York Convention under the reservation that it shall only apply in respect to other members of the New York Convention.⁹¹

However, pursuant to article 10(2) of the Saudi Arbitration Law, a Saudi governmental authority may not agree to arbitration without the approval of the prime minister or where the government authority is specifically authorized to agree to arbitration by law.⁹² Where no such approval is given, an arbitration clause in a contract with the Saudi government or a governmental entity is void pursuant to article 10(2) KSA-Arb L. Recognition of an award passed in an arbitration conducted based on such a clause may, therefore, be refused pursuant to article V(2)(a) of the New York Convention or article 37(1)(b) of the Riyadh-Convention.

Pursuant to article 12 KSA-EL, the provisions on recognition of foreign judgments apply to the recognition of foreign arbitral awards.

F. United Arab Emirates

i. Foreign Judgments

aa) Treaties and Domestic Law

UAE are party to both the GCC-Convention and the Riyadh-Convention.

As per article 238 of the Civil and Commercial Procedure Law, treaty provisions governing recognition take precedence over those of the UAE-CCPL.⁹³ Where no treaty is applicable, foreign judgments may be recognized pursuant to articles 235 et seq. UAE-CCPL, provided that reciprocity is established between the UAE and the country of origin (article 235(1) UAE-CCPL).

It appears that, at least in the case of Dubai, reciprocity cannot be established by practice.⁹⁴ Thus, in the case of Dubai, the provisions of the UAE-CCPL concerning recognition will only be applicable where reciprocity is established by a treaty and this treaty does not comprise a specific procedure for the recognition of foreign judgments (i.e. the GCC-Convention). For lack of corresponding judgments, it is not clear whether articles 235(1) UAE-CCPL will be applied as restrictively in the other emirates.

Where reciprocity is established a foreign judgment may be recognized pursuant to article 235(2) UAE-CCPL, where:

1. The courts of the UAE do not have jurisdiction over the concerned subject matter.
2. The foreign court had international jurisdiction pursuant to the

a defense. The *Execution Law*, Royal Decree No M/53, 14 July 2012, art 11(3) (Saudi Arabia) features a similar emphasis.

⁹¹ See *New York Convention*, *supra* note 3.

⁹² *Arbitration Law* (2012), art 10(2) (Royal Decree M/34/1433H) (Saudi Arabia) [KSA-Arb L].

⁹³ *Civil and Commercial Procedure Law* (1992), art 238 (Federal Law 11/1992) (UAE) [UAE-CCPL].

⁹⁴ See below at: II., 6., a), cc).

country of origin's *lex fori*.

3. The parties were duly summoned and represented.

4. The judgment is final in accordance of the law of the country of origin.

5. The judgment does not conflict with a prior judgment of a UAE court on the same subject matter or the UAE *ordre public*.

Aside from the strict standard applied to reciprocity – at least – by the Dubai Court of Cassation (محكمة التمييز), article 235(2)(1) UAE-CCPL will pose a considerable hindrance for recognition. In line with the wording, UAE courts interpret this provision as excluding the recognition of any foreign judgment the subject matter of which falls within the jurisdiction of UAE courts, regardless of whether such jurisdiction is exclusive or competing.⁹⁵ The fact that this interpretation of article 235(2)(1) UAE-CCPL conflicts with article 235(2)(5) UAE-CCPL appears to be of no concern to the UAE courts.

Furthermore, UAE courts will generally make extensive use of their competence to review a foreign judgment on its compliance with UAE *ordre public* and will consider the (fundamental) principles of Islamic law to be part of UAE *ordre public*.⁹⁶

Pursuant to article 714 of the UAE Civil Code, a contractual obligation to pay interest on a loan is void.⁹⁷ However, article 76 of the UAE Commercial Transaction Law is an exception to this rule where the loan concerned is a commercial transaction of at least one party and provided that the total amount owed as interest does not exceed 12 percent of the principle.⁹⁸ Default interest may be charged in commercial transactions pursuant to article 88 UAE-CTL.⁹⁹

UAE law generally recognizes the concept of consequential damages. Its application is, however, confined to liability under tort (article 283(2) UAE-CC). Thus, contractual claims for consequential damages cannot be enforced in the UAE. The same applies to claims for loss of profit (article 292 UAE-CC).

UAE law explicitly only regulates the assignment of obligations (article 1106 et seq. UAE-CC). However, a number of court decisions recognized the assignment of rights. For instance, the Dubai Court of Cassation has applied the provisions governing assignment of obligations to the assignment of rights correspondingly.¹⁰⁰ In its decision the court found that rights may be assigned under UAE law by agreement among assignor, assignee and original debtor (article 1109 UAE-CC), provided that the requirements of article 1113 UAE-CC are fulfilled. In particular, the court

95 Hilmar Krüger, "Gerichtsklauseln nach dem Recht der Vereinigten Arabischen Emirate mit rechtsvergleichenden Hinweisen" in Reinhold Geimer & Rolf A Schütze, eds, *Wege zur Globalisierung des Rechts: Festschrift für Rolf A. Schütze zum 65. Geburtstag* [Internationalization of Law] (Munich: Beck, 1999) at 407.

96 See *Constitution of United Arab Emirates*, 2 December 1971, art 7, providing that Islamic law is the principle source of UAE law.

97 *UAE Civil Code* (1987), art 714 (Federal Law 5/1987) [UAE-CC].

98 *Commercial Transaction Law* (1993), art 76 (Law 18/1993) (UAE) [UAE-CTL].

99 The obligation to pay interest, whether arising out of a purely private or a commercial transaction, is void under Islamic law; Siddiqi, *supra* note 12 at 38, 42ff. Consequently, any provision of UAE allowing for interest to be charges may be considered to conflict with article 7 Constitution of the UAE of 1971. However, in its decision of 19 December 1999, No 321/1999 the Dubai Court of Cassation rejected this concern.

100 See Court of Cassation, Dubai, 24 November 2008, Case No 231/2008 (United Arab Emirates); Court of Cassation, Dubai, 27 January 2009, Case No 246/2008 (United Arab Emirates).

held that the content of the right has to be identifiable at the time of assignment (article 1113(d) UAE-CC).¹⁰¹ This interpretation by the Dubai Court of Cassation is in line with the jurisprudence of the UAE Federal Supreme Court (المحكمة الاتحادية العليا).¹⁰²

bb) Reciprocity

Pursuant to a decision of the Dubai Court of Cassation, reciprocity has to be established by treaty.¹⁰³ However, since decisions of the Dubai Court of Cassation do not have binding precedence – in particular not in respect to the courts of other emirates – other courts may interpret article 235(1) UAE-CCPL less restrictively. Nevertheless, decisions of the Dubai Court of Cassation are commonly considered by lower Dubai courts as well as the courts of the northern emirates as (non-binding) guidelines.¹⁰⁴ Still, it remains to be seen how the other courts – and those of Abu Dhabi in particular – would interpret article 235(1) UAE-CCPL.

Aside from the GCC-Convention and the Riyadh-Convention, a treaty governing the reciprocal recognition of foreign judgments exists – for instance – between the UAE and France: the Paris Convention.¹⁰⁵ Article 13(1) of the Paris Convention establishes the reciprocal recognition of judgments where:

1. The foreign court had jurisdiction to hear the dispute according to the *lex fori* of the country of origin.¹⁰⁶
2. The law applied to the dispute is the law applicable pursuant to the provisions on conflict of law of the requested country, unless a different law is applied and the application of this law comes to the same result the requested country's law would have.
3. The judgment is final according to the law of the country of origin.
4. The parties have been duly summoned and represented or the judgment was legally rendered in absentia pursuant of the country of origin's law.
5. The judgment does not conflict with the *ordre public* of the requested country.

However, recognition may be refused where the judgment conflicts with a prior action

101 Where monetary claims are concerned this is the case if the amount is finally determined at the time of assignment.

102 See United Arab Emirates Supreme Court, 13 June 2001, Decision No 172/21. While the decisions of the UAE Federal Supreme Court – as those of any other UAE court – do not have binding precedence, its decisions are frequently considered as (non-binding) guidelines by lower UAE courts. Thus, assignment of rights under a corresponding application of art 1106ff United Arab Emirates Civil Code [UAE-CC] will likely be deemed permissible by all UAE courts.

103 Court of Cassation, Dubai, 10 March 2001, Case No 17/2001 (United Arab Emirates).

104 Gordon Blanke, “Court-ordered Interim Relief in Aid of Arbitration in Turkey” in Dora Ziyeva, ed, *Interim and Emergency Relief in International Arbitration* (Huntington, NY: JurisNet, 2015) 121 at 123ff.

105 *Convention on Judicial Assistance, Recognition, and Enforcement of Judgments in Civil and Commercial Matters*, France and United Arab Emirates, 9 September 1991, 1721 UNTS 179 (entered into force on 28 April 1993).

106 See also *ibid* at art 14; it provides certain provisions on jurisdiction, which take precedence over the provisions of domestic law.

filed with or a prior judgment rendered by the courts of the requested country (article 13(2) of the Paris Convention).

Since none of the other jurisdictions examined concluded treaties on reciprocal recognition with the UAE, judgments rendered in these jurisdictions will likely not be recognized in Dubai,¹⁰⁷ and possibly not in the other emirates.

In case the courts of the other emirates would not follow the Dubai Court of Cassation's interpretation of article 235(1) UAE-CCPL and hold that reciprocity can be established by practice, judgments rendered in Germany and Switzerland will likely be recognized by these courts. Austrian judgments, however, will not be enforceable in any UAE jurisdiction because no treaty or regulation on reciprocal recognition exists between the two countries. Furthermore, UK judgments will most likely not be recognized, as the common law regime concerning recognition of foreign judgments is not compatible with the provisions of UAE law. Whether Canadian and US judgments will be recognized remains unclear.

ii. Foreign Arbitral Awards

The UAE ratified the Riyadh-Convention and assented to the New York Convention without reservation.¹⁰⁸ Arbitral awards rendered in France may also be recognized under articles 13 et seq. of the Paris Convention.

Under UAE law, disputes arising in connection with a commercial agency may not be subjected to arbitration.¹⁰⁹ Thus, a foreign award concerning a commercial agency may not be recognized in the UAE under the New York Convention (article V(2)(a)) or the Riyadh-Convention (article 37(1)(a) Riyadh-Convention).¹¹⁰ Furthermore, government authorities of the Emirate of Dubai may only agree to arbitration with the consent of the Royal Diwan (ديوان الملكي).¹¹¹ Where no such consent exists, recognition of the relevant award may be refused under the New York Convention (article V(2)(a)) or the Riyadh Convention (article 37(1)(b)).

Pursuant to article 236 UAE-CCPL, the provisions on recognition of foreign judgments apply to foreign arbitral awards.

¹⁰⁷ While the UK and the UAE concluded a treaty on judicial assistance (*Treaty between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates on Judicial Assistance in Civil and Commercial Matters*, 7 December 2006, 001/2009 UK Treaties Series Cm7535 (entered into force on 2 April 2008), this treaty does not address the reciprocal recognition of foreign judgments. In addition, the Judiciary of England and Wales and the DIFC concluded the *Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court*, Queen's Bench Division, England and Wales, 23 January 2013, online: <<https://www.judiciary.gov.uk/announcements/uk-uae-ties-commercial-court/>>. This memorandum – while not having legal binding force – seeks to clarify the procedure for reciprocal recognition of foreign judgments between the DIFC and England and Wales.

¹⁰⁸ See *New York Convention*, *supra* note 3.

¹⁰⁹ *Commercial Agency Law* (1981), art 6 (Federal Law 18/1981) (UAE).

¹¹⁰ Notably, the Paris-Convention does not exclude the recognition of awards dealing with a subject matter precluded from arbitration pursuant to the law of the requested country. Still, UAE courts will likely deny recognition of such awards; possibly under article 13(e) Paris-Convention due to a conflict with UAE *ordre public*.

¹¹¹ *Emiri Decree Concerning Disputes with the Government and Government Institutions in the Emirate of Dubai*, Dubai Law No 4/1997 (United Arab Emirates). No similar provisions exist in the other emirates.

IV. CONSEQUENCES FOR DISPUTE RESOLUTION AND STRATEGIES

The issues discussed in the previous section require certain consideration to be taken in respect to contract drafting and dispute resolutions where claims may have to be enforced in the GCC.

Generally speaking, choosing arbitration over litigation may, in many cases, be the better solution. In principle, foreign arbitral awards have better chances of being recognized. In particular, the fact that all GCC countries are parties to the New York Convention goes a long way in securing recognition of foreign awards. Furthermore, where the relevant award is made in a member state of the Arab League, recognition may be requested under the Riyadh-Convention. Still, certain obstacles remain.

Certain disputes are excluded from arbitration under the laws of specific GCC countries. Pursuant to Kuwaiti, Omani and UAE law, disputes arising out of or in connection with commercial agencies may not be subjected to arbitration. The government or government entities of Saudi Arabia and Dubai are not permitted to agree to arbitration unless they obtain the prior consent of certain institutions and thus will often have to be subjected to litigation. In disputes with the Kuwaiti government, the restrictions are even more significant. Such disputes are subject to the exclusive jurisdiction of a specific dispute resolution authority pursuant to Kuwaiti law. Thus, neither foreign judgments nor awards over disputes with the government are enforceable in Kuwait. Moreover, even where the subject matter may be subject to arbitration, arbitration may not be the ideal choice in every case. Where the expected disputes are of moderate value, or one of the parties refuses to agree to arbitration, resorting to litigation instead may be the better choice.

Considering the significant hindrances for recognition of foreign judgments, litigation may be considered as an alternative in the country where claims would most probably have to be enforced. When this is not an option, it may be considered to choose a place of litigation in a country that has a treaty on reciprocal recognition in place with the country where recognition may be sought – i.e. another GCC country, a member of the Riyadh-Convention or in respect to the UAE, France. This way the party pursuing a claim would profit from the application of the relevant Convention. This is particularly important where claims may have to be enforced in the UAE, or at least in Dubai. Since pursuant to decisions of the Dubai Court of Cassation reciprocity can only be established by treaty, the choice of venue is limited to those countries that have a treaty on reciprocal recognition in place with the UAE. Whether the courts of the other UAE emirates share this position is so far unclear. When choosing litigation in a GCC country or in a member of the Riyadh-Convention as a mean of dispute resolution it should, however, be kept in mind that GCC courts as well as those of other countries of the MENA-Region tend to be less reliable than those of Western jurisdictions.

Choice of venue is less relevant when the parties agree to arbitration. Even though only Oman, Qatar and the UAE acceded to the New York Convention without limiting its application to awards passed in the jurisdiction of another member of the New York Convention, the New York Convention – in principle – allows for the recognition of arbitral awards rendered in the vast majority of the countries worldwide. Furthermore, the Riyadh-Convention may serve as an additional means of recognition.

In any case, regardless of which dispute resolution mechanism and venue the parties chose; where a foreign ruling may have to be enforced in a GCC country, special consideration has to be given to the particular challenges posed by the legal regimes of the GCC countries governing recognition.

In particular, the GCC courts' tendency to comprehensively review foreign judgments and arbitral awards on their merits in the *exequatur* procedure poses a considerable hindrance for the recognition of foreign rulings. Not only does the often-lengthy review by the local courts delay the *exequatur* procedure, it also significantly limits the parties' options to make a determination as to the law applied to their contractual relationship and conflicts with accepted standards on international procedural law. According to international standards, foreign judgments and arbitral awards shall not be reviewed on their merits but only on certain procedural standards.¹¹² This approach seeks to ensure compliance with accepted standards on conflict of law – standards determining which law will be applicable on a specific subject matter – as well as the parties' choice of law – an expression of the principle of freedom to contract, which is also an accepted standard in the GCC countries. Where a review of foreign judgments and awards on their merits under the law of the requested country is conducted, these standards are circumvented and the application of the requested country's law is imposed. To ensure that fundamental principles of the requested country are honored and no country is forced to recognize a ruling that would contradict these, the *ordre public* requirement allowing for a review of foreign rulings in respect to their compliance with these fundamental principles was included.

The legal regimes for recognition established by regional and international treaties applicable in the GCC and the domestic laws of the individual GCC countries – in principle – comply with these international standards. However, the courts of GCC countries interpret the *ordre public* requirement differently from the internationally accepted standard and deem it to authorize them to review foreign judgments and awards on their merits. Thus, the practice of the courts of the GCC countries does not comply with international standards for recognition of foreign rulings.¹¹³ Consequently, where claims under a contract may have to be enforced in a GCC jurisdiction, the law of that country has to be considered when drafting the contract and in any legal action brought in connection with it.

Another issue that may create some difficulty where disputes between parties from Western and GCC jurisdictions are involved is the application of Islamic law. Western lawyers and entrepreneurs will generally not be acquainted with the particulars of Islamic law and its application in civil and commercial matters. Nonetheless they will have to observe these in their

112 Although nearly all countries now regularly recognize foreign judgments and awards, this state practice is not considered specific enough to create a binding rule of customary international law. However, the *ordre public* requirement is internationally understood as comprising only the fundamental provisions of the requested country's domestic law; see Fernández Arroyo, "What's New in Latin American Private International Law" (2005) 7 YB of Private Intl L 85 at 112ff; Marie-Elodie Ancel, "The New Policy of the *Cour de Cassation* Regarding Islamic Repudiations: A Comment on Five Decisions Dated 17 Feb 2004" (2005) 7 YB Private Intl L 261 at 262; Alex Mills, *The Confluence of Public and Private International Law* (Cambridge: Cambridge University Press, 2009) at 190ff.

113 Omani law even goes so far to explicitly require a review of foreign rulings under Omani law. Hence, Omani courts do not have to take the d-tour over the *ordre public* requirement to come to a review of foreign rulings on their merits.

dealings with the GCC region and – of course – if they plan to take legal action in respect to a matter with connection to the GCC. Even though principles of Islamic law have – with the exception of Saudi Arabia – comparatively little relevance in the commercial and civil law of the GCC countries,¹¹⁴ Islamic law is the basis of the legal system of all GCC countries and forms part of their *ordre public*. Islamic law will be particularly relevant in disputes involving claims for interest, consequential damages and assigned claims.

Claims for interest, whether charged in consideration of a loan or for default, are restricted under the law of the GCC countries. Aside from Saudi law, which strictly prohibits charging interest, interest may be charged in (most) commercial transactions in the other GCC jurisdictions within the statutory limits for interest rates. Additional restrictions apply in the UAE where default interest may only be charged up to a total amount (not interest rate) of 12 percent of the principal. Furthermore, under Omani law charging default interest is prohibited pursuant to the provisions of the OMN-CC. Since no statutory exception to this rule exists, there is a considerable risk that claims for default interest may not be enforceable in Oman regardless of whether they derive from a civil or commercial transaction. Finally, in Qatar the only statutory exceptions to the general prohibition of interest stipulated by the QAR-CC are the provisions of the QAR-CBL allowing banks licensed by the Central Bank of Qatar to charge interest for loans and default. Claims for interest brought by other persons or entities will likely not be enforceable.

Furthermore, the enforcement of consequential damages in the GCC may pose some difficulties. The most liberal jurisdiction in this respect is Qatar. While Qatari law – in principle – recognizes consequential damages, it – in line with Islamic law principles – sets high standards in respect to the causal link between the damage caused and the underlying breach of contract or harmful act as well as foreseeability of damages. The Omani approach is very similar to that of Qatar. Further restrictions apply in the other GCC countries. Under Bahraini and Kuwaiti law consequential damages other than loss of profit may not be recoverable and UAE law only provides for consequential damages in tort. Under Saudi law, finally, consequential damages cannot be recovered.

While it is disputed whether assignment of rights is permissible under Islamic law, most GCC countries allow for the assignment of rights. Even in the UAE, where only assignment of obligations is regulated by law, court practice has established the assignment of rights in a corresponding application of the provisions governing assignment of obligations. Whether a similar approach would be followed by Omani courts is unclear. Likewise, it is disputed whether rights may be assigned under Saudi law.

Where a foreign judgment or award infringes upon the above described restrictions imposed by Islamic law as interpreted in the individual GCC countries, the judgment or award will not be recognized by the competent authorities. Thus, when asserting a claim that may have to be enforced in one or more GCC countries, the relevant provisions of Islamic law will have to be observed. For instance, where a claim may have to be enforced in Saudi Arabia, no claim for

¹¹⁴ Traditionally the influence of Islamic law in civil and commercial matters was quite significant. Since the OMN-CC was enacted the principle source of Omani civil law is the OMN-CC rather than Islamic law. Still, the influence of Islamic law principles is somewhat stronger in the OMN-CC than in the civil codes of Bahrain, Kuwait, Qatar and the UAE; OMN-CC, *supra* note 60 at art 119ff.

interest or consequential damages should be included in the submissions to the court or arbitral tribunal. And while a claim based on a right assigned to the claimant may be recoverable in most GCC countries, such a claim may be difficult to assert in Oman and is unenforceable in Saudi Arabia. In case a claim that is prohibited by Islamic law as interpreted in the GCC country where enforcement may have to be sought is essential to the relevant transaction, securities to be provided outside of the relevant GCC jurisdiction may have to be requested so that a judgment or award could be enforced outside of the GCC.

In addition, where a claim may have to be enforced in Bahrain, Saudi Arabia or the UAE special attention has to be given to the question of jurisdiction. A strict reading of the provisions on recognition of foreign rulings of all three countries suggests that judgments and awards will not be recognized in these countries where the courts of the requested country have competing jurisdiction over the concerned subject matter. At least in Dubai this interpretation is supported by court practice. If it is also applied by the courts of Bahrain, Saudi Arabia and the other UAE emirates, it would pose a considerable hindrance for the recognition of foreign judgments in these jurisdictions as well. Where foreign arbitral awards are concerned, this obstacle is just as significant. Under the New York Convention and the Riyadh-Convention, jurisdiction is only a hindrance for recognition where the concerned subject matter may not be resolved by arbitration pursuant to the laws of the requested country. Thus, competing jurisdiction will only be an obstruction for the recognition of arbitral awards in Bahrain, Saudi Arabia or the UAE where no treaty is applicable.

Considering the complex issues arising in respect to the recognition of foreign judgments and awards in the GCC described above, legal action – whether litigation or arbitration – with connection to the GCC should not be taken without the advice of a lawyer experienced in these jurisdictions. Furthermore, it is advisable to involve competent counsel when drafting an agreement with a connection to the GCC to ensure that the agreement will be enforceable in the relevant jurisdiction(s) and the dispute resolution clause remains effective.