

# The Enforcement of International Commercial and Investment Arbitration Awards in the MENA Region

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## 1. Introduction

The present article discusses in some detail the practice and procedure of the enforcement of foreign commercial and investment arbitration awards in the Middle East and Northern Africa (MENA or MENA region). Given prevailing constraints of space, the discussion will focus on some of the more prominent arbitration jurisdictions, such as the Gulf countries, Egypt and Tunisia. Occasional reference will be made to a jurisdiction outside this group of countries if it is felt necessary to do so in order to highlight developments that—albeit unique to it—are instructive for enforcement in the MENA region more generally.

It is worth mentioning that some MENA arbitration jurisdictions are more advanced than others. This may be because the judiciaries of the more advanced jurisdictions have grown particularly experienced in handling arbitration disputes over the years or because the legislature of those jurisdictions adopted a version of the UNCITRAL Model Law as their stand-alone arbitration law to provide reliable guidance to users of arbitration both domestically and internationally. Whatever the reason, following a slow start, there has more recently been a general trend in the Middle East in favour of the enforcement of foreign arbitration awards. The United Arab Emirates (UAE)<sup>1</sup> champion this trend and have developed into one of the most avant-garde arbitration jurisdictions in the Middle East. Arbitration practices and techniques prevalent in the UAE are likely to lead by example in the remaining MENA jurisdictions in years to come and therefore merit closer scrutiny. Egypt, even though once amongst the most progressive arbitration jurisdictions in the Middle East, has fallen behind following recent arbitration reforms that appear to have rendered more difficult the enforcement of foreign arbitral awards (at least against governmental entities in investment arbitration).<sup>2</sup> Saudi Arabia has always stood out from the Gulf group of countries as the most arbitration-hostile jurisdiction, yet more recent developments, including in particular the adoption of the Saudi Arbitration Act,<sup>3</sup> which is based on the UNCITRAL Model Law,<sup>4</sup> have been a source of hope that arbitration in the kingdom has reached a turning point and will be off to a brighter future.<sup>5</sup>

The majority of MENA jurisdictions operate a civil law system and rely on their civil procedures rules for guidance on the enforcement of foreign arbitral awards. Two Gulf countries, the UAE and Qatar, have established jurisdictions of common law origin in the form of free zones that have an autonomous judiciary and a stand-alone arbitration law. This has given rise to the operation of some of these free zones as “conduit” or “host”

<sup>1</sup> On arbitration in the UAE more specifically, see G. Blanke, “United Arab Emirates” in G. Blanke (ed.), *Arbitration in the MENA* (Huntington, NY: Juris, 2016).

<sup>2</sup> For a further discussion, see M.S. Abdel Wahab, “Investment Arbitration: The Chronicles of Egypt: A Perilous Path to Pass”, in this issue.

<sup>3</sup> Issued by Saudi Arabia Royal Decree No.M/34, which came into force on 9 July 2012.

<sup>4</sup> UNCITRAL Model Law on International Commercial Arbitration 1985.

<sup>5</sup> Indicative of the kingdom’s brighter future is no doubt the first appointment of a female to sit as arbitrator in Saudi following the adoption of the Saudi Arbitration Act. See M.H. Almulhim, “The First Female Arbitrator in Saudi Arabia” (29 August 2016), *Kluwer Arbitration Blog*, <http://kluwarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> [Accessed 15 December 2016]. For the avoidance of doubt, the appointment of a female arbitrator will no longer invalidate arbitration awards (whether domestic or foreign) and hence no longer thwart their enforcement in Saudi.

jurisdictions for the enforcement of foreign arbitral awards for onward execution against award debtors outside the free zone.

Most MENA countries are party to multi-lateral regional enforcement instruments that assist in the enforcement of foreign arbitration awards of Middle Eastern origin, including, in particular, the GCC Convention<sup>6</sup> and the Riyadh Convention.<sup>7</sup> In addition, all the Gulf countries and a number of other MENA jurisdictions are members of the New York Convention,<sup>8</sup> the most successful international enforcement instrument in arbitration history. As will be seen, the New York Convention has come to play a significant role in the enforcement of foreign arbitral awards (of both convention and non-convention origin).

Finally, enforcement in the MENA region and elsewhere depends inevitably on the extent to which an award debtor will be able to mount a successful public policy defence. The content of that public policy will mostly draw on the concept and understanding of public policy in the enforcing jurisdiction. This, in turn, raises concerns of the role of the Islamic Sharia in the enforcement of foreign arbitral awards in jurisdictions in the Middle East.

This article will give further consideration to these various facets of enforcement across jurisdictions in the Middle East in the hope of dissipating the common perception that the enforcement of arbitration awards in the MENA region is unpredictable and fraught with insurmountable procedural difficulties. The article will also explore the regime in place for the enforcement of ICSID and non-ICSID awards in the Middle East—taking account in particular of the significant practical interest this topic has raised in the aftermath of the Arab Spring.<sup>9</sup>

## 2. The Enforcement of International Commercial Arbitration Awards

The enforcement of international commercial arbitration awards in the MENA countries is mainly governed by provisions of domestic legislation and the provisions of prevailing regional or international enforcement instruments.

Some MENA jurisdictions, such as Egypt or Tunisia,<sup>10</sup> have adopted stand-alone arbitration laws, largely modelled on the UNCITRAL Model Law. Most recently, as stated previously, Saudi Arabia has adopted a stand-alone arbitration law based on the UNCITRAL Model Law. Importantly, the new Saudi Arbitration Act essentially echoes the conditions of enforcement of the New York Convention.

Other jurisdictions, such as Iraq, Kuwait, Qatar and the UAE, rely upon specific arbitration-related provisions in their respective codes of civil procedures for the enforcement of foreign awards. Before the adoption of the New York Convention, the enforcement of foreign awards was essentially based on a regime of reciprocity similar to the one applicable to the enforcement of foreign judgments in the relevant jurisdiction. As a result, courts in the MENA region have proved susceptible to formalistic procedural grounds in the enforcement of foreign awards (bearing in mind the exceptional character attributed to arbitration as an alternative to the fundamental right to go to court). The UAE courts, for instance, may nullify awards if a party's representative has agreed to a party's submission to arbitration without having special authority to do so,<sup>11</sup> or if the award does not mention a date of issue unless the competent supervisory court could discern the date of issue from a review of the arbitration record<sup>12</sup> or if the award is rendered out of time.<sup>13</sup> Some of these

<sup>6</sup> GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996.

<sup>7</sup> Riyadh Convention on Judicial Cooperation between States of the Arab League 1983.

<sup>8</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

<sup>9</sup> For further detail, see also the other contributions in this journal, in particular K.A. Youssef, "The Impact of the Arab Spring on International Commercial and Treaty Arbitration in Egypt and the MENA Region", in this issue.

<sup>10</sup> Arbitration in Tunisia is governed by the Tunisia Arbitration Code, promulgated on 26 April 2013.

<sup>11</sup> See e.g. Case No.191/2009, ruling dated 13 September 2009, Dubai Court of Cassation.

<sup>12</sup> See e.g. Case No.400/2001, ruling dated 16 February 2002, Dubai Court of Cassation.

<sup>13</sup> See e.g. Case No 573/2003, ruling dated 5 June 2004, Dubai Court of Cassation.

strict requirements have relaxed over time, in particular in their application to the enforcement of foreign awards. In addition, the UAE courts, for example, have more recently recognised the application of the apparent authority rule to the formation of arbitration agreements, relativising the need for a special power of attorney in a situation where the attorney holds him-/herself out as having proper authority to bind to arbitration.<sup>14</sup>

Other jurisdictions still distinguish between domestic and international enforcement by reference to different laws. In Bahrain, domestic arbitration is governed by relevant provisions of the Bahrain Civil Procedures Law while international arbitration is governed by the International Commercial Arbitration Law of 1994 (the ICAL).<sup>15</sup> The regime of enforcement of foreign arbitral awards as set out in the ICAL is identical to that of the New York Convention.<sup>16</sup> In similar vein, the Lebanese Arbitration Act, i.e. the arbitration-specific provisions in the New Code of Civil Procedure, much inspired by French law, consists of two separate sections: one for domestic arbitration and the other for international arbitration and contains different provisions dealing with the enforcement of domestic and foreign awards.<sup>17</sup> The Tunisia Arbitration Code contains three different chapters. The first contains provisions common to both domestic and international arbitration, inspired by the UNCITRAL Model Law; the second regulates domestic arbitration while the third is dedicated to international arbitration with specific provisions dealing with the enforcement of foreign awards.<sup>18</sup>

It is common to most of these jurisdictions that they do not perform a review on the merits except where there is a concern that the underlying award may violate prevailing notions of public policy.<sup>19</sup> Potential public policy violations will be raised ex officio by an enforcing court and will prompt a full investigation into the merits. This being said, some MENA jurisdictions have recognised the principle of partial enforcement although a violation of public policy may have the effect of nullifying the award in toto.<sup>20</sup>

### *Enforcement through regional and international enforcement instruments*

As stated previously, most MENA countries are party to regional and international conventions, such as the GCC Convention, the Riyadh Convention and the New York Convention. Foreign awards in the MENA may therefore be recognised and enforced by reference to these conventions. To the extent that membership of the New York Convention overlaps with that of the regional conventions binding on the enforcing country, it is likely that the most favourable convention, invariably the New York Convention, will prevail. In addition, certain jurisdictions may have certain bi-lateral arrangements in place, in particular with jurisdictions that are not party to at least one of the previously mentioned multi-lateral enforcement regimes.<sup>21</sup> These arrangements are typically based on the overarching principle of reciprocity.

<sup>14</sup> See G. Blanke, “Recent Developments of (International) Commercial Arbitration in the UAE (Part II)”, in the next issue of *Arbitration*.

<sup>15</sup> Enacted by Bahrain Legislative Decree No.9 of 1994, largely based on the UNCITRAL Model Law.

<sup>16</sup> For further detail, see H. Ali Radhi, “International Arbitration and Enforcement of Arbitration Awards in Bahrain” (2014) 1(1) *BCDR International Arbitration Review* 29.

<sup>17</sup> See the Lebanon Code of Civil Procedures arts 762–821 issued by Decree-law 90/1983, as amended, which entered into force on 1 January 1985. For further detail, see J. El Ahdab and M. Eid, “Lebanon” in Blanke (ed.), *Arbitration in the MENA* (2016).

<sup>18</sup> For further detail, see S. Houerbi, “Tunisia” in Blanke (ed.), *Arbitration in the MENA* (2016).

<sup>19</sup> E.g. Blanke (ed.), *Arbitration in the MENA* (2016), on the situation in the UAE; see Ali Radhi, “International Arbitration and Enforcement of Arbitration Awards in Bahrain” (2014) 1(1) *BCDR International Arbitration Review* 29, on the situation in Bahrain; and Rashid Hamad Al Anezi, “Enforcement of Foreign Arbitral Awards in Kuwait” (2014) 1(1) *BCDR International Arbitration Review* 85–93, on the situation in Kuwait.

<sup>20</sup> See Blanke (ed.), *Arbitration in the MENA* (2016), on the situation in the UAE.

<sup>21</sup> E.g. the Treaty on Judicial Cooperation between the UAE and Sudan 2005 or the Agreement on Legal and Judicial Cooperation between the UAE and Somalia 1982. These bi-lateral treaties are of particular importance given that these two countries have not yet ratified the New York Convention.

### *The GCC Convention and the Riyadh Convention*

A number of MENA countries are parties to the GCC<sup>22</sup> and the Riyadh Conventions.<sup>23</sup> Both the Riyadh Convention and the GCC Convention are based on the principle of mutual recognition, pursuant to which an award originating in one convention state will be readily recognised and enforced in another convention state without re-examination of the merits provided that leave to enforce has been granted in the originating jurisdiction.<sup>24</sup>

Both conventions contain similar grounds for refusing enforcement, which include<sup>25</sup>:

- a violation of Islamic Sharia or public order in the enforcing state;
- the non-arbitrability of the disputed subject matter;
- an invalid arbitration clause or contract or the award not being final in the originating state;
- the absence of a proper arbitral mandate;
- failure of proper notification of the defendant;
- the existence of a prior/pending conflicting judgment before the enforcing state; and
- the award debtor being a sovereign entity of the enforcing state.<sup>26</sup>

There is little reported practice on the application of the GCC and Riyadh Conventions.<sup>27</sup> Suffice it to say for present purposes that their use in practice has been limited and is now largely overtaken by recourse to the New York Convention.

### *The New York Convention*

Most jurisdictions in the MENA—save for Iraq, Libya, Sudan and Yemen—have adopted the New York Convention into their national laws. Hence, given its status as an international treaty, the convention overrides any previous national law regarding the enforcement of foreign awards.

The New York Convention applies to all “foreign” awards, i.e. all awards made in a country other than that where enforcement is sought. The New York Convention art.III provides that

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

provided that such awards satisfy the conditions set forth in the convention. The convention prohibits states from imposing

“substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.<sup>28</sup>

To obtain the enforcement of a foreign award in another convention country, an award creditor is simply required to submit a duly authenticated original award or a duly certified copy thereof together with the original arbitration agreement and/or a duly certified copy

<sup>22</sup> The signatories of the GGC Convention are: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE.

<sup>23</sup> The signatories of the Riyadh Convention are: Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE and Yemen.

<sup>24</sup> Riyadh Convention art.37; and GCC Convention art.12.

<sup>25</sup> Riyadh Convention art.37; and GCC Convention art.2.

<sup>26</sup> GCC Convention art.2 only.

<sup>27</sup> Although there is an established regional enforcement practice of foreign judgments under both Conventions.

<sup>28</sup> New York Convention art.III.

thereof.<sup>29</sup> Provided that these conditions are met, the courts of any convention state must enforce the award without amendment/review as if it were a judgment of its own.

The grounds for refusing recognition or enforcement are<sup>30</sup>:

- the existence of an invalid arbitration agreement under the parties' agreed governing law or (if this cannot be established) under the law of the country where the award was made;
- a violation of due process;
- a failure to comply with the terms of the arbitration agreement; and
- irregularities affecting the composition of the arbitral tribunal or the arbitral proceedings.

Enforcement of the award may also be refused if the party resisting enforcement proves that

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

In addition, enforcement of an award may be refused by the competent authority of its own accord in the country where enforcement is sought if it finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; or
- the recognition and enforcement would be against public policy in the terms defined in that country.

A detailed look at the approach taken by the MENA courts to the interpretation and application of the grounds for challenge under the New York Convention reveals that overall, the courts appear to have taken a pro-enforcement approach. The UAE are one of the most instructive jurisdictions in this context. Since 2010, the UAE courts have—bar some isolated exceptions<sup>31</sup>—consistently enforced foreign arbitral awards in strict compliance with the terms of the New York Convention.<sup>32</sup> In doing so, the UAE courts have rejected challenges to procedural irregularity in relation to the underlying arbitration process that, in a domestic arbitration context, would have been likely to succeed. It is also worth mentioning that the UAE ratified the New York Convention without reservations. This essentially means that the UAE courts are, in principle, subject to wide enforcement obligations, which extend to the recognition and enforcement of foreign awards rendered in non-convention countries.<sup>33</sup> As a result, the domestic law provisions on enforcement of foreign awards in the UAE Arbitration Chapter<sup>34</sup> are bound to fade into insignificance.

<sup>29</sup> New York Convention art.IV(1).

<sup>30</sup> New York Convention art.V.

<sup>31</sup> See Case No.156/2013: *Canal de Jonglei*, ruling of the Dubai Court of Cassation of 18 August 2013, reported in G. Blanke, “Enforcement of New York Convention Awards in the UAE: The Story Re-told” (2013) 5(3) *International Journal of Arab Arbitration* 19. See also *Fluor Transworld Services v Petrixo Oil & Gas*, judgment of 30 March 2016, Dubai Court of Appeal, in which the Court of Appeal refused to enforce a foreign award with seat in London on the basis that no evidence had been submitted to establish that the UK had signed and ratified the New York Convention. This decision was fortunately overturned by the Dubai Court of Cassation in its decision of 19 September 2016 (Case No.384/2016), in which it was confirmed that both the UAE and the UK had acceded to the New York Convention and that the Court of Appeal erred in its decision by misapplication of the law.

<sup>32</sup> See in particular G. Blanke, “The Role of the New York Convention in the Enforcement of Foreign Awards in the UAE: Expectations and Challenges or the Tale of the Ugly Duckling” (2015) 2 T.D.M.; and G. Blanke, “Recognition and Enforcement of Domestic and Foreign Arbitral Awards in the UAE: Practice and Procedure” in C. Klausegger et al. (eds), *Austrian Yearbook of International Arbitration 2015* (Manz: Stämpfli/Beck, 2015), pp.395–436.

<sup>33</sup> Although, interestingly, in all New York Convention enforcement cases to date, the UAE courts have always emphasised the fact of membership of the country in which the award subject to enforcement originated. Most tellingly in this context, see the Dubai Court of Cassation decision referred to at fn.31 above.

<sup>34</sup> For a full commentary, see G. Blanke, *Commentary on the UAE Arbitration Chapter* (London: Sweet & Maxwell, 2016).

In addition, more recently, the UAE courts have validated the arbitrability of agency disputes within the context of the New York Convention.<sup>35</sup> The Dubai Court of Cassation has further helpfully confirmed in a recent decision that the issue of capacity/authority of the signatory of an arbitration clause on behalf of a UAE company may be assessed by reference to the law of the seat of arbitration rather than to the law of incorporation of the company, thereby dismissing a challenge to the enforcement of a foreign award based on alleged lack of authority to bind the award debtor company to arbitration.<sup>36</sup>

The Egyptian courts have confirmed that they will only refuse enforcement of a foreign award on the basis of one of the criteria listed in the New York Convention art.V.<sup>37</sup> In this context, the Egyptian Court of Cassation has refused to assess the fairness of an award or to review its merits. The Bahraini courts have also demonstrated their commitment to compliance with the terms of the New York Convention.<sup>38</sup> So have the courts of Oman<sup>39</sup> and Kuwait.<sup>40</sup> Importantly, the Enforcement Court in Saudi Arabia is reported to have decided in favour of enforcement of a foreign ICC award under the New York Convention.<sup>41</sup>

### *The public policy exception*

The public policy exception and how it operates within the context of the enforcement of foreign arbitral awards in the Middle East is discussed in further detail elsewhere in this journal.<sup>42</sup> Suffice it to recall that many Middle Eastern jurisdictions are more secular than is commonly made out in public media. The UAE have proven to be particularly enforcement friendly and narrowly interpret the concept of public policy, including under the New York Convention art.V(2)(b). By way of example, failure to comply with the oath-taking requirement under the UAE Arbitration Chapter art.208(2), which qualifies as of public policy within a domestic arbitration context,<sup>43</sup> does not undermine enforcement under the New York Convention before the UAE courts.<sup>44</sup> The UAE courts and other courts in the Middle East have also recognised the enforcement of interest awards (both simple<sup>45</sup> and compound<sup>46</sup>). The Tunisian courts have confirmed that payment in a foreign currency is not contrary to public order.<sup>47</sup>

<sup>35</sup> *Al Reyami Group LLC v RTI Befestigungstechnik GmbH & Co KG* Case No.434/2014, 23 November 2014, Dubai Court of Cassation.

<sup>36</sup> Case No.693/2015, 10 April 2016, Dubai Court of Cassation, reported in *Al Tamimi Law Update*, issue 293, October 2016.

<sup>37</sup> See M.S. Abdel Wahab and S.A.F. Haridi, "The Public Policy Exception under the New York Convention: The Unruly Arabian Horse in the MENA Region" (2015) 2 T.D.M. 5.

<sup>38</sup> E.g. Civil Case No.1470/2012, Senior Civil Court, Chamber 3 (enforcement of a DIAC award under the New York Convention), reported in Ali Radhi, "International Arbitration and Enforcement of Arbitration Awards in Bahrain" (2014) 1(1) *BCDR International Arbitration Review* 29.

<sup>39</sup> See e.g. Cassation Appeal 280/2010, 27 April 2011, Omani Supreme Court, reported in A. Hirst, "The Recognition and Enforcement of Foreign Arbitral Awards in the Sultanate of Oman" (2014) 1(1) *BCDR International Arbitration Review* 61, 66.

<sup>40</sup> For seemingly consistent case law precedent in favour of enforcement under the New York Convention, see R.H. Al Anezi, "Enforcement of Foreign Arbitral Awards in Kuwait" (2014) 1(1) *BCDR International Arbitration Review* 85, 90–93.

<sup>41</sup> See H. Ibn Ghaith, "Saudi Enforcement Court confirms that it would enforce a London ICC Award" (13 July 2016), *Kluwer Arbitration Blog*, <http://kluwerarbitrationblog.com/2016/07/13/saudi-enforcement-court-confirms-that-it-would-enforce-a-london-icc-award/> [Accessed 15 December 2016].

<sup>42</sup> See in particular S. Haridi and M.S. Abdel Wahab, "Public Policy: Can the Unruly Horse be Tamed?", in this issue.

<sup>43</sup> See the infamous *Bechtel* case, *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai* Case No.503/2003, 15 May 2005, Dubai Court of Cassation, and subsequently confirmed by Case No.322/2004, 11 April 2005, Dubai Court of Cassation.

<sup>44</sup> *Airmech Dubai LLC v Maxtel International LLC* Appeal No.126/2011 Commercial, 22 February 2012, Dubai Court of Cassation, with commentary by Blanke, *Commentary on the UAE Arbitration Chapter* (2016).

<sup>45</sup> See e.g. the express availability of simple interest in UAE domestic law, UAE Commercial Transactions Code arts 76–78.

<sup>46</sup> Upon agreement of the contracting parties. See Blanke, *Commentary on the UAE Arbitration Chapter* (2016).

<sup>47</sup> Case No.6969, 9 March 2004, Tunis Court of Appeal, S. Sarda, reported in S. Huerbi, "Tunisia" in Blanke (ed.), *Arbitration in the MENA* (2016).

That being said, Middle Eastern jurisdictions, other than Egypt<sup>48</sup> or Lebanon,<sup>49</sup> generally do not distinguish between “domestic” and “international” public policy.<sup>50</sup> There is hence a *perceived* risk that local courts may refuse enforcement of foreign arbitral awards on the basis of a domestic conception of public policy, thus opening the doors to the invasion of the Islamic Sharia into enforcement practice under both regional and international enforcement instruments and relevant domestic laws (where no enforcement instrument is in place). Fears of any such invasion into enforcement considerations of foreign awards by local courts have largely proved unjustified: only Saudi Arabia has shown signs of strict compliance with the Islamic Sharia in its enforcement practice, awards of interest being systematically set aside.<sup>51</sup>

Nevertheless, the Qatari courts made headlines more recently, setting aside a foreign arbitral award on the basis that it was not rendered “in the name of the Emir” and as such contrary to domestic public policy.<sup>52</sup> Fortunately, the Qatar Court of Cassation overturned the rulings of two lower courts, finding that by analogy to foreign judgments, a foreign arbitral award was not required to comply with local judicial requirements and that there was hence no violation of public policy within the meaning of the New York Convention.<sup>53</sup> Further, the Egyptian courts have refused to decline enforcement of a foreign award for violation of public policy under the New York Convention art.V(2)(b) that awarded interest over and above a mandatory ceiling of interest applicable under the laws of Egypt and instead ordered enforcement after having reduced the interest to comply with local laws.<sup>54</sup> In other words, the court approved the partial enforcement of a foreign arbitral award that would otherwise have violated domestic public policy.

### *Enforcement in and through free zones*

International arbitration awards can also be enforced in or through so-called free zones. The most prominent free zone is the UAE-based DIFC, which is carved out of the heart of

<sup>48</sup> For further detail on Egypt, see Haridi and Abdel Wahab, “Public Policy: Can the Unruly Horse be Tamed?”, in this issue.

<sup>49</sup> The Lebanon Arbitration Act art.814 provides that foreign awards “shall be recognized and granted exequatur if the party relying thereon has established their existence and if it does not blatantly infringe international public policy”. In other words, the control exercised by the Lebanese court is reduced to a strict minimum and the court cannot rely on domestic public policy to refuse enforcement of a foreign award. For further detail, see J. El Ahdab and M. Eid, “Lebanon” in Blanke (ed.), *Arbitration in the MENA* (2016). In this context, it is also worth noting that the Tunis Court of Appeal in a judgment dated 3 May 1995 held that a foreign award made in a foreign language could be enforced in Tunisia without violating international public order (*LuidginaiAkacha v SNCFT* Case No.19335, reported in S. Huerbi, “Tunisia” in Blanke (ed.), *Arbitration in the MENA* (2016).

<sup>50</sup> To this effect, see e.g. G. Blanke, “On recent developments of ‘public policy’ and their potential implications for the enforcement of New York Convention awards in the UAE: is it a ‘camel’ or a ‘Trojan horse’?” (2013) 18(1) *IBA Newsletter* 46.

<sup>51</sup> See more recently J.-B. Zegers, “Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia” (2014) 1(1) *BCDR International Arbitration Review* 69.

<sup>52</sup> See the M. Khatchadourian, “The Application of the 1958 New York Convention in Qatar” (2014) 1(1) *BCDR International Arbitration Review* 49, 55 and following. In addition, see earlier Court of Cassation case law precedent to the same effect: Petition No.64/2012, 12 June 2012, Qatar Court of Cassation, reported in M. Khatchadourian, “Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards” (23 September 2013), *Kluwer Arbitration Blog*, <http://kluwerarbitrationblog.com/2013/09/23/controversial-ruling-of-the-qatari-court-of-cassation-regarding-arbitral-awards/> [Accessed 15 December 2016].

<sup>53</sup> Petitions Nos 45 and 49/2014, 25 March 2014, Qatar Court of Cassation, reported in M. Khatchadourian, “The Application of the 1958 New York Convention in Qatar” (2014) 1(1) *BCDR International Arbitration Review* 49, 59. See also decision of the Court of Cassation rendered in September 2014 in Case No.164/2014, in which the Court of Cassation overturned a decision to annul an award issued by an ICC arbitrator in Paris on the grounds that the failure to render the award “in the name of the Emir” violated the public policy of Qatar. However, the Court of First Instance seized with an enforcement action of the same refused to enforce the award on the basis that it was not established that the award had been authenticated and certified by the competent authorities, thereby adding to the requirements of the New York Convention. For further detail, see Abdel Wahab and Haridi, “The Public Policy Exception under the New York Convention: The Unruly Arabian Horse in the MENA Region” (2015) 2 T.D.M. 5–8.

<sup>54</sup> Challenge No.815/Judicial Year 52, 21 May 1990, Egyptian Court of Cassation, reported in Abdel Wahab and Haridi, “The Public Policy Exception under the New York Convention: The Unruly Arabian Horse in the MENA Region” (2015) 2 T.D.M. 5.

Dubai.<sup>55</sup> It constitutes a common law jurisdiction with its own two-tiered court system, the DIFC courts, and a stand-alone arbitration law, the DIFC Arbitration Law,<sup>56</sup> which is based on the UNCITRAL Model Law. The DIFC Arbitration Law art.42 empowers the DIFC courts to hear actions for enforcement of foreign awards. In addition, more recently, the DIFC courts have acquired the status of a host or conduit jurisdiction to enforce foreign arbitral awards for onward execution against award debtors in onshore Dubai.<sup>57</sup> A regime of mutual recognition between the onshore Dubai and the DIFC courts<sup>58</sup> in respect of judgments, orders and ratified awards facilitates the onward execution of DIFC enforcement orders through the Dubai execution courts. This being said, conflicts of jurisdiction between the onshore Dubai and offshore DIFC courts in the enforcement of foreign arbitral awards may now be subject to the Dubai-DIFC Judicial Committee,<sup>59</sup> which has recently been established by the Ruler of Dubai.<sup>60</sup>

Taking inspiration from the DIFC and no doubt in an endeavour to emulate the success of the DIFC, Abu Dhabi has more recently established its own free zone, the ADGM.<sup>61</sup> Like the DIFC, the ADGM has its own offshore common law courts, the ADGM courts, and a stand-alone arbitration law, the ADGM Arbitration Regulations 2015,<sup>62</sup> also modelled on the UNCITRAL Model Law. The 2015 ADGM Regulations arts 53 and following empower the ADGM courts to hear actions for enforcement of foreign awards within the ADGM. The ADGM courts are at present in the process of establishing a regime of co-operation with the UAE Ministry of Justice and the Abu Dhabi courts. It will be interesting to see whether the ADGM courts will be able to establish a regime of free movement of judgments, orders and ratified awards with their onshore counterparts<sup>63</sup> and/or other Emirati courts<sup>64</sup> more generally. In addition, it remains to be seen whether the ADGM courts will acquire conduit jurisdiction status for the enforcement of foreign arbitral awards for onward execution against award debtors outside the ADGM.

Finally, arbitration in Qatar may be conducted within the Qatar Financial Centre (QFC). Like the DIFC or the ADGM, the QFC is a free zone established in 2005, with an autonomous legal and judicial system based on the common law. Arbitration in the QFC is governed by the 2005 QFC Arbitration Regulations, which are based on the UNCITRAL Model Law. Arbitral awards issued in QFC-seated procedures are enforced through the jurisdiction of the QFC courts. Awards issued in seats other than the QFC may be enforced

<sup>55</sup> For further detail on arbitration in the DIFC, see G. Blanke, "Arbitration in the DIFC: Some Initial Insights" in B. Gessel-Kalinowska vel Kalisz (ed.), *The Challenges and the Future of Commercial and Investment Arbitration—Liber Amicorum Professor Jerzy Rajski* (Warsaw: Wolters Kluwer, 2015), pp.587–605. For more detailed accounts, see E. Al Tamimi and R. Karrar-Lewsley, "Dubai" in M. Ostrove, C.T. Salomon and B. Shifman (eds), *Choice of Venue in International Arbitration* (Oxford: Oxford University Press, 2014), pp.118–146. For earlier contributions, see also G. Blanke, "The DIFC: A Brave New World of Arbitration" (2009) 75 *Arbitration* 422; and R. Mohtashami and S. Tannous, "Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East" (2009) 25(2) *Arbitration International* 173. Most recently, see also N. Bakirci, "Article on Arbitration in the DIFC" (4 October 2016), <http://difccourts.ae/article-arbitration-difc/> [Accessed 15 December 2016].

<sup>56</sup> DIFC Law No.1 of 2008.

<sup>57</sup> E.g. Case No.ARB 002/2013, 2014, ruling of the DIFC Court of First Instance; and *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* Case No.ARB 003/2013, 27 May 2014, DIFC Court of First Instance. For extensive commentary, see G. Blanke, "Free Zone Arbitration in the UAE: DIFC v ADGM", forthcoming in *Arbitration International*.

<sup>58</sup> In the terms of the Judicial Authority Law as amended art.7.

<sup>59</sup> I.e. the Judicial Committee of the Dubai courts and the DIFC courts.

<sup>60</sup> Dubai Decree No.19 of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts, dated 9 June 2016. For further detail, see G. Blanke, "Free Zone Arbitration in the UAE: DIFC v ADGM", forthcoming in *Arbitration International*.

<sup>61</sup> For a detailed background discussion, see G. Blanke, "Free Zone Arbitration in the UAE: DIFC v ADGM", forthcoming in *Arbitration International*.

<sup>62</sup> The ADGM Arbitration Regulations were enacted by the Board of Directors of the ADGM on 17 December 2015.

<sup>63</sup> Memorandum of Understanding concerning cooperation in legal and judicial matters between the UAE Ministry of Justice and the ADGM courts.

<sup>64</sup> Memorandum of Understanding concerning cooperation in legal and judicial matters between the Abu Dhabi Judicial Department and the ADGM courts, dated 19 April 2016.



by the QFC courts provided there is a nexus to the QFC, geographic or otherwise. For the avoidance of doubt, the QFC courts have not developed a host jurisdiction status in the terms proposed by the DIFC courts.

### 3. Enforcement of Investment Arbitration Awards

The enforcement of investment arbitration awards in the Middle East is primarily subject to the regime of the International Centre for the Settlement of Investment Disputes (ICSID) or the enforcement regime in place in each individual jurisdiction for international commercial arbitration awards, depending on the origin of the investment arbitration award. Other than that, some investment arbitration awards may require enforcement under regional investment treaties, such as the Unified Agreement for the Investment of Arab Capital in the Arab States (UAIACA) and the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of Islamic Cooperation (AOIC).

#### *Enforcement of ICSID awards*<sup>65</sup>

An investment arbitration award rendered within the ICSID framework is subject to the ICSID rules of enforcement. An award creditor who wishes to enforce an ICSID award against a MENA country in its capacity as the award debtor will be able to do so in reliance on the ICSID Convention arts 53(1) and 54.<sup>66</sup> Essentially, the parties to an ICSID award are obliged to recognise the award as binding, the award being enforceable against the debtor state in the same way as a final domestic judgment. No further ratification at the domestic level of the enforcing state is required (or permitted for that matter). There is at present little guidance on the enforcement practice of ICSID awards in Middle Eastern jurisdictions.<sup>67</sup> Egypt has been swift to settle payment obligations pending against it under ICSID awards, thus demonstrating its commitment to the ICSID Convention and avoiding negative publicity.<sup>68</sup>

#### *Enforcement of non-ICSID awards*<sup>69</sup>

Unlike ICSID awards, non-ICSID awards do not follow a special regime of enforcement. On the contrary, for the purposes of enforcement, non-ICSID awards qualify as ordinary international commercial awards and are hence subject to the same enforcement regime that applies to ordinary international commercial arbitration awards. For present purposes, it is therefore sufficient to refer to the enforcement practices of Middle Eastern jurisdictions referenced in the preceding sections of this article. The statements made there apply here *mutatis mutandis* with the exception of the importance that a governmental award debtor may raise a state immunity defence in order to avoid the enforcement of an international investment arbitration award against it.

A state immunity defence may fall on infertile ground in the MENA region since certain MENA jurisdictions, including the UAE, will enforce against private corporate entities with a majority government shareholding.<sup>70</sup> While most MENA jurisdictions do not prohibit

<sup>65</sup> See in particular A. Parra, "The Convention and Centre for Settlement of Investment Disputes" (2015) 374 *Receuil des cours* (Hague Academy of International Law) 323.

<sup>66</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965.

<sup>67</sup> See N.G. Ziadé, "Arbitration under MENA Regional Investment Treaties", in this issue.

<sup>68</sup> See M.S. Abdel Wahab, "Investment Arbitration: The Chronicles of Egypt: A Perilous Path to Pass", in this issue.

<sup>69</sup> See G. Blanke, "Recourse against non-ICSID Investment Arbitration Awards in the MENA—Initial Insights" (2017) 3(1) *BCDR International Arbitration Review*, forthcoming.

<sup>70</sup> See e.g. UAE: *Middle East Foundations LLC v Meydan Group LLC (formerly Meydan LLC)* Case No.249/2013, Commercial Appeal, 15 January 2014, Dubai Court of Appeal. For a stricter position, e.g. in Bahrain, see Ali Radhi, "International Arbitration and Enforcement of Arbitration Awards in Bahrain" (2014) 1(1) *BCDR International Arbitration Review* 29.

enforcement of an arbitration award against a sovereign entity, the prevailing local laws often restrict the availability over sovereign assets of attachments that assist in ring-fencing over the course of an arbitration process assets of a prospective award debtor in support of a future action of enforcement.<sup>71</sup>

That being said, in the recent *Canal de Jonglei* case,<sup>72</sup> the Dubai Court of Cassation refused enforcement of a foreign ICC award rendered in Paris against the Government of Sudan by reading a geographic nexus requirement into the enforcement process under the New York Convention on the basis of art.III of the convention. This, no doubt, raises questions on the extent to which political considerations and in particular respect for other sovereigns enter the decision-making process of the UAE courts as courts of primary and secondary jurisdiction. Tellingly, the GCC Convention specifically provides as a ground for refusal to enforce an arbitral award rendered in another Convention country the award debtor being a sovereign entity of the enforcing State, hence essentially giving rise to a State immunity defence.<sup>73</sup>

### *Other regional investment treaty frameworks*<sup>74</sup>

There are two further regional investment treaty frameworks of relevance to the enforcement of investment arbitration awards in the MENA region. The first, the UAIACA,<sup>75</sup> contains enforcement provisions similar to those in the ICSID regime, providing for the immediate enforceability of a UAIACA award. This has been confirmed by the Cairo Court of Appeal, which affirmed a debtor state's obligations to comply with a UAIACA award voluntarily subject to the automatic enforcement process through the Arab Investment Court.<sup>76</sup> The second regime of interest for present purposes is AOIC.<sup>77</sup> Pursuant to the AOIC art.17(2)(d), a member state is under an obligation to enforce a resultant award "as if it were a final and enforceable decision of its national courts". The AOIC has largely been under-utilised by investors in the MENA region, as a result of which there is little publicly accessible case law precedent.<sup>78</sup>

## 4. Conclusion

It is fair to say that even though enforcement of foreign arbitration awards in the Middle East and more specifically the MENA region is still in its infancy, the present indications

<sup>71</sup> See e.g. UAE: UAE Law No.10 of 2005 Amending Certain Provisions of Government Lawsuit art.3(1); UAE Law No.3 of 1996 (no attachments over assets owned by the government, including public institutions and corporations, or the Ruler of Dubai).

<sup>72</sup> *Canal de Jonglei*, Case No.156/2013, 18 August 2013, Dubai Court of Cassation, reported in Blanke, "Enforcement of New York Convention Awards in the UAE: The Story Re-told" (2013) 5(3) *International Journal of Arab Arbitration* 19.

<sup>73</sup> GCC Convention art.2(e).

<sup>74</sup> See also the discussions in N.G. Ziadé, "Arbitration under MENA Regional Investment Treaties", in this issue.

<sup>75</sup> Which is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2394> [Accessed 15 December 2016]. Amended in 2013, see H. El-Khadry, "The Amendments to the 1980 Arab League Investment Agreement: Implications on the Right to Regulate Investment in Arab Countries" (April 2014) *TDM*; and M. Al-Rashid and L. Carpentieri, "The Revival of Islamic and Middle East Regional Investment Treaties: A New Way Forward?" (April 2014) *TDM*.

<sup>76</sup> Case No.39, Judicial Year 130/2014, 5 February 2014, decision of Cairo Court of Appeal (involving Libya as a debtor party), reported in K. Mechantaf, "A blast from the past ... 'the unified Arab investment treaty' and finality of arbitration awards" (13 February 2014), *Kluwer Arbitration Blog*, <http://kluwerarbitrationblog.com/2014/11/13/a-blast-from-the-past-the-unified-arab-investment-treaty-and-finality-of-arbitration-awards/> [Accessed 15 December 2016]. See also W. Ben Hamida, "The Development of the Arab Investment Court's Case Law: New Decisions Rendered by the Arab Investment Court" (2014) 6(1) *International Journal of Arab Arbitration* 3; and W. Ben Hamida, "Note—21 August 2007, Arab Investment Court" (2009) 1(2) *International Journal of Arab Arbitration* 444.

<sup>77</sup> Which is available online at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2399> [Accessed 15 December 2016]. For commentary in context, see M. Al-Rashid and L. Carpentieri, "The Revival of Islamic and Middle East Regional Investment Treaties: A New Way Forward?" (April 2014) *TDM*.

<sup>78</sup> See W. Ben Hamida, "A Fabulous Discovery: The Arbitration Offer under the Organization of Islamic Cooperation Agreement Related to Investment" (2013) 30(6) *Journal of International Arbitration* 637.

are that the more experienced arbitration jurisdictions in the region are more enforcement friendly than they are often given credit for. The New York Convention, as the most important international enforcement instrument in history, has gained currency in Middle Eastern arbitration practice. It is hoped that the pro-enforcement sentiment instilled into the Middle Eastern judiciaries by the enforcement canons of the New York Convention will affect enforcement practices within the region more widely and enhance the implementation in practice of corresponding provisions contained in regional enforcement instruments, such as the GCC and the Riyadh Conventions. It is certainly encouraging to see that the threat of local public policy as a shield to otherwise sound foreign awards is more imagined than real and that arbitration in the more developed arbitration jurisdictions in the Middle East is—for want of a better term—truly secular.

This is, of course, not to say that the current state of enforcement of foreign awards in the Middle East is beyond improvement. It is widely recognised that the Middle Eastern judiciary is presently going through a socialisation process in an endeavour to become more familiar with best international arbitration practice.<sup>79</sup> In addition, international arbitration practitioners that come to the region for arbitration work arguably have a burden of self-education in order to ensure that the arbitration process they conduct and the awards they render comply with the relevant procedural and content requirements prevailing in the Middle East (and more specifically a prospective enforcement jurisdiction) and will withstand potential challenges at a prospective place of enforcement (or indeed the place of arbitration).<sup>80</sup> Finally, jurisdictions in the Middle East have a patent interest in safeguarding inflows of foreign direct investment and for that reason alone have a strong incentive to create a legal and judicial environment that supports the ready enforcement of foreign awards against domestic award debtors.

In the round, there is no reason to believe that the recent political turmoil in the region will ultimately not operate as a catalyst for the regeneration and growth of mature judiciaries that provide a reliable basis for the enforcement of foreign awards in the Middle East. The UAE have certainly and significantly benefited from the political and economic demise of their neighbours and have applied their forces to create one of the most avant-garde jurisdictions in the Middle East (and possibly the world). This is no doubt due, in significant measure, to the creation of the Union's free zone dispute resolution facilities in the form of the DIFC and the ADGM. Be that as it may, the embedding of the offshore DIFC common law jurisdiction into the civil law judicial framework of onshore Dubai has undoubtedly produced positive externalities on the Dubai courts' enforcement practices under the New York Convention. With this in mind, it is to be hoped that the UAE will continue to lead by example and consolidate existing pro-enforcement practices of foreign awards throughout the Middle East.

<sup>79</sup> To similar effect, see also E. Al Tamimi, "Enforcement of Foreign Arbitration Awards in the Middle East" (2014) 1(1) *BCDR International Arbitration Review* 95.

<sup>80</sup> Al Tamimi, "Enforcement of Foreign Arbitration Awards in the Middle East" (2014) 1(1) *BCDR International Arbitration Review* 95.