



Research article

Understanding the jurisprudence of the Arab Gulf States national courts on the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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Abstract

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention) is a treaty connected with arbitration, the system of dispute resolution used in international trade. In today's practice, the international commercial arbitration system based on the NY Convention effectively facilitates resolution of multinational commercial disputes and contributes to the world's continuing economic development. The NY Convention is at work only in the courtroom, which means that its terms and provisions have to be construed by local state judges and then applied to the facts of a case. The presence of efficient judiciaries capable of interpreting and applying the NY Convention in a manner compatible with international arbitration norms and standards is an important pillar for the use of arbitration in any state. However, some judicial practices of Arab Gulf States in implementing the NY Convention show undesirable attitudes to the business and arbitration communities in this region. This research article seeks to examine these critical judicial practices to understand whether the undesirable attitudes are related to the courts' commitments to implement the NY Convention, or to the level of familiarity the Arab State judiciaries have with the well-established norms and features of the NY Convention.

Cite this article as: Seyadi RM. Understanding the jurisprudence of the Arab Gulf States national courts on the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *International Review of Law* 2017;12 <http://dx.doi.org/10.5339/irl.2017.12>.

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Keywords: arbitration, international commerce, international commercial arbitration, recognition and enforcement, local standards, international standards, autonomous interpretation, foreign arbitral award, Arab Gulf States (GCC)

فهم فقه المحاكم الوطنية لدول مجلس التعاون الخليجي في تنفيذ اتفاقية نيويورك 1958 بشأن الاعتراف والتنفيذ الخاص بأحكام التحكيم الأجنبية

ملخص

من أهم الاتفاقيات الدولية في مجال التحكيم التجاري الدولي هي الاتفاقية الصادرة عن الامم المتحدة عام 1958 والتي تناولت الاعتراف والتنفيذ الخاص بأحكام المحكمين الدولية والأجنبية والمعروفة باتفاقية نيويورك. لعبت هذه الاتفاقية دورا هاما في وضع حجر الأساس لنظام التحكيم كوسيلة لحل المنازعات التي قد تنشأ من المعاملات التجارية الدولية بين الأشخاص. حيث ساهمت في زيادة لجوء الأطراف للتحكيم والاعتماد عليه كوسيلة مرنة وأكثر طمأنينة لحل النزاع التجاري الدولي. وفقا لبنود اتفاقية نيويورك فيحق للطرف الذي يرغب بتنفيذ حكم التحكيم في دولة ما أن يلجأ الى محاكم تلك الدولة ويطلب تنفيذ حكم التحكيم. ويقع على المحاكم الوطنية عبء تفسير بنود الاتفاقية والتحقق ما إذا كان بالإمكان تنفيذ حكم التحكيم أو رفض تنفيذه. لذلك فإن وجود محاكم وطنية ملزمة بأهم المبادئ والمعايير الدولية للتحكيم التجاري والتي بنيت عليها بنود اتفاقية نيويورك يعتبر أحد الأركان الأساسية والمساعدة للجوء الى التحكيم في تلك الدول. صدر مؤخرا عن محاكم دول مجلس التعاون عددا من الأحكام القضائية في مجال تنفيذ احكام تحكيم أجنبية والتي أثارت بعض الجدل حول مدى التزام دول مجلس التعاون الخليجي بتطبيق بنود اتفاقية نيويورك على أحكام المحكمين الأجنبية التي تسعى للتنفيذ في دول مجلس التعاون الخليجي. يتناول هذا البحث تحليل هذه التطبيقات القضائية لفهم ما إذا كان عدم تطبيق بنود اتفاقية نيويورك على أحكام المحكمين الأجنبية يرجع الى مدى التزام المحاكم الوطنية بتنفيذ اتفاقية نيويورك. أو الى مدى المام وإدراك المحاكم الوطنية بأهم المبادئ والمعايير الدولية للتحكيم التجاري والتي بنيت عليها اتفاقية نيويورك.

1. Introduction

Arbitration is now the principle method of resolving multinational commercial disputes involving states, individuals, and corporations.¹ This development is one of the consequences of the increased globalisation of world trade and investment. It has resulted in increasingly harmonised arbitration practices by specialised international arbitration practitioners who speak a common procedural language, whether they practice in the East or the West or any other part of the world. The increased reliance on arbitration as a form of dispute resolution to satisfy the needs of commerce may be attributed to the considerable work of the United Nations Commission on International Trade Law (UNCITRAL). This work led to the 1958 adoption by the United Nations of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards² (hereafter, NY Convention) to facilitate, as the name suggests, the recognition and enforcement of foreign arbitral awards (hereafter, REFAA). Today some 157 nations (as of the time of this writing) have ratified the NY Convention, including most major trading nations and many developing countries from all regions of the world.³

The Arab Gulf states are composed of six states: The Kingdom of Bahrain, Kuwait, Oman, Qatar, the Kingdom of Saudi Arabia (KSA), and the United Arab Emirates (UAE).⁴ On 25 May 1981, the six states of the Gulf formed a cooperation council, better known in the English-speaking world as the Gulf Cooperation Council (GCC). Its task is to create integration in many aspects, similar to the integration of the European Community, and it is registered with the United Nations as a regional entity.⁵ Currently, these states are referred to as “GCC states” and this term will be used throughout this article. In the last three decades, international commercial arbitration has gradually emerged as a hot topic in the GCC states.⁶ This can be traced back to the remarkable development of their national economies, which has been largely based on the extraction and global sale of oil.⁷

¹A number of surveys were conducted by the Queen Mary University of London, School of International Arbitration during the period of 2006–2015. These surveys empirically show the prevalence of arbitration over litigation in many different types of international commercial activities. Links to these surveys are available on the school website page *Research at the School of International Arbitration*, <http://www.arbitration.qmul.ac.uk/research/index.html> (last visited 30 June 2017) [hereinafter St. Mary Surveys].

²Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958, entered into force 7 June 1959, 300 U.N.T.S. 3, Regis. No. 4739, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en [hereinafter NY Convention].

³UNCITRAL official website, *Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited 30 June 2017) [hereinafter *CREFAA Status*].

⁴This article uses the GCC’s definition of the Arab Gulf States. For further information, see the official website of the Cooperation Council for the Arab States of the Gulf, <http://www.gcc-sg.org/en-us/Pages/default.aspx> (last visited 22 Sept. 2017) [hereinafter Cooperation Council]; <https://www.britannica.com/topic/Gulf-Cooperation-Council>.

⁵Charter of the Co-operation Council for the Arab States of the Gulf (with Rules of Procedures of the Supreme Council, of the Ministerial Council and of the Commission for Settlement of Disputes), 25 May 1981, 1288 U.N.T.S. 152, Reg. No. 21244, <https://treaties.un.org/doc/Publication/UNTS/Volume%201288/volume-1288-I-21244-English.pdf>. For further information, see Cooperation Council, *supra* note 4.

⁶See Yousif Zainal, *The Prevalence of Arbitration in the Gulf Cooperation Council Countries*, 18 J. INT’L ARB. 657 (2001); Nasser Al Zayed, *Commercial Arbitration in the Gulf States: An Overview*, 2 INT’L J. ARAB ARB. 37 (2010).

⁷See the official reports issued by the Organization of the Petroleum Exporting Countries (OPEC) on its website, http://www.opec.org/opec_web/en/index.htm, including Table 5.7 of the *OPEC Monthly Oil Market Report* 66 (Aug. 2015), http://www.opec.org/opec_web/static_files_project/media/downloads/publications/MOMR_August_2015.pdf.

The NY Convention was gradually adopted by the GCC states during the period of 1978–2006.⁸ Although the adoption of the NY Convention by the GCC states might suggest the states' willingness to accept international arbitration, there remains much uncertainty at the domestic level related to the courts' implementation of the NY Convention. This article seeks to examine the possible reasons behind the emerging phenomenon⁹ whereby the GCC judiciaries constitute a barrier to REFAA, and to further discuss the possible solutions that would enhance the GCC judiciaries' familiarity with the NY Convention. The article relies mainly on a comparative analysis of the case law on REFAA from the GCC courts with the case law on REFAA from other developed arbitration jurisdictions, with the aim of comparing their judicial practices.

The article first examines how the NY Convention has been implemented in the domestic legal systems of the GCC states, in order to understand the courts' commitment to implementing the provisions of the NY Convention on REFAA. The article then examines the possible adoption of the principle of autonomous interpretation of the NY Convention provisions, and how this principle works in developed arbitration jurisdictions but is missing in some of the GCC judicial practices concerning REFAA.

2. The 1958 New York Convention

As noted earlier, the increased use of arbitration as a form of dispute resolution in international commercial disputes may be attributed to the considerable work of the United Nations Commission on International Trade Law (UNCITRAL).¹⁰ The NY Convention was adopted in 1958 by the United Nations to facilitate REFAA worldwide.¹¹ Its adoption so far by 157 nations of varying economies and degrees of development indicates its success.¹² In fact, the NY Convention is broadly considered the most successful convention in international arbitration, if not in international commercial law.¹³ Despite its brevity (it only includes seven substantive articles), it is now widely regarded as the "cornerstone of international commercial arbitration."¹⁴

REFAA does not occur automatically in the state that are parties to the NY Convention. National courts retain the authority to refuse recognition and enforcement of arbitral awards for a limited number of reasons that are set out in Article V of the NY Convention. Article V constitutes the heart and essence of the NY Convention since it seeks to limit the grounds on which arbitral awards may be refused enforcement by the national courts.¹⁵ In broad terms, Article V(1) of the NY Convention provides for five grounds for refusal that have to be proven by the defendant (award debtor), and they are as follows: a) the arbitration agreement is invalid or a party lacks capacity, b) the arbitration proceedings have a lack of due process, c) the arbitral award exceeds the scope of the arbitration agreement, d) the arbitral procedure and composition of the arbitral tribunal was not conducted in accordance with the parties

⁸See *CREFAA Status*, *supra* note 3.

⁹Ahmed Almutawa & A.F.M. Maniruzzaman, *Problems of Enforcement of Foreign Arbitral Awards in the Gulf Cooperation Council States and the Prospect of a Uniform GCC Arbitration Law: An Empirical Study*, 25, 28 (4 Feb. 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559690; Essam Al Tamimi, *Enforcement of Foreign Arbitration Awards in the Middle East*, 1 BCDR INT'L ARB. REV. 95, 99 (2014) (in English).

¹⁰See generally St. Mary Surveys, *supra* note 1.

¹¹ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 7 (1981).

¹²See *CREFAA Status*, *supra* note 3.

¹³Michael Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 34, 47 (1989); CAROLE MURRAY ET AL., *SCHMITTHOFF: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* 580 (12TH ed. 2012).

¹⁴GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 33 (2d ed. 2001).

¹⁵NY Convention, *supra* note 2, art. V.

agreement, e) the court of the country of the place of arbitration (seat jurisdiction) annulled the arbitral award.¹⁶ Moreover, Article V(2) of the NY Convention provides two additional grounds for refusal that may be raised by the court on its own motion: a) the subject matter of the dispute cannot be referred to arbitration; b) the arbitral award violates the state's public policy.¹⁷

2.1. Key features of the 1958 New York Convention

There are three key features that are well established in the NY Convention literature and that reflect the spirit and purpose of the NY Convention: pro-enforcement bias, narrow interpretation of the grounds for refusal, and exclusive grounds for refusal. These three features are widely accepted by many national courts and commentators on the NY Convention, and they appear in the preparatory work of the NY Convention and many other UNCITRAL works.¹⁸ In their decisions involving the NY Convention, however, the GCC national courts seem to give less weight to these features, as will be discussed in this article.

One of the key features in interpreting any international convention is that it should be interpreted in light of its object and purpose.¹⁹ The purpose of the NY Convention is to facilitate REFAA.²⁰ It also aims to “unify the standards by which arbitral awards are enforced in the signatory countries.”²¹ One of the leading commentators on the NY Convention states, “As far as the grounds for refusal for enforcement of the award as enumerated in Article V are concerned, it means that they have to be construed narrowly.”²²

This comment suggests that the interpretation to be followed by the courts is that the provisions of the NY Convention, particularly Article V, should be interpreted narrowly, which means that its bars to enforcement should play a role only in limited and circumscribed circumstances.²³ Most of the national courts have, in fact, accepted this feature, particularly in developed arbitration jurisdictions. In addition, the trend in modern arbitration law is to limit the grounds upon which national courts can review arbitral awards to those listed in Article V of the NY Convention. The reason for the adoption of this trend is the desire of the international community to promote the finality of arbitral awards and to activate the principle of party autonomy in choosing arbitration rather than litigation in national courts. In addition, the

¹⁶*Id.*

¹⁷*Id.*

¹⁸VAN DEN BERG, *supra* note 12, at 264; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 638-39 (5th ed. 2009); ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE 412 (2007); International Council for Commercial Arbitration, ICCA'S Guide to the Interpretation of the 1958 New York Convention: A Handbook For Judges, 14–15 (2011), http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf [hereinafter ICCA Guide]; UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, 34–37 (2008), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter MLICA]; UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 133 (2012), <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> [hereinafter UNCITRAL 2012 Guide].

¹⁹Vienna Convention on the Law of Treaties, arts. 31–32, 22 May 1969, entered into force 27 Jan. 1980, 1155 U.N.T.S. 331.

²⁰ICCA Guide, *supra* note 19, at 14; see also Cour d'appel de Paris [Paris Court of Appeal], *Government of the Kaliningrad region (Russia) v. Republic of Lithuania*, 18 Nov. 2010, 09/19535.

²¹*Scherk v. Alberto-Culver Co.* 417 U.S. 506 (1974), published in ICCA YEARBOOK COMMERCIAL ARBITRATION I 203-04 (1976), http://www.arbitration-icca.org/media/3/61925062805088/yb_1976_toc.pdf.

²²VAN DEN BERG, *supra* note 12, at 267–268.

²³ICCA Guide, *supra* note 19; UNCITRAL 2012 Guide, *supra* note 19, at 139, 174.

NY Convention is at work only in the courtroom, which means that its terms and provisions have to be construed by national judges, and then applied to the facts of a case.

3. Understanding the operation of the NY Convention at the domestic level

It is accepted that the NY Convention is an international treaty that obligates state parties to recognise and enforce foreign arbitral awards from around the world. At the same time, most, if not all, national arbitration laws include provisions that also regulate REFAA. The wide adoption of the Model Law on International Commercial Arbitration²⁴ (MLICA) as a national arbitration law has enhanced the consistency between the NY Convention provisions and national arbitration law in this regard. However, at the domestic level, the incorporation of the NY Convention provisions into the national arbitration laws takes different forms. It is either found in a domestic law that makes explicit reference to the NY Convention, or in a domestic law that indirectly incorporates similar provisions to the NY Convention without reference to the NY Convention. However, the fact that the NY Convention and national arbitration laws regulate the same topic—that is, REFAA—leads to uncertainty in some jurisdictions, such as the GCC states, about whether the national courts are obligated to follow the NY Convention provisions or the provisions of the national arbitration laws in their decisions on REFAA. This quandary requires further analysis as to the relationship between international and domestic law.

3.1. *The relationship between international law and domestic law*

The relationship between international law and domestic law is a much-debated topic.²⁵ After the states have fulfilled the formal requirements that make an international convention (a type of treaty) legally binding for the state parties, the question of how the state parties should implement the convention into their legal systems needs to be answered. For example, if a state ratifies the NY Convention, does that fact alone suffice to enable the award creditor to ask the enforcing court (ratifying state) to enforce his/her arbitral award against the award debtor and in accordance with the NY Convention? International law jurisprudence suggests that the answer to this kind of question depends on whether the state subscribes to the theory of monism, on the one hand, or dualism, on the other.²⁶

The monist theory assumes that international law and domestic law constitute a single system in which international law is applied within a given legal system without the need for it to be transformed into domestic law by legislation.²⁷ In a monist legal system, international law is part of the internal legal system without the need for internal legislation to give effect to international law. The dualist theory, in contrast, considers that international law and domestic law operate on different planes, international law governing relations between states, and domestic law relations within a state.²⁸ For example, ratification of a treaty by a state would impose an obligation on it at an international level, but it would have no effect on the state's domestic law unless the legislature enacted domestic law giving effect to the adopted treaty at the domestic level. In a dualist legal system, in summary, international law is independent from national

²⁴G.A. Res. 40/72 (11 Dec. 1985); G.A. Res. 61/33 (18 Dec. 2006) (revised articles); see MLICA, *supra* note 19.

²⁵Edwin Borchard, *Relation between International Law and Municipal Law*, 27 VA. L. REV. 137 (1940); DINAH SHELTON, *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION* 3 (2011).

²⁶These two theories are very well known in the literature of international law. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31–32 (7th ed. 2011).

²⁷*Id.*

²⁸*Id.*

laws and does not affect rights and obligations at the national level unless domestic legislation is enacted to give effect to the international law in internal legal systems.²⁹

Throughout the twentieth century, international legal scholarship was divided over whether international law and domestic legal orders constitute a single system (monism) or whether each domestic legal system is self-contained, separate from others and from the international system (dualism).³⁰ In the present day, these debates seem to have evaporated, primarily because they failed to provide answers to the many questions raised by current practices.³¹ This failure is shown by the varying ways the NY Convention has been implemented in the domestic legal systems of state parties. For example, some state parties to the NY Convention that are categorised as monist states have nonetheless enacted a domestic law to achieve the same purpose as the NY Convention (REFAA). Some dualist states have enacted a domestic law that regulates REFAA, while at the same time, the national courts have interpreted the provisions of their domestic law by looking to the corresponding provisions of the NY Convention. In further contrast, other dualist states, such as the GCC states, do not refer to the NY Convention in their court decisions on REFAA because its recognition and enforcement occur at the domestic level through national laws.

All these different practices suggest different understandings of the concepts of monism and dualism discussed above. The variation also suggests a level of uncertainty surrounding the ideal interpretative approaches to be adopted by national courts in their decisions involving REFAA.

3.2. The potential gap in the interpretive approach among the courts' decisions on the recognition and enforcement of foreign arbitral awards

The exact form of implementation adopted in a country is partially predictable. For example, as noted above, some states (monist states) consider an international treaty as self-executing once the state has ratified it, and hence do not require domestic legislation to implement the treaty. Most of these states consider international treaties to have hierarchical authority over national laws: their provisions prevail over the texts of national laws in cases of conflict or in cases where the national law violates the provisions of the international treaty. The best example to explain this scenario is that of France. Although the French constitution³² considers international conventions as self-executing, France has enacted a larger domestic law (Code of Civil Procedure) that indirectly incorporates provisions similar to those of the NY Convention (without any reference to the NY Convention). Therefore, in France, the REFAA occurs at the domestic level in addition to the state commitment at international level.

In dualist states, the constitution requires the enactment of domestic law to give the ratified international treaty binding force in the internal legal system. This is, for example, the position adopted by all the GCC states. Some of the GCC states issued a dedicated law called the 'NY

²⁹HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 403 (3d ed. 1959).

³⁰For an introduction to the historical debate, see *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW* 1–56 (Janne Nijman & André Nollkaemper eds., 2007).

³¹*Id.* at 2.

³²"Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party." 1958 CONST. art. 55 (Fr.).

Convention implementing decree' that directly incorporates the NY Convention provisions by attaching the provisions of the NY Convention to the law as a schedule. Qatar and the UAE have used this approach.³³

Other dualist states might incorporate the NY Convention within a larger text, such as an 'Arbitration Law' or a 'Code of Civil Procedure.' For example, in the UK Arbitration Act 1996, the NY Convention is expressly cited within the text of the law.³⁴ Other states have implemented the NY Convention by enacting a Model Law that contains provisions for recognition and enforcement similar to those of the NY Convention but without making explicit reference to the NY Convention. Bahrain and Oman are dualist states that have taken this approach.

Overall, according to the UNCITRAL report, the vast majority of NY Convention states parties have incorporated the provisions of the NY Convention *indirectly* in their national laws, such as through an Arbitration Act, a Code of Civil Procedure, or private international law rules.³⁵ This suggests that in most states, the NY Convention operates through domestic law to further the state commitment at the international level to implement the NY Convention to the REFAA.

In light of this situation, a potential interpretive problem arises during the implementation of the NY Convention provisions at the domestic level. On the one hand, a court is more likely to refer to international rules of interpretation for international treaties if it has to directly interpret the NY Convention provisions. On the other hand, a court is more likely to follow domestic rules of interpretation if it has to interpret the domestic law that regulates the same topic addressed by the NY Convention (REFAA). In the latter case, the court in question might lose sight of the connections between the NY Convention provisions and the relevant domestic law, in the sense that both of them regulate the REFAA. Although it is not necessarily a problem in all state parties to the NY Convention, this potential interpretation problem appears clearly in some GCC national court decisions on the REFAA.

In fact, most of the GCC judgments on the foreign arbitral awards *do not refer* to the NY Convention or its internationally accepted features. This approach creates a sphere of uncertainty regarding the applicability of the NY Convention to REFAA in the GCC states. Given that the NY Convention is a treaty that is correlated with the system of dispute resolution in international trade, having a level of certainty about the judicial acceptance of the NY Convention, including its internationally accepted features, is of utmost importance. The question raised is: how can this be achieved?

The following sub-sections will examine cases from developed arbitration jurisdictions that demonstrate a desirable technique of interpretation for court decisions on the REFAA. In these cases, although the NY Convention operates at the domestic level through domestic law, the judges often reconcile the provisions of the domestic law with the corresponding provisions of the NY Convention, bearing in mind its international features and its overall purpose to facilitate the REFAA. This type of interpretation, referred to

³³Decree No. 29 of 2003 Ratifying the Accession of the State of Qatar to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, <http://www.almeezan.qa/LawPage.aspx?id=1022&language=en>; Federal Decree No. 43 for the Year 2006 Regarding the United Arab Emirates Joining the Convention of New York on Recognition and Enforcement of Foreign Arbitral Awards, <http://www.diac.ae/idias/rules/Newyork/>.

³⁴UK Arbitration Act 1996, c. 23, §§100-104 (Eng.).

³⁵See U.N. Comm'n Int'l Trade L., Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), U.N. Doc. A/CN.9/656 at 8 ¶ 2 (2008).

as “autonomous interpretation,”³⁶ makes the domestic law modelled after or inspired by the NY Convention come to life and gives it meaning.

4. The principle of autonomous interpretation

When domestic law is inspired by an international convention, such as the decrees or arbitration laws that regulate REFAA in the GCC states, autonomous interpretation of the law can be characterised in different ways. An interpretation might be considered “autonomous” if it distances itself from relying only on the meaning provided in the national legal system.³⁷ This may be referred to as a negative definition. Autonomous interpretation can also be defined in a positive way. In this positive sense, the domestic law that emerges from an international convention and its terms and provisions might be interpreted *within the context of the international convention*.³⁸ In other words, the court looks at the texts and purpose of the international convention and does not just rely on the domestic understanding of the texts.³⁹

It is accepted that every national court tends to interpret the texts of the law according to its own legal tradition, even in the situation where the court is required to interpret and apply a national law that emerged from an international convention.⁴⁰ Nevertheless, interpreting national laws that emerged from an international convention is not simply a matter of looking at the provisions and construing such provisions according to domestic principles or domestic literal meaning.⁴¹ At the same time, autonomous interpretation does not mean that the classical methods of interpreting domestic laws, such as looking at their literal meaning in certain legal traditions, are less important, only that domestic elements alone are not enough to assure consistency of interpretation.⁴²

Analysis of the interpretation methods used by courts in some developed arbitration jurisdictions, such as the United Kingdom, European nations, and the United States, reveals that courts in these jurisdictions refer to the provisions and features of the NY Convention when interpreting domestic law that regulates REFAA. In other words, they engage in autonomous interpretation. Such courts often start their interpretation by emphasising the NY Convention provisions, as well as its aims and features.

For example, the High Court in England and Wales engaged in an interpretation that goes to the heart of this discussion. In *Diag Human SE v. The Czech Republic*,⁴³ the court noted that:

[A]lthough the wording of Article V of the Convention [NY Convention] is reflected in s103 of the 1996 Arbitration Act, the latter stands as an **independent statutory provision** ... the effect is that it directly enacts the relevant part of the New York Convention and gives effect to it; **and bearing this in mind**, the statutory language *must* of course be **given an autonomous**

³⁶See, e.g., ROY GOODE ET AL., *TRANSNATIONAL COMMERCIAL LAW: TEXT, CASES, AND MATERIALS* 712–18 (2007); Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, 5 *UNIFORM L. REV.* 683 (2000); Michael Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 *VA. J. INT'L L.* 729 (1987); Christoph Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 *BRIT. Y.B. INT'L L.* 255 (1971); ICCA Guide, *supra* note 16, at 17.

³⁷Gebauer, *supra* note 35, at 684.

³⁸*Id.*; Goode, *supra* note 35, at 717.

³⁹Goode, *supra* note 35, at 713.

⁴⁰Schreuer, *supra* note 35, at 256.

⁴¹Sturley, *supra* note 35, at 743.

⁴²Goode, *supra* note 35, at 717.

⁴³*Diag Human v. Czech*, [2014] EWHC 1639 (Comm).

meaning, which **may** be informed by the *travaux préparatoires* of the New York Convention . . . the decisions on it of foreign courts and the views on it of foreign jurists.⁴⁴

The court in *Diag Human* thus highlighted the autonomy of the section of the UK Arbitration Act, 103, that implemented Article V of the NY Convention. The court then emphasised the international origin of section 103, and stated that it should be interpreted by reference to the preparatory work of the NY Convention and not solely by reference to the domestic understanding of the section's text. The wording of this judgment might be seen as very ambitious within the arbitration community, and it confirms that the English court is implementing the NY Convention even though the NY Convention operates in England through domestic law. As will be shown in the next section of this article, this type of wording is missing in the decisions of the GCC states and no apparent consideration is given to the NY Convention or its features in the wording of judgments in these states.

The French approach to implementing the NY Convention at the domestic level differs from that of England. While the UK arbitration act makes explicit reference to the NY Convention in the text of the law (sections 100–103), the French arbitration law does not refer to the NY Convention in its text. Despite this, the French courts predominantly highlight the provisions and features of the NY Convention in the wording of their judgments on the REFAA. For example, in 1998, the Paris Court of Appeal noted in one decision, "Article 1502 (5) of the France arbitration act (as to the violation of international public policy) is in 'perfect harmony' with Article V (2)(b) of the New York Convention."⁴⁵ This statement confirms that the NY Convention is well implemented in the French legal system even though no direct reference is made to the NY Convention in the French arbitration law. Thus, the court applied an autonomous interpretation that reconciled the French arbitration law with the corresponding provisions of the NY Convention.

In another case, that of *Manufacturer (Slovenia) v. Exclusive Distributor (Germany)*,⁴⁶ the German Court of Appeal noted that:

According to *German law*, an arbitral award only violates public policy under Act V (2) (b) of the New York Convention when it violates a norm that regulates state or economic principles or when it is unacceptably at odds with the German principles of justice. This agrees with the opinion held by a large majority that also from the point of view of public policy, the recognition and enforcement of *foreign* arbitral awards is subject to a *less stringent* regime than is the case with domestic arbitral awards, because there is a *distinction* between national and international public policy.⁴⁷

The German court in this case highlighted the norm of distinguishing between domestic and international public policy, but did so with specific reference to the NY Convention. Importantly, the NY Convention does not include explicit reference to international public policy as a ground for refusal, but the court highlighted this feature as it reflects the widely accepted norm in the practice of international commerce.

⁴⁴*Id.* at 4 ¶ 9 (emphasis in bold added).

⁴⁵Cour d'appel de Paris [Paris Court of Appeal], *Compagnie française d'études et de construction Technip (Technip) v. Entreprise nationale des engrais et des produits phytosanitaires*, 4 Feb. 1998, 97/6929 (emphasis added).

⁴⁶German Court of Appeal, 24 June 1999, *Manufacturer (Slovenia) v. Exclusive Distributor (Germany)*, published in XXIX Yearbook of Commercial Arbitration 687–696 (2004), http://www.arbitration-icca.org/media/3/89885952875741/yb_2004_toc.pdf.

⁴⁷*Id.* at 695 (emphasis added).

Many other courts also highlight other features of the NY Convention while dealing with domestic law that implements the NY Convention. For example, the England and Wales High Court in *Norsk Hydro ASA v. The State Property Funds of Ukraine*⁴⁸ noted that:

There is an important policy interest, reflected in this country's treaty obligations ... However, the task of the enforcing court should be as “mechanistic” as possible, save in connection with threshold requirements for enforcement and the *exclusive grounds* on which enforcement of a New York Convention award may be refused.⁴⁹

The NY Convention does not state that the grounds for refusal are exclusive, but it is understandable from the spirit and purpose of the NY Convention. Similarly, the Federal Court of Australia held that “it considered that the *pro-enforcement bias* of the New York Convention, as reflected *in the Act*, requires that this ground for refusing enforcement not be made available too readily.”⁵⁰

As demonstrated, autonomous interpretation in this context involves a specific technique used to interpret domestic law that emerges from international conventions or to interpret domestic law that regulates the same topic as does an international treaty ratified by the state. In particular, it seems that autonomous interpretation does not require the traditional methods of interpretation of domestic law to be ignored; rather, it requires a combination of the classical method of interpretation and autonomous interpretation.⁵¹ This combination seems to rely on two layers of interpretation. The first is that achieving a domestic understanding of the texts should not be the predominant aim of the interpretation. The second is that the purpose for having the domestic law, and particularly the convention's purposes, are both inherently relevant to the theme of interpretation.⁵²

The autonomous approach is particularly relevant to the NY Convention because the interpretation challenge discussed here comes up in most states. The NY Convention regulates REFAA, and most, if not all, of the NY Convention state parties have enacted domestic law that also regulates REFAA.

4.1. The lack of autonomous interpretation in the GCC interpretative approach

Although there is only a limited amount of published case law on the foreign arbitral awards from the GCC states,⁵³ the GCC judiciaries seem hesitant to use any interpretation approach similar to the approaches described in the foregoing examples from developed arbitration jurisdictions. In the following case law analysis, the arbitral awards were recognised and enforced according to domestic laws that are consistent with the NY Convention.⁵⁴ However, the GCC judiciary cases demonstrate a lack of autonomous

⁴⁸*Norsk Hydro ASA v. The State Property Fund of Ukraine* [2002] EWHC 2120 (UK QBD, Admin. Ct.).

⁴⁹*Id.* ¶ 17 (emphasis added).

⁵⁰*Traxys Europe SA v. Balaji Coke Industry Pvt Ltd.* [2012] 276 Fed. Ct. 25, ¶ 90 (Austl.) (emphasis added).

⁵¹Goode, *supra* note 35, at 718.

⁵²Gebauer, *supra* note 35, at 257.

⁵³One of the challenges is the fact that courts in all the GCC states do not systematically publish their cases, making it hard to track the progress in terms of the concerns about REFAA. Most of the case law examined in this research was either obtained from the courts' secretariats through a personal visit or was published in a limited number of journals that specialise in arbitration practices in the GCC states. What remains to be done is to keep track of cases and developments in the GCC states, and perhaps for the GCC states to create an online case reporting system for publishing case law materials including the case law on arbitration and REFAA.

⁵⁴*See, e.g.*, Kuwaiti Legislative Decree No. (10) of 1978; Bahrain International Commercial Arbitration Act, Law No. (9) for 1994, published in Bahrain Official Gazette No. 2125 for 1994.

interpretation, interpretation that would refer to the NY Convention or highlight the features and spirit of the NY Convention in the texts of the court judgments.

The case of *International Trading and Industrial Investment Company (ITIIC) v. DynCorp Aerospace Technology (DynCorp)*⁵⁵ demonstrates the approach of the Qatari courts regarding the enforcement of foreign arbitral awards. ITIIC obtained an award from a tribunal seated in France under the auspices of the International Chamber of Commerce (ICC). Subsequent proceedings were commenced sequentially in Qatar, the United States, and France either to enforce or set aside the arbitral award. In Qatar, the Qatari Court of Cassation reviewed the merits of the award, and set aside the award on its merits. However, the ITIIC/award creditor succeeded in enforcing the award in the United States,⁵⁶ and the award debtor/DynCorp failed to set aside the award in France.⁵⁷

In deciding the case, the Qatari court did not apply the NY Convention implementing decree while considering the case, even though the case was connected to REFAA.⁵⁸ Nor did the court refer to Article 383 of the Qatari arbitration law, which provides the possibility of accommodating the overlap between the Qatari arbitration law and the NY Convention.

Similarly, in another case, the Bahrain High Civil Court enforced a foreign arbitral award issued in the UAE without referring to the NY Convention.⁵⁹ In a memorandum submitted to the court, the award creditor/claimant sought to recognise and enforce the arbitral award pursuant to the NY Convention and the former Bahraini arbitration law,⁶⁰ which was also based on the MLICA. The award debtor/defendant challenged the enforcement request and argued that the arbitral award suffered from a lack of due process, arguing that the arbitral tribunal had not given a proper opportunity for the defendant to present his case.⁶¹ The court dismissed the debtor/defendant challenge and enforced the arbitral award pursuant to Articles 35–36 of the former arbitration law, which that mirrored articles IV–V of the NY Convention.

Importantly, the Bahraini court did not refer to relevant NY Convention features such as the narrow interpretation of lack of due process claims or pro-enforcement bias; in fact, the court did not refer to the NY Convention at all in the text of the judgment. This kind of interpretation thus reflects a lack of autonomous interpretation, even though the arbitral award was recognised and enforced.

In the case of *Saudi Establishment v. Bahraini Limited Liability Company*,⁶² the Gulf Cooperation Council Arbitration Centre (GCCAC),⁶³ located in Bahrain, issued an arbitral award concerning a dispute

⁵⁵*Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, [2006] 1013 Qatar Court of First Instance, [2006] 631 Qatar Court of Appeal, [2008] 33 Qatar Court of Cassation.

⁵⁶*Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12 (D.D.C. 2011).

⁵⁷Cour d'appel de Paris [Paris Court of Appeal], *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 4 Nov. 2010, 09/17405.

⁵⁸Reza Mohtashami & Merrill Lawry-White, *The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. DynCorp*, 29 J. INT'L ARB. 429, 432 (2012).

⁵⁹*Party v party* [2012] 1470 Bahrain High Civil Court - Chamber 3. This judgment is not published, and the researcher was given the file of the case during the interview study, after the court secretariat redacted the names of the parties.

⁶⁰Bahrain Arbitration Law of 1994. This law was abolished according to the new Bahrain Arbitration Law No. 9/2015, www.newyorkconvention.org/11165/web/files/document/2/o/20911.pdf.

⁶¹See *Party*, supra note 61, at 5–6.

⁶²*Saudi Establishment v. Bahraini Limited Liability Company* [2012] Appeal No. 746 for 2010, published in YEARBOOK FOR COMMERCIAL ARBITRATION (YBCA), Vol XXXVIII for 2013, at 574; see also *Party v. Party* [2012] Appeal No. 101 for 2010 Bahrain Court of Cassation. For further details, see Taha Abdulmawla Taha, *Extent of Recognition by the Bahraini Court of Cassation of the GCC Commercial Arbitration Centre Arbitral Awards*, 1 BCDR INT'L ARB. REV. 17 (2014) (in Arabic); Hassan Ali Radhi, *International Arbitration and Enforcement of Arbitration Awards in Bahrain*, 1 BCDR INT'L ARB. REV. 29 (2014) (in English).

⁶³See the GCC Commercial Arbitration Centre official website: <http://www.gccac.org/en> (last visited July 2015).

between Bahraini and Saudi parties. The arbitration in this case was seated in the Kingdom of Saudi Arabia, and recognition and enforcement of the arbitral award was sought through the Bahraini courts. The Bahraini party challenged the enforcement request pursuant to Act Number 6 for 2000, which implemented the GCCAC charter and arbitration rules in Bahrain's legal system and provided for more favourable room for enforcement than the NY Convention.⁶⁴ The Bahrain Court of Cassation recognised and enforced the arbitral award and confirmed that if an award is issued by the GCCAC, then superiority is given to the GCCAC implementing law.⁶⁵ The text of the judgment did not refer to the NY Convention, particularly Article VII (1), which allows national courts to recognise and enforce an arbitral award according to the more favourable national law.

In another case, the Kuwait Court of Cassation enforced a foreign arbitral award issued in Bahrain without referring to the NY Convention or its features in the text of the judgment.⁶⁶ The arbitral award in question was issued in Bahrain by the GCCAC and recognition and enforcement were sought through the Kuwaiti courts. The award debtor challenged the enforcement request on the grounds that the arbitral award was issued under the name of the Bahraini king and thus the recognition and enforcement of the arbitral award would violate the state public policy.⁶⁷ However, the Kuwait Court of Cassation held that this reason should not be considered as grounds for refusal under Law No. 14 for 2002, which implemented the GCCAC charter and arbitration rules in the Kuwaiti legal system.⁶⁸ Ultimately, the Court of Cassation recognised and enforced the arbitral award without referring to the NY Convention, or the feature of exclusive grounds for refusal, or Article VII (1) of the NY Convention.

The foregoing analysis of the judicial practices of some GCC national courts demonstrates why there is increasing uncertainty regarding the acceptance of the NY Convention in the GCC states, including its internationally recognised features such as pro-enforcement bias and narrow interpretation of the grounds for refusal. One could argue that the reason behind the emerging perception that the GCC judiciaries constitute a barrier to REFAA⁶⁹ is that REFAA does occur in the GCC states, but through reference to domestic laws rather than the NY convention. This approach does not pose a problem in and of itself. However, it may raise concern about the applicability of the NY Convention and its internationally accepted features to REFAA.

As explained earlier in this article, in most state parties to the NY Convention, either dualist or monist states, REFAA occurs by reference to both domestic law and the state obligation at the international level to recognise and enforce the foreign arbitral award. Use of a different interpretative approach in a case that involves application of the NY Convention at the domestic level is problematic. Specifically, with

⁶⁴In 1993 the Gulf Cooperation Council (GCC) established a regional arbitration institution called the Gulf Cooperation Council Commercial Arbitration Centre (GCCAC). The charter and arbitration procedure rules of this arbitration institution have been incorporated in the domestic legal systems of all six GCC states. Some GCC states have enacted domestic law that implements the GCCAC charter and arbitral procedure, and others have issued government resolutions. Bahrain: Bahrain Legislative Decree No (6) for 2000, in Agreeing on the Accession to the Charter of the GCC Commercial Arbitration Centre, published in Bahrain Official Gazette No. 2422 for 2000; Kuwait: Law No. (14) for 2002; Oman: Council of Ministers Resolution No: 10/2000 for 2000; Qatar: Council of Ministers Resolution No. (29) for 2001; Saudi Arabia: Council of Ministers Resolution No. (102) for 2002; UAE: Council of Ministers Resolution No. (5) for 2001.

⁶⁵Taha, *supra* note 64, at 25.

⁶⁶*Party v Party* [2008] Appeal No. 668–2006, Kuwait Court of Cassation (*referenced, with names redacted, in* Rashid Hamad AlAnezi, *Enforcement of Foreign Arbitral Awards in Kuwait*, 1 BCDR INT'L ARB. REV. 85 (2014)).

⁶⁷*Id.*

⁶⁸See Law No. 14, *supra* note 66.

⁶⁹Almutawa & Maniruzzaman, *supra* note 10, at 25, 28; Al Tamimi, *supra* note 10, at 99.

regard to the GCC court decisions concerning foreign arbitral awards, it seems that the courts have been losing sight of the connection between the NY Convention provisions and the relevant domestic law, particularly in failing to acknowledge that both of them regulate REFAA.

Therefore, the lack of autonomous interpretation in the GCC courts decisions concerning REFAA makes the NY Convention appear to be merely an international act that the GCC states are willing to be bound by, but that will not impact judicial decisions concerning REFAA. This creates a sphere of uncertainty about whether the GCC states take into consideration the reality that the purpose of the NY Convention is to facilitate REFAA.

This article suggests that it may well be important for the GCC national courts to consider the principle of autonomous interpretation and interpret arbitration law in the context of the NY Convention. The NY Convention is a treaty connected with the predominant system of dispute resolution in international trade, which is arbitration. Highlighting the provisions and features of the NY Convention in the wording of the GCC judgments on REFAA would have a positive impact on perceptions regarding the acceptance of the NY Convention in the GCC states. Otherwise, the ratification of the NY Convention by GCC states might be seen as an act whereby a state indicates its consent to be bound to the NY Convention, but does not, in fact, change its judicial practices to achieve the convention's purpose.

5. Conclusion

The NY Convention is a treaty whose goal is to encourage the recognition and enforcement of the most successful system of dispute resolution in international trade: arbitration. Highlighting the provisions and features of the NY Convention in the wording of the GCC judgments on REFAA would have a positive impact on the level of certainty regarding whether there is genuine acceptance of the NY Convention in the GCC legal systems. It is understandable that the NY Convention operates in the GCC states through a dualist approach, whereby domestic laws regulate recognition and enforcement of foreign arbitral awards in order to further the state commitment at the international level to apply the provisions of the NY Convention on the recognition and enforcement of foreign arbitral awards. However, the case law analysis in this article reveals that the GCC judiciaries have not demonstrated familiarity with the important role of the NY Convention in the field of recognition and enforcement of foreign arbitral awards.

In the GCC cases discussed here, neither the NY Convention nor its internationally accepted features (pro-enforcement bias, narrow interpretation of the grounds for refusal, exclusive grounds for refusal) were referenced in the texts of the judgments. This omission contrasts with cases in most of the developed arbitration jurisdictions where the NY Convention also operates at the domestic level through domestic laws; the judiciaries in these countries have commonly adopted an autonomous interpretation and interpret the domestic law (arbitration law) in the context of the spirit and purpose of the NY Convention. The omission also leaves the question of whether the GCC courts recognize or accept the NY Convention as an essential international treaty in the world of arbitration with an uncertain answer. It also suggests that the GCC states are not consistently helping promote the flow of international arbitration as a means of dispute resolution. The clash between applying the local law or the NY Convention is not only unacceptable, it also might damage the private sector and weaken the operation of arbitration in the GCC states.

The judiciary of any state plays a significant role in the success of international commercial arbitration practices. It is the gateway for arbitration to enter any country and flourish. Hence, any sort of proposal to enhance the system of recognition and enforcement of foreign arbitral awards in GCC states must take into account the critical need for GCC judiciaries to be familiar with arbitration practice generally and the NY Convention in particular.
