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A CRITIQUE OF THE APPROACH OF THE GULF COOPERATION COUNCIL STATES TO CHOICE OF COURT AGREEMENTS WITH REFERENCE TO THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

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DECLARATION OF AUTHENCITY AND AUTHOR'S RIGHT

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

Signed: ……

Hasan Alrashid

20 of August 2018

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ABSTRACT

Proper regulation of the recognition of choice of court agreements can provide significant advantages for the parties in international business transactions. Effective rules governing the recognition of choice of court agreements allow the parties to litigate before the court of their choice and may oblige a non-chosen court to decline jurisdiction in favour of the chosen court. Therefore, the recognition of choice of court agreements by national courts promotes legal certainty and predictability for the parties, avoids parallel litigation and inconsistent judgments and reduces litigation costs. Choice of court agreements are a fundamental concept in private international law that seeks to ensure that the parties' expectations are met and that their intentions are fulfilled. In 2005, the approach to dealing with choice of court agreements, both at the litigation stage and at the recognition of foreign judgments stage in a commercial context, was harmonised by the global Hague Convention on Choice of Court Agreements, which entered into force on 1 October 2015 and is currently applicable in 31 countries. It seeks to ensure legal certainty and predictability between parties in international business transactions.

Even though the recognition of choice of court agreements is an important consideration in international business transactions, it will be demonstrated that the rules governing the recognition of choice of court agreements in the Gulf Cooperation Council States, which consist of Kuwait, The Kingdom of Saudi Arabia, the United Arab Emirates, Oman, The Kingdom of Bahrain and Qatar, are limited and problematic for the contracting parties and might not be conducive to facilitating and encouraging international business transactions. Therefore, the underlying research question of this study considers the extent to which the current legal regimes for recognition of choice of court agreements in the GCC States is conducive to facilitating and encouraging international business in those States, by enabling the parties to avoid the risks of uncertainty and unpredictability, parallel litigation and inconsistent judgments in their international business transactions, and how the legal situation can be improved by ratifying the 2005 Hague Convention and by modernising their rules as they apply to choice of court agreements.

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LIST OF ABBREVIATIONS

	Abbreviation	Wording
1	B2B	Business-to-Business
2	B2C	Business-to-Consumer
3	BCDR	Bahrain Chamber for Dispute Resolution Court
4	C2C	Consumer-to-Consumer
5	DIFC	Dubai International Financial Centre Courts
6	ECJ	European Court of Justice
7	EJDJN	Enforcement of Judgment Delegations and Judicial Notices
8	EU	European Union
9	FTA	Free Trade Agreement
10	GATT	General Agreement on Tariffs and Trade
11	GCC	The Cooperation Council for the Arab States of the Gulf
12	GDP	Gross Domestic Product
13	HCCH	Hague Conference on Private International Law
14	ICC	International Chamber of Commerce
15	ICSID	International Centre for the Settlement of Investment Disputes
16	UAE	The United Arab Emirates
17	UDHR	The Universal Declaration of Human Rights 1948
18	US	The United States
19	WTO	The World Trade Organisation

CHAPTER 1: INTRODUCTION

1.1 The Central Issue of the Thesis

Private international law regulates individuals' relationships that involve a foreign element[1] in three core areas: determining what forum is available to hear a particular case (jurisdiction rules), what substantive law applies in deciding a particular case (choice of law rules) and which courts can enforce any resulting judgment (recognition and enforcement of foreign judgments rules).[2] The particular focus of this thesis is in relation to rules of jurisdiction. Determining whether a state has jurisdiction over a dispute has traditionally depended on territorial sovereignty. As Buxbaum stresses:

> Private international law … is based on principles of territorial sovereignty and equality among sovereigns. It assumes that each state has the authority to regulate persons and activities within its borders, and that the laws and actions of one state can have no direct effect on another.[3]

Territorial sovereignty is used to exercise jurisdiction, because jurisdiction is viewed as a state activity[4] and a manifestation of state sovereignty.[5] As Lord Macmillan said, 'it is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits.' [6] These territorial principles in exercising jurisdiction date back to an era in which transactions rarely crossed state

[1] In the context of private international law, a foreign element refers to a contact with another system of law other than the forum; for example, the nationality of one of the parties may be foreign to the forum, or the contract may have been made or intended to be performed in a foreign country, see Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 3.
[2] T Hartley, 'The Modern Approach to Private International Law: International Litigation and Transaction from a Common-Law Perspective (vol 319)' in *Collected Courses of the Hague Academy of International Law* (Brill 2006) 23; Clarkson and Hill, *The Conflict of Laws* (4th edn, OUP 2011) 9; Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009) 3.
[3] Hannah L Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance* (2002) 42 Va J Intl L 931, 932.
[4] FA Mann, 'The Doctrine of Jurisdiction in International Law (vol 111)' in *Collected Courses of the Hague Academy of International Law* (Brill 1964) 73.
[5] DW Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 BIYL 1, 1.
[6] Mann (n 4) 632.

boundaries due to the lack of modern transportation and technology.[7] However, in the late twentieth century, international business transactions and trade grew significantly due to the emergence of technology and the development of the means of communication and transportation.[8] Furthermore, the General Agreement on Tariffs and Trade (GATT)[9] and later the World Trade Organisation (WTO)[10] and the 1980 Vienna Sale of Goods Convention[11] have contributed to the increase of international business transactions,[12] which has in turn led to an increase in international business disputes and claims.[13] It has been argued that one of the legal difficulties that international businesses face is 'litigation risk'.[14] This refers to the risk that there will be a lack of certainty and predictability about which court will settle any dispute, since the nature of international business transactions is such that the parties or the contract may be connected to more than one state, so that according to the principles of territorial sovereignty, more than one state could be interested in asserting jurisdiction over the dispute.[15]

Academic scholars believe that regulating and recognising the concept of party autonomy in choice of court agreements might minimise the litigation risk,[16] as the

[7] Stewart E Sterk, 'Personal Jurisdiction and Choice of Law' (2012) 98 Iowa L Rev 1163, 107.
[8] Edward CY Lau, 'Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments' (2000) 6 Ann Surv Intl & Comp 13, 14; Ronald Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press 2008) 3.
[9] General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 187 (GATT).
[10] ibid.
[11] United Nations Convention on Contracts for the International Sale of Goods (CISG) (11 April 1980) 1489 UNTS 3 (Vienna Convention).
[12] Ronald A Brand, 'Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law' in J Bhandari and A Syke (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press 1997) 592–641, 593; Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press on Demand 2003) 3.
[13] Lau (n 8) 13; Ronald Brand and Paul Herrup (n 8) 3.
[14] Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) 3; Trevor Hartley, *Choice-of-court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention and the Hague Convention* (Oxford University Press 2013) 4.
[15] Jeffrey Talpis and Nick Krnjevic, 'The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to a Mouse' (20060 13 Sw JL & Trade Am 5.
[16] Fentiman (n 14) 9; Hartley, *Choice-of-court* (n 14) 4; Bell (n 12) 276; JT Brittain, 'Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity' (2000) 23 Hous J Intl L 305, 306; Deborah A Laurent, 'Foreign Jurisdiction and Arbitration Clauses in the New Zealand Maritime Context' (2007) 21 Austl & NZ Mar LJ 121, 124; William W Park, 'Neutrality, Predictability and Economic Co-

recognition of the rules providing for recognition of choice of court agreements would allow the parties to choose where to litigate and may oblige every court other than the chosen court to decline jurisdiction in favour of the chosen court. Party autonomy in choice of court agreements has been regarded as an important concept in private international law that seeks to ensure that the parties' expectations are met, and their intentions are fulfilled.[17]

Traditionally, developed countries were not willing to recognise choice of court agreements in favour of the courts of other legal systems due to the traditional view that exercising jurisdiction was a manifestation of state sovereignty and activity, which cannot be overlooked or ignored by the parties to a contract.[18] However, over the years the importance[19] of recognising choice of court agreements in international business transactions and the increasing number of these transactions have led developed countries to pay closer attention to this aspect of dispute resolution.[20] Developed countries have become increasingly keen to regulate, via their jurisdiction rules, the recognition of choice of court agreements to reduce the risk of litigation by minimising uncertainty and unpredictability for parties in their international business transactions.[21] Furthermore, in 2005, the approach to the recognition of choice of court agreements and foreign judgments in a commercial context was harmonised

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operation' (1995) 12 J Intl Arb 199; Francisco J Alférez Garcimartín, 'Regulatory Competition: a Private International Law Approach' (1999) 8 European Journal of Law and Economics 3, 251–270, 255.

[17] Clarkson and Hill (n 2) 9; Mills (n 2) 8.

[18] Nygh, *Autonomy in International Contracts* (OUP 1999) 19; T Hartley, The Modern Approach (n 2); see also United Kingdom cases in which courts disregarded choice of court agreements and refused to decline jurisdiction in favour of the chosen court by arguing that 'no persons in this country can by agreement between themselves exclude themselves from the jurisdiction of the king's courts'; *Gienar v Meyer* (1878) LR 8 Ch 26 (CA) and also *The Athenee* [1922] LI LR 6; see also United States cases in which American courts refused to decline jurisdiction in favour of the chosen court: *Nute v Hamilton Mutual Insurance Co* (1856) 72 Mass 174.

[19] The importance and the role of choice of court agreements in international business transactions will be discussed in detail in chapter two.

[20] See in the United Kingdom, *The Eleftheria* [1969] 2 All ER 641; *Aratra Potato Co Ltd v Egyptian Navigation Co* (The El Amria) [1981] Lloyd's Rep 119, CA; New Zealand case law followed *The Eleftheria* in *Apple Computer Inc v Apple Corp SA* [1990] 2 NZLR 598; in the United States *M/S Bremen and Unterweser Reederei GmbH v Zapata Off-shore Co* (1972) 407 US 1; and in Canada ZI *Pompey v ECU-Line* NV (2003) SCC 27 and Brussels Recast, Article 25: 'if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)'.

[21] *Bremen* case (n 20) 2–3.

by the global 2005 Hague Convention on Choice of Court Agreements (the 2005 Hague Convention).[22] The 2005 Hague Convention seeks to ensure legal certainty and predictability between parties in international business transactions by harmonising the rules on choice of court agreements at the international level between parties to commercial transactions, and it governs the recognition and enforcement of judgments resulting from proceedings based on such agreements.[23]

Even though the recognition of choice of court agreements is an important consideration in international business transactions, it will be demonstrated that the rules governing the recognition of choice of court agreements in the Gulf Cooperation Council States (GCC States),[24] which consist of Kuwait, The Kingdom of Saudi Arabia, the United Arab Emirates, Oman, The Kingdom of Bahrain and Qatar, are problematic and might not serve the interests of the parties in their international business transactions, and may not be conducive to facilitating and encouraging international business. The reason behind that, as will be demonstrated through the thesis, is that the GCC States are still influenced by the traditional belief that jurisdiction is a matter for the state, and it represents a manifestation of state sovereignty that cannot be overlooked or ignored by the parties to a contract. A review of judicial judgments in the GCC States to date has revealed that several cases have appeared before courts in different GCC States regarding the recognition of choice of court agreements.[25] In all of these cases, when the forum was not the chosen court, the courts

[22] Hague Convention on Choice of Court Agreements (30 June 2005) 44 ILM 1294.
[23] The Recital of the 2005 Hague Convention.
[24] On 25 May 1981 Kuwait, Saudi Arabia, United Arab Emirates, Oman and Qatar formed a cooperation council that aims to have cooperation between these six states in many aspects whether legally, socially, economically, politically and military. See the Charter of the Gulf Cooperation Council at its official website < http://www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx> accessed 1 January 2018.
[25] See Kuwait Cassation Court decisions no 1232/2004 Commercial 12/6/2007; Cassation Court decision no 1175/ 2005 Commercial 03/4/2007; Cassation Court decision no 436/2006 Civil 21/5/2006; Cassation Court decision no 448/2000 Commercial 30/4/2001; Cassation Court decision no 316, 318/97 and Commercial 24/5/1998; decision no 38/74 21/5/1975. Also see United Arab Emirates States Cassation Court decisions, Abu Dhabi Cassation Court decision no 674/2012 Commercial 28/3/2013; Abu Dhabi Cassation Court decision no 747/2012 Commercial 17/7/2013; Abu Dhabi Cassation Court decision no 719/2011 Commercial 10/5/2012;

regarded the choice of court agreement as a direct assault on state authority and sovereignty, refused categorically to recognise them, and refused to decline proceedings in favour of the chosen court.

This thesis argues that applying strict territorial principles in exercising jurisdiction in the GCC States creates uncertainty and unpredictability in international business transactions and might has a negative impact upon international trade and commerce in those States. It will assert that the ideas of territorial sovereignty are not compatible with trading conditions in the twenty-first century, when the volume of international business has grown significantly due to the emergence of technology and the development of means of communication and transportation. The thesis will suggest that the approach of the courts and legislations in the GCC States to the recognition of choice of court agreements needs to be regulated and improved if litigation risks are to be avoided and parties are to benefit from legal certainty and predictability in their international business transactions. Chapter two discussed in detail the concept of party autonomy in choice of court agreements and how applying effective rules regarding exercising and declining jurisdiction based on the concept of party autonomy of choice of court agreements can minimise litigation risks for the parties in their international business transactions.[26] Chapter three will discuss how the GCC States regulate when jurisdiction can be exercised or declined based on the concept of party autonomy underlying choice of court agreements and how their regulations might have a negative impact upon international business transactions.[27] The thesis will also refer in chapter six to the 2005 Hague Convention to evaluate the feasibility and desirability of incorporating into those States' legal systems provisions for the recognition of party autonomy with regard to the choice of court.

Dubai Cassation Court decisions no 72/2011, 7/6/2011; Dubai Cassation Court decision no 143/2010, 2/1/2011 and Dubai Cassation Court decision no 79/2002, 12/5/2002.

[26] See chapter two of this thesis.

[27] See chapter three section 3.3.1, 3.3.2, 3.3.3 and 3.4.

According to the above discussion, the underlying research question of this study considers the extent to which the current legal regimes for recognition of choice of court agreements in the GCC States is conducive to facilitating and encouraging international business in those States by enabling the parties to avoid the risks of uncertainty and unpredictability, parallel litigation and inconsistent judgments in their international business transactions and how the legal situation can be improved by ratifying the 2005 Hague Convention and by modernising their rules as they apply to choice of court agreements.

1.2 The Importance of the Thesis

Since the mid-twentieth century, when oil was discovered in the GCC States and started to be exported, the economy of the GCC States has depended mainly on the revenues derived from the sale of oil.[28] However, after repeated oil crises,[29] the GCC States realised the need to diversify the sources of income contributing to their Gross Domestic Product (GDP) rather than rely solely on this one source.[30] Hence, the GCC States established a serious plan to gradually reduce their dependence on oil as a source of GDP. In 1995, Oman announced Oman Vision 2020,[31] Kuwait in 2010 established the Development Plan,[32] the United Arab

[28] Matteo Legrenzi and Bessma Momani (eds), *Shifting Geo-economic Power of the Gulf: Oil, Finance and Institutions* (Ashgate Publishing 2011) 1; International Monetary Fund, 'Economic Diversification in Oil-Exporting Arab Countries' (IMF Report of Annual Meeting of Arab Ministers of Finance, Manama, Bahrain 2016) 8 and Abdulaziz Alrasheed, *The History of Kuwait* (Dar Maktaba Al-Hiat 1987) 72.

[29] This is especially true with regard to the recent crisis in 2015, when the price of oil fell by 49% compared with 2014, see United Arab Emirates, 'Annual Economy Report 2006 (24th edn, Ministry of Economy of UAE) <http://www.economy.gov.ae/Publications/MOE%20Anual%20Repoert%20English%202016.pdf> accessed 1 January 2018.

[30] Several studies and workshops have been done on the importance of diversity income in the GCC States, such as Martin Hvidt, 'Economic Diversification in the Gulf Arab States: Lip service or Actual Implementation of a New Development Model?' in M Legrenzi and B Momani (eds), *Shifting Geo-Economic Power of the Gulf: Oil, Finance and Institutions* (Ashgate Publishing Ltd 2011) 39–54; 'Economic Diversification in GCC Countries: Past record and future trends' (LSE Report 2013); World Bank, 'Sustaining Fiscal Reforms in the Long-term' (2017) 1 Gulf Economic Monitor Report; Kristin Coates Ulrichsen, 'Economic Diversification in Gulf Cooperation Council (GCC) States' (Paper, Rice University Baker Institute for Public Policy June 2017).

[31] Oman Vision 2020 (English) <https://www2.deloitte.com/content/dam/Deloitte/xe/Documents/About-Deloitte/mepovdocuments/mepov12/dtme_mepov12_Oman2020vision.pdf> accessed 1 January 2018.

[32] Kuwait Development Plan (English) < http://www.newkuwait.gov.kw/en/> accessed 1 January 2018.

Emirates in 2010 launched UAE Vision 2021,[33] in 2008 Bahrain launched Bahrain Economic Vision 2030,[34] and Saudi Arabia in 2016 established Saudi Vision 2030.[35]

All of these plans stress the importance of enhancing the private sector and encouraging international trade and investment to contribute to financing the economy.[36] The importance of an effective legal framework for the facilitation of international trade and investment is widely acknowledged in an increasingly economically interdependent world. Chapter two will consider in detail why and how providing adequate recognition of choice of court agreements has significant impact upon international trade and commerce. Therefore, the GCC States' economic development plans lend considerable importance to the study of the possibility of improving the recognition of choice of court agreements in the GCC States to improve the international litigation rules and, thereby, enhance the predictability and certainty of litigation measures in international business transactions.

More importantly, in June 2011, the first Gulf Judicial Seminar on Cross-Frontier Legal Cooperation in Civil and Commercial Matters was held in Doha, Qatar.[37] The Permanent Bureau of the Hague Conference attended the conference and invited the GCC States to adopt some of the Hague Conventions. One of these was the 2005 Hague Convention on Choice of Court Agreements.[38] One of the recommendations of the conference was that the GCC States should research 'the benefits of predictability and legal certainty provided by the 2005 Hague Convention and its resulting advantages for cross-

[33] UAE Vision 2021 (English) < https://www.vision2021.ae/en> accessed 1 January 2018.
[34] Bahrain, 'Economic 2030 Vision' (English) <https://www.bahrain.bh/wps/portal/ > accessed 1 January 2018.
[35] Saudi Vision 2030 (English) < http://vision2030.gov.sa/en> accessed 1 January 2018.
[36] See Oman Vision (n 29) points 2 and 3; Kuwait Development Plan (n 30) in chapter 'Goals and Aims'; UAE Vision 2021 (n 31) 12; Bahrain Economic Vision (n 32) 7; Saudi Vision 2030 (n 33) 5.
[37] First Gulf Judicial Seminar on Cross-Frontier Legal Cooperation in Civil and Commercial Matters (Doha, Qatar, 20–22 June 2011) <https://www.hcch.net/en/news-archive/details/?varevent=225> accessed 1 November 2016.
[38] Hague Convention on Choice of Court Agreements.

border trade and investment' [39] to consider possible adoption of the 2005 Hague Convention.[40]

Also, in 2016, the Dubai International Financial Centre Court (DIFC Court) [41] established the Strategic Plan 2016–2021.[42] One of the aims of the DIFC's strategic plan is to encourage the UAE Federal Government to sign and ratify the 2005 Hague Convention because of its importance in facilitating international business disputes.[43]

To the best of the author's knowledge, up to the current date no study has been carried out in the GCC States to consider the benefits of predictability and legal certainty in international business transactions by improving the recognition of choice of court agreements in general, or the feasibility and desirability of becoming a party to the 2005 Hague Convention in particular. In contrast, there has been considerable research and numerous literature including books,[44] articles[45] and PhD theses,[46] about the importance of recognising arbitration agreements and arbitral awards in the GCC States to provide parties

[39] The Gulf Judicial Seminar recommendations (n 37) 3.
[40] ibid.
[41] The DIFC Court is considered in detail in chapter five.
[42] See DIFC Strategic Plan (2016–2021) 13 (English) < http://difccourts.ae/difc-courts-strategic-plan-2016-2021/> accessed 7 September 2017.
[43] ibid point 9, 28.
[44] See Ahmad Alsamdan, *International Arbitration and Foreign Arbitration in Kuwati Private International Law* (1999); Jalal El-Ahdab, *Arbitration with the Arab countries* (Kluwer Law International 2011); Samir Saleh, *Commercial Arbitration in the Arab Middle East: Jordan, Kuwait, Bahrain, and Saudi Arabia* (Lexgulf Publishers 2012); Reyadh Mohamed Seyadi, *The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States* (Cambridge Scholars Publishing 2019).
[45] See William M Ballantyne, 'Arbitration in the Gulf States: Delocalisation: A Short Comparative Study' (1986) ALQ 205–215; Samir Saleh, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' in JDM Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 340–352; Richard Kreindler, 'An Overview of the Arbitration Rules of the Recently Established GCC Commercial Arbitration centre, Bahrain' (1997) 12 ALQ 1, 3–25; Jalila Sayed Ahmed, 'Enforcement of Foreign Judgments in Some Arab Countries-Legal Provisions and Court Precedents: Focus on Bahrain' (1999) 14 ALQ 2, 169–176; Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 American Journal of International Law 3, 643–656; Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2007) 5 Santa Clara J Intl L.
[46] See Abdullah Mubarak Aldelmany Alenezi, 'An Analytical Study of Recognition and Enforcement of Foreign Arbitral Awards in The GCC States' (PhD thesis, University of Stirling 2010); Faisal MA Al-Fadhel, 'Party Autonomy and the Role of the Courts in Saudi Arbitration Law with Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL model law' (PhD thesis, Queen Mary University 2010); Mohamed Saud Al-Enazi, 'Grounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in GCC States Law' (PhD thesis, Brunel University 2013); Ahmed Mohd Almutawa, 'Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council' (PhD thesis, University of Portsmouth 2014).

greater legal certainty and predictability in their international business transactions. However, as will be discussed in chapter two, parties to international business transactions might wish to settle their dispute through litigation rather than arbitration mechanisms, which therefore makes choice of court agreements significant as a dispute resolution method for those parties.

Accordingly, the absence of any study on the recognition of choice of court agreements in the GCC States and the recommendation of the Qatar conference and the DIFC's strategic plan lends considerable importance to the present study of the possibility of securing recognition of choice of court agreements in the GCC States by amending their international litigation rules or adopting the 2005 Hague Convention to enhance the predictability and certainty of litigation as a form of international dispute resolution.

1.3 Scope

The concept of party autonomy is embodied in jurisdiction rules as well as in choice of law rules across many legal systems.[47] The former regulate the freedom of the parties to choose the applicable forum, namely whether in judicial, ie choice of court agreements or in arbitral ie arbitration agreements.[48] The latter regulate the freedom of the parties to choose the applicable law (choice of law agreements).[49] The focus of this thesis is primarily on choice of court agreements and specifically on the rules of choice of court in the GCC States as it is impossible to cover the subject of party autonomy in all areas be it in litigation, arbitration and choice of law. The last two areas could be the subject of further research. However, an understanding of choice of arbitration agreements is necessary for the context of this thesis, because, as will be analysed in chapter two, both of these two resolution methods provide legal certainty and predictability for the parties in international business transactions. The recognition of both agreements would permit the parties to choose the forum to settle their

[47] Nygh (n 18) 13; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 10; Hartley, *Choice-of-court* (n 14) 4.
[48] ibid Nygh; Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 1.
[49] ibid Nygh 15; Briggs 10.

dispute and could lead to the exclusion of the jurisdiction of the state which would otherwise have jurisdiction.

Party autonomy in choice of court agreements applies in the context of civil and commercial matters, tort law[50] and even family law.[51] For the purposes of this thesis, rules in relation to choice of court agreements will be considered only in the context of civil and commercial matters.

This thesis will also consider the rules for the recognition and enforcement of foreign judgments, as they can help to improve the effectiveness of choice of court agreements in two ways.[52] First, such rules facilitate the recognition and enforcement of a foreign judgment delivered by the chosen court.[53] Secondly, under these rules, a foreign judgment delivered by a non-chosen court in breach of a choice of court agreement may neither be recognised nor enforced.[54] It is important to consider these rules, as ultimately any judgment delivered by the chosen court needs to be enforced. Otherwise the whole procedure has no practical value to the parties. The 2005 Hague Convention seeks to harmonise the rules that govern choice of court agreements and the rules that govern recognition and enforcement of foreign judgments where the parties have entered into such an agreement. Thus, examination of the rules of recognition and enforcement of foreign judgments in relation to choice of court agreements is necessary for the purposes of this thesis. To achieve its aims, this thesis will focus on the rules of choice of court agreements and any resulting judgments under current GCC States' legislation, regional conventions on recognition and enforcement foreign judgments of which

[50] For example, under the Rome II Regulation (2007) Art 14.
[51] See Janeen Carruthers, 'Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?' (2012) 61 ICLQ 881.
[52] T Hartley and M Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013) 791 <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=3> accessed 1 January 2018.
[53] Tang (n 48) 224.
[54] ibid.

the GCC States are members,[55] and the 2005 Hague Convention of which the GCC States are not yet members.

Although this thesis considers the recognition of choice of court agreements in the GCC States, Qatar, which is a member of the GCC, has been excluded from the scope of this thesis, because Qatar has no legislation covering jurisdiction rules. The Qatari courts apply what they claim to be general principles of law regarding jurisdiction that are accepted internationally.[56] However, it is not clear what is meant in this context by general principles, because there are no accepted general principles worldwide. Each country has its own jurisdiction rules, except where there is an international or regional convention.[57] Qatar is not a member of any convention that harmonises the rules on international jurisdiction. Furthermore, access to Qatari judgments is difficult, as they are unavailable to the public. Therefore, it is difficult to know exactly what general common international rules of jurisdiction Qatar applies in private international disputes. Consequently, it is not possible to determine Qatar's approach to choice of court agreements. Therefore, Qatar will be excluded from the scope of this thesis. Thus, for the purposes of this thesis, the term 'GCC States' will henceforth refer only to Kuwait, The Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain and Oman.

It is important to stress at the outset that, although the GCC States' legal systems are influenced by Islamic or Sharia law,[58] this thesis will not involve a consideration of Sharia

[55] The GCC States are members of two regional conventions that harmonise the recognition and enforcement rules of foreign judgments at the regional level. The first is the League of Arab States Riyadh Arab Agreement for Judicial Cooperation (6 April 1983) <http://www.refworld.org/docid/3ae6b38d8.html> accessed 17 December 2018; second, the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States (1995) <http://arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf> accessed 17 December 2018. Both conventions are considered in detail in chapter six.

[56] Qatar Cassation Court decision no 226/ 2012 Civil and Commercial.

[57] Hartley, The Modern Approach (n 2) 3.

[58] Art 2 of the Kuwait Constitution 1962 provides that Sharia law is a main source of legislation (English) <https://www.constituteproject.org/constitution/Kuwait_1992?lang=en> accessed 24 January 2018; similar provisions can be found in the Bahrain Constitution 1973 as amended 2002 art 2; the Oman Constitution 1996 as amended 2011 art 2; the United Arab Emirates Constitution 1971 as amended 2004 art 7; see also WM Ballantyne, 'The States of the GCC: Sources of Law, the Sharia and the Extent to which it Applies' (1985) ALQ

law. It will not explore whether recognition of choice of court agreements would be compatible with the primary sources of Sharia law, which are the *Holy Qur'an*[59] and the *Sunna,*[60] because, first, the constitutions of each GCC State (except Saudi Arabia)[61] provide that Sharia law is a main source of legislation[62] rather than the *only* source of legislation. This means that the legislation can be derived either from a Sharia law or any other law.[63] Thus, recognition of choice of court agreements does not necessarily have to be compatible with Sharia law to be recognised in the GCC States. Secondly, according to a study on the recognition of choice of court agreements from a Sharia law perspective,[64] the only potential conflict between the recognition of choice of court agreements and Sharia law is whether a Muslim party can exclude the domestic court from settling a dispute and choose a foreign court with non-Muslim judges.[65] However, such an issue does not seem to exist in the GCC States for several reasons. First, as will be considered in chapter three, the non-recognition of choice of court agreements in the GCC States does not relate to the issue of excluding Islamic judges and litigating before non-Islamic judges.[66] Secondly, none of the GCC States require the parties who have opted for arbitration to choose Muslim arbitrators to settle their

3–18; Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates: A Detailed Guide to Litigation and Arbitration in the United Arab Emirates Based on Federal Laws, Laws Specific to the Individual Emirates, Judgments Delivered by the Court of Cassation and International Conventions to which the United Arab Emirates is a Member* (Kluwer Law International 2003) 5 and Hassan Ali Radhi, *Judiciary and Arbitration in Bahrain: a historical and analytical study* (Vol. 25. Brill, 2003) 16.

[59] The *Holy Qur'an* is divided into 30 Juza (parts), 114 Surahs (chapters) and 6,236 Ayah (verses). The Holy Qur'an is the first primary source of the Sharia.

[60] The *Sunna*, which is regarded as the second primary source of the Sharia, constitutes the Prophet Muhammad's (PBUH) sayings and traditions as recorded into what is known as the Hadith.

[61] In Saudi Arabia, Sharia law is the main and only source of law, as the Saudi Arabia Constitution art 1 clearly provides that 'God's Book and the *Sunnah* of His Prophet, God's prayers and peace be upon him, are its constitution'. Saudi Arabia Constitution (English) is < http://www.servat.unibe.ch/icl/sa00000_.html> accessed 24 January 2018.

[62] See the articles in the GCC States' constitutions that relate to applying the Sharia law ibid (n 56).

[63] For more details, Othman Abdul-Malik Al-Saleh, *Constitutional System and Political Institutions in Kuwait, Part One* (2nd edn, Dar Al Kutub 2003) 239–44; Also Kuwaiti Constitution, 1962 explanatory note 'The Kuwaiti National Assembly' <http://www.kna.kw/clt-html5/run.asp?id=51> accessed 26 July 2017.

[64] Yahia Ahmed Alshami, *Declining Jurisdiction in Islam and its Relation to International Individual Relationships* (Dar al-Wafa 2016).

[65] ibid 106.

[66] Chapter three considers in detail the reasons for refusing the recognition of choice of court agreements in the GCC States.

dispute,[67] even in Saudi Arabia where the legal system of which is based mainly on Sharia law.[68] Finally, all of the GCC States recognise and enforce foreign judgments delivered by non-Muslim judges, if the requirements of recognition and enforcements are met.[69] Therefore, the settlement of a dispute by a non-Muslim judge does not seem to be an issue in the GCC States.

In addition, even Saudi Arabia, the legal system of which is based mainly on Sharia law, tends to subject commercial matters to secular laws or 'regulations' as the term is used in Saudi Arabia.[70] Moreover, in a recent interview by *The Guardian* in October 2017, Saudi Arabia's crown prince, Mohammed bin Salman, vowed to return the country to 'moderate Islam' and asked for global support to transform Saudi Arabia into an open society that empowers citizens and attracts investors.[71] Accordingly, for a variety of reasons that are highlighted above it is considered irrelevant and unnecessary to consider to what extent the recognition of choice of court agreements is compatible with the Islamic Sharia.

[67] None of the arbitration laws in the GCC States require a Muslim arbitrator, see Kuwait Code of Civil and Commercial Procedure, Law no 4 of 1980 arts 173–188; Saudi Arabia KSA Arbitration Law issued by Royal Order no A/90, 7/8/1412H; Bahrain Rules of Arbitration of the Bahrain Chamber for Dispute Resolution effective 1 October 2017; Omani Law of Arbitration in Civil and Commercial Disputes Royal Decree 1997 47/97; United Arab Emirates Civil Procedure Code Federal Law no 11 of 1992 arts 233–281 UAE Official Gazette no 235 3/3/1992.

[68] Art 3 of the previous Saudi Arabia Arbitration Law 1985 required that the arbitrator be a Muslim expatriate. However, in 2012, the 1985 Arbitration Law was replaced by the 2012 Saudi Arabia Arbitration Law, and the latter does not require the arbitrator to be Muslim, see art 12 which provides that the arbitrator must hold at least a university degree in law or Sharia.

[69] Chapter six of this thesis will consider the requirements of recognition and enforcement of foreign judgments in the GCC States. It will be shown that none of these requirements relate to the religion of the judge who delivered the judgment. Moreover, the Saudi Arabian court recognised and enforced a judgment delivered by a court in the state of Columbia and rejected the argument of the defendant that the judges who delivered the judgment were non-Muslim, see Diwan Al-Mathalem Court decision no 1 343/1424 Hegira, 27/5/1429 Hegira.

[70] It can be demonstrated by reference to its accession to the ICSID Convention in 1979 and ratification of the 1958 New York Convention on 18 July 1994. Furthermore, Saudi Arabia issued an Arbitration Law in 2012 and a Recognition and Enforcement Foreign Judgments Law in 2013; see Husain M Al-Baharna, 'The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain' (1989) ALQ 332–344, 339.

[71] Martin Chulov, 'I Will Return Saudi Arabia to Moderate Islam, Says Crown Prince' *The Guardian* (Manchester, 24 October 2017) < https://www.theguardian.com/world/2017/oct/24/i-will-return-saudi-arabia-moderate-islam-crown-prince> accessed January 2018; Subsequently, a royal decree issued on 26 September 2017 lifting the ban on women driving cars is a sign that the Kingdom is serious about such a modernisation. Furthermore, on 11 December 2017, the government of Saudi Arabia issued a decree re-introducing cinemas after a 35-year hiatus, which is yet further evidence of its move away from strict Islamic Sharia to 'open, moderate Islam'.

1.4 Methodology

The research method which will be adopted is 'doctrinal legal research'. This research will draw on materials from conventions, legislation, case law, reports, official documents, books, articles and newspapers. The research method is mainly analytical and comparative. The study will examine the GCC States' approach to choice of court agreements by reference to their codes, judicial decisions and regional conventions of which the GCC States are members, and will compare these with the approach to choice of court agreements in the 2005 Hague Convention to determine the adequacy of the GCC approach to choice of court agreements.

In addition, a part of the thesis will comprise a comparative study between arbitration agreements and choice of court agreements, as these constitute alternative international dispute resolution methods. Given that the GCC States recognise arbitration agreements, a fundamental question is whether choice of court agreements are viable alternatives to arbitration. The aim of the comparative study is not to ascertain whether choice of court agreements are preferable to arbitration agreements, but to consider whether choice of court agreements can be a viable dispute resolution alternative that will provide contracting parties with a wider range of options under the GCC States' legal systems.

1.5 Structure

To undertake this research and to reflect on the underlying research question, after the introductory chapter, the planned structure of this thesis will be as follows:

Chapter two: This chapter aims to stress the importance and significance of choice of court agreements in international business transactions in order persuade the GCC States to re-evaluate their approach regarding the recognition of such agreements. The first part of the chapter begins by describing how the recognition of choice of court agreements will increase legal certainty and predictability for the parties in international business transactions by

reducing litigation risks. The second part of the chapter involves a comparison between litigation and arbitration. It argues that litigation and arbitration are different methods of dispute resolution and that each has its own advantages and disadvantages for the parties in international business transactions. Thus, the existing rules on recognition of arbitration agreements in the GCC States does not necessarily reduce the need and importance for examining how the rules of choice of court agreements can be improved.

Chapter three: This chapter aims to clarify the current position regarding the recognition of choice of court agreements in the GCC States. It focuses on the uncertainty and gaps in that recognition and the attendant problem of litigation risks that are likely to exist in international business transactions connected with GCC States. It argues that the GCC States should revise their approaches to the recognition of choice of court agreements to help the parties in international business transactions avoid or reduce litigation risks. The chapter also considers the rationale behind the rejection of choice of court agreements in the GCC States, observing that the GCC States believe that state sovereignty would be threatened if choice of court agreements were recognised, especially where the forum has to decline jurisdiction in favour of the chosen court. However, the chapter argues that the traditional notion of state sovereignty has changed over time in that it no longer reflects only state interests, but also reflects the interests of individuals. Therefore, on that basis, the recognition of choice of court agreements can be justified even in GCC States where the state sovereignty principle remains central.

Chapter four: This chapter discuses two special international commercial courts that have been established in Dubai and Bahrain. Since both courts regulate the recognition of choice of court agreements, their position in this regard must be considered. The chapter aims to stress that, although both courts have been established precisely to encourage and attract international trade and commerce by creating commercial courts to resolve commercial

disputes, the recognition of choice of court agreements in both courts needs to be revised to provide parties with the necessary legal certainty and predictability in order to further facilitate and encourage such international transactions.

Chapter five: This chapter considers the recognition and enforcement of foreign judgments in the laws of the GCC States and the regional conventions of which the GCC States are members. It argues that the rules of recognition and enforcement in the GCC States might have a negative impact upon the effectiveness of choice of court agreements, which therefore needs to be reconsidered and revised.

Chapter six: This chapter discusses in detail the 2005 Hague Convention and evaluates the feasibility and desirability of incorporating into the legal systems of the GCC States provisions dealing with choice of court agreements in order to reflect the arguments laid out in the earlier chapters.

Chapter seven: This chapter reflects the overview of the research and contribution to knowledge, underlines the key recommendations for the GCC States to consider in reviewing and revising their rules on the recognition of choice of court agreements and concludes with the limitations of the research study and recommendations for future research.

CHAPTER 2: CHOICE OF COURT AGREEMENTS AND THEIR NECESSITY IN INTERNATIONAL BUSINESS TRANSACTIONS

2.1 Introduction

Before focusing on the range of issues regarding how the GCC States regulate the recognition of choice of court agreements and how their approach might be improved, it is important to clarify at the outset of this thesis the importance of legal systems providing rules for recognising choice of court agreements. This chapter will focus on the importance of recognition of choice of court agreements from an economic perspective. It will argue that recognition of choice of court agreements is significant for the parties in their international business transactions and might encourage wider international trade and commerce. Therefore, if the GCC States continue to strive to diversify their economies by developing non-oil trade sectors and to attract investment by creating a competitive business environment, it is important to introduce effective rules governing the recognition of choice of court agreements, as an attractive business environment goes hand-in-hand with a more reassuring legal environment. The importance of an effective legal framework for the facilitation of international trade and investment is widely acknowledged in an increasingly economically interdependent world.

The chapter will also take a closer look at arbitration agreements and critically compare them with choice of court agreements, as both types of agreements have advantages for international business transactions. Therefore, it might be argued, if the GCC States regulate the recognition of arbitration agreements and the recognition and enforcement of arbitral awards, why is there a need to regulate the recognition of choice of court agreements? This chapter will demonstrate that although arbitration agreements are important in international business transactions, and they have elements in common with choice of court agreements, the arbitration mechanism is not without limitations and disadvantages, which

therefore makes litigation and consequently choice of court agreements also attractive in international business transactions. Therefore, recognition of arbitration agreements does not necessarily reduce the need or importance of regulating the recognition of choice of court agreements.

This chapter will first clarify the meaning of jurisdiction rules in the context of private international law and the concept of choice of court agreements. It will then consider the importance of choice of court agreements in international business transactions. Finally, the chapter will critically compare choice of court agreements with arbitration agreements.

2.2 Understanding the Meaning of Jurisdiction Rules and Choice of Court Agreements

The concept of party autonomy in choice of court agreements is embodied in jurisdiction rules. Accordingly, an understanding of jurisdiction rules is needed for the purpose of this thesis. The definition of the term 'jurisdiction', according to Black's Law Dictionary is, 'A government's general power to exercise authority over all persons and things within its territory'.[1] The exercise of jurisdiction has several manifestations. In public international law, the term jurisdiction has a wider meaning than in private international law.[2] The term jurisdiction in public international law refers to the power of the state to exercise its authority and sovereignty.[3] This may be achieved by means of legislative, executive or judicial action.[4] Jurisdiction to prescribe or legislate can be exercised by any law-making authority, legislature, judiciary, or executive; the issue here being the extent of the permissible scope for the state to make its law (ie legislative jurisdiction).[5] Jurisdiction to enforce sets the scope and limits of the executive branch of government responsible for implementing law (ie

[1] *Black's Law Dictionary* (9th edn, Westlaw Blacks 2009).
[2] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BIYL 1, 194.
[3] Michael Akehurst, 'Jurisdiction in International Law' (1972–73) 46 BYBIL 145; FA Mann, 'The Doctrine of Jurisdiction in International Law (vol 111)' in *Collected Courses of the Hague Academy of International Law* (Brill 1964) 9–10; MN Shaw, *International Law* (Cambridge University Press 2008) 645–649; M Reisman, *Jurisdiction In International Law* (Ashgate 1999) xi.
[4] Mills (n 2) 195.
[5] ibid.

executive jurisdiction).[6] Finally, jurisdiction to adjudicate refers to the limits and the scope of the judicial branch of government (judicial jurisdiction).[7]

In the context of private international law, jurisdiction refers only to the rules on adjudicative jurisdiction (jurisdiction rules) which aim to determine whether a state or its court can adjudicate civil disputes involving some foreign element.[8] The term jurisdiction rules will be used throughout the thesis in referring to jurisdiction in the context of private international law unless stated otherwise.

Choice of court agreements is a concept regulated by jurisdiction rules in the context of private international law in order to provide the parties with the freedom to designate a court to settle an existing international dispute or potential future disputes.[9] Choice of court agreements can be either non-exclusive or exclusive.[10] With non-exclusive agreements, the parties seek to grant jurisdiction to hear a case to a state or court of their choice, but according to the terms of the agreement they do not exclude other courts that are otherwise competent from exercising jurisdiction.[11] Therefore, one of the parties can bring the case to one of these other competent courts. The following is an example of a non-exclusive choice of court clause: 'In addition to all competent courts, any dispute which shall arise out of the contract can also be brought to a court in the state of X'.

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[6] Mills (n 2) 195.
[7] Trevor Hartley, 'The Modern Approach to Private International Law: International Litigation and Transaction from a Common-Law Perspective (vol 319)' in *Collected Courses of the Hague Academy of International Law* (Brill 2006) 41.
[8] Akehurst (n 3) 145.
[9] Nygh, *Autonomy in International Contracts* (Oxford University Press 1999) 15; Trevor Hartley, *Choice-of-court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention and the Hague Convention* (Oxford University Press 2013) 4; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 10; Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 8; Arthur Lenhoff, 'The Parties' Choice of a Forum: Prorogation Agreements' (1960) 15 Rutgers L Rev 414, 415; in the United States forum selection agreements are used rather than the term of choice of court agreements; see Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer Law International 2013) 2; Michael Solimine, 'Forum-Selection Clauses and the Privatization of Procedure'(1992) 25 Cor Int LJ 51; William W Park, 'Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection' (1998) 8 Transnatl L & Contemp Probs 19; Michael Mousa Karayanni, 'The Public Policy Exception to the Enforcement of Forum Selection Clauses' (1995) 34 Duq L Rev 1009.
[10] Nygh (n 9) 15; Trevor Hartley, The Modern Approach (n 7); Tang (n 9) 8.
[11] ibid.

On the other hand, with exclusive choice of court agreements, the parties seek to grant jurisdiction to a specific court and to exclude other courts that are otherwise competent from exercising jurisdiction.[12] The following is an example of an exclusive choice of court clause: 'Any dispute that arises out of the contract shall be heard exclusively by the court of state X'. Accordingly, the recognition of exclusive choice of court agreements will have two functions, one positive and one negative.[13] The positive function confers jurisdiction exclusively upon the forum chosen by the parties, which should then accept jurisdiction. Such a function is known as the prorogation effect of choice of court agreements.[14] In contrast, the negative function applies when the forum is not the court that the parties have designated exclusively, which should then decline jurisdiction. That function is known as the derogation effect of choice of court agreements.[15] Both terms, prorogation and derogation effects will be used throughout the thesis to refer to the positive and negative functions of the rules on the recognition of choice of court agreements.

This chapter will focus mainly on the recognition of exclusive choice of court agreements, since avoiding uncertainty and unpredictability, parallel litigation and inconsistent judgments in international litigation can be achieved predominantly through the recognition of exclusive choice of court agreements, as there will be only one forum competent to settle the dispute.[16]

2.3 The Necessity of Choice of Court Agreements in International Business Transactions

2.3.1 International Business Transactions and Potential Risks

[12] Nygh (n 9) 15; Trevor Hartley, The Modern Approach (n 7); Tang (n 9) 8.
[13] ibid.
[14] Nygh (n 9) 15; Lenhoff (n 9) 415; Tang (n 9) 8.
[15] ibid.
[16] Hartley, The Modern Approach (n 7) 111.

Business transactions depend on the assessment and management of risks[17] in order to make as much profit as possible and to avoid as much loss as possible. The risks can be divided into financial[18] and legal risks.[19] In international business transactions, one of the legal risks is known as 'litigation risk'.[20] Litigation risk exists in international business transactions, since the nature of international business transactions requires a connection by the parties or the contract to more than one state, which therefore might lead to a conflict of interest between the states, in the sense that more than one state may be interested in having jurisdiction over the dispute.[21] It is the risk that a party will be sued and have to defend proceedings in an unexpected forum.[22] It exists when the optimal forum may be legally or practically unavailable, because of procedural jurisdiction obstacles that make it impossible to litigate in the optimal forum, or because the proceedings have been initiated in an unsuitable court.[23] Therefore, litigation risk can manifest as uncertainty and unpredictability about where legal action will be initiated.[24] It is also the risk of being sued in two different fora, which results in what is known as 'parallel litigation'.[25]

Litigation risks can have significant economic implications and may inhibit transactions.[26] The criticisms of litigation risks in international business transactions might be outlined as follows: first, the uncertainty and unpredictability of where the transactions will

[17] Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) 3.
[18] Financial risks can concern a counterpart's credit-worthiness, solvency, liquidity risk, foreign exchange risk and interest rate risk; see Fentiman (n 17) 3; Suvi Hassinen, 'Risk Management in SMEs: Development plan of Hassinen Veljekset Oy' (Thesis, Karelia University Finland 2015) 7; Michael G Papaioannou, 'Exchange rate risk measurement and management: Issues and approaches for firms' (Working Paper, International Monetary Fund 2006).
[19] Fentiman (n 17) 3.
[20] ibid 42–43.
[21] The conflicts of interest between states in having jurisdiction over a dispute is one of the main issues that private international law seeks to address by regulating jurisdiction rules; See Clarkson and Hill, *The Conflict of Laws* (4th edn, OUP 2011) 3.
[22] Fentiman (n 17) 42–43.
[23] ibid.
[24] Fentiman (n 17) 7; Hartley, *Choice-of-court* (n 9) 4.
[25] Fentiman (n 17) 7; Ryan M Vassar, *Litigation Parallelisms: A Comment on Parallel Proceedings and Anti-Suit Injunctions Spanning the Parallels* (2010) 1; Neale H Bergman and others, 'International Litigation' (2010) 44 Intl Law 167, 207.
[26] Fentiman (n 17) 7.

take place might lead to one party being sued in an expected forum in which the party might not be familiar with the legal system, civil procedure rules, litigation costs and perhaps the court language of that forum.[27] Therefore, the lack of familiarity of such procedures might lead to unexpected fees. Also, that party might lose the case by being sued in unexpected forum, because he/she might not have drafted the terms of the transaction according to the legal system and policies of that forum.

Secondly, litigation risk can lead to parallel litigation as considered previously, which is also the subject of criticism in international business circles,[28] because it will increase the litigation costs for the parties, as they must participate in two different courts.[29] In addition, parallel litigation can lead to inconsistent judgments, since more than one forum will resolve the same dispute and deliver a final decision.[30] Also, parallel litigation is likely to cause delay, and time is important for parties in international business transactions.[31]

The above concerns about litigation risks by international businesses are not just hypothetical or theoretical; they are also supported by research. In particular, a survey by the International Chamber of Commerce demonstrates that the risk of litigation is ever-present in contractual relations, so that market actors may be dissuaded from entering transactions because of litigation risk.[32] Of the hundred leading companies canvassed in the survey, forty reported occasions when their decision-making was influenced by litigation risk. Accordingly, litigation risks can have a negative impact on international trade and the economies of the states where such litigation risks exist, because international businesses may not do business in these states, or the cost of the transaction may increase because of the risk of being sued in an unexpected forum or due to the possibility of inconsistent judgments.

[27] William W Park, Bridging the Gap (n 9) 26.
[28] Steven C Nelson, 'Alternatives to Litigation of International Disputes' [1989] 23 Intl L 188.
[29] Vassar (n 25) 3.
[30] Nelson (n 28) 189.
[31] ibid 193.
[32] International Chamber of Commerce, 'Survey on Jurisdiction Certainty' (April 2003) in Fentiman (n 17) 43.

Having considered litigation risks and how such risks might have a negative impact upon international business transactions, consideration will now be given to how rules providing for the effective recognition of choice of court agreements might minimise such risks.

2.3.2 The Role of Choice of Courts Agreements in Minimising Litigation Risks

Private international law scholars argue that concluding an exclusive choice of court agreement in an international business transaction and the recognition of that agreement by the domestic courts provides significant advantages for the parties in their international business transactions by minimising litigation risks.[33] The recognition of the rules of exclusive choice of court agreements, as considered above, would allow parties to choose where to litigate. Such rules would also oblige every court other than the chosen court to decline jurisdiction in favour of the chosen court. Accordingly, jurisdiction rules providing for recognition of exclusive choice of court agreements would benefit parties to international business transactions on several counts.

First, recognition of exclusive choice of court agreements might avoid a conflict of jurisdiction[34] and parallel litigation[35] in different national courts, as, by recognising both prorogation and derogation effects, only one forum will hear the dispute. This would avoid uncertainty and unpredictability,[36] as the parties will be able to predict in which jurisdiction the dispute will be resolved. If the parties can predict in advance which forum will assert

[33] Fentiman (n 17) 9; Hartley, *Choice-of-court* (n 9) 4; Andrew S Bell, *Forum Shopping and Venue in transnational litigation* (Oxford University Press on Demand 2003) 276; JT Brittain, 'Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity' (2000) 23 Hous J Intl L 305, 306; Deborah A Laurent, 'Foreign Jurisdiction and Arbitration Clauses in the New Zealand Maritime Context' (2007) 21 Austl & NZ Mar LJ 121, 124; William W Park, 'Neutrality, Predictability and Economic Co-operation' (1995) 12 J Intl Arb 99; Francisco J Alférez Garcimartín, 'Regulatory Competition: A Private International Law Approach' (1999) 8 European Journal of Law and Economics 3, 251–270, 255.

[34] Nelson (n 28) 188.

[35] Fentiman (n 17) 9; Bell (n 33) 276; James T Gilbert, 'Choice-of-Forum Clauses in International and Interstate Contracts' (1976) 65 Ky LJ 1, 2-3; Leandra Lederman, 'Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases' (1991) 66 NYUL REV 422–23; Solimine (n 9) 51, 52; William W Park, Bridging the Gap (n 9) 26–28.

[36] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 76.

jurisdiction, they will be able to draft the terms of their contract according to the public policy and mandatory rules of that forum to avoid the possibility of the contract being declared null and void by the forum. In that connection, Richard Fentiman has argued:

> Only once the location of proceedings is known can each party assess the risk of pursuing or defending a claim. Only once a dispute's legal framework is clear – dependent on where it occurs and under which law – can they measure their chance of success. Only then can they weigh that chance against the cost of litigation. Only then can they identify the risk of investing in litigation. Most importantly, only then are the parties equipped to achieve the settlement which is almost certainty their objective.[37]

Accordingly, providing the parties with the right to determine in which court the dispute will be settled seems crucial to enable them to plan ahead and to ensure that the terms of the contract and the activities that take place pursuant to it will not be regarded as unlawful by the court hearing the case.

Secondly, avoidance of parallel litigation through recognition of choice of court agreements reduces the risk of inconsistent judgments,[38] because a single forum will resolve the dispute and deliver a final decision. Thus, recognition of choice of court agreements avoids any potential costs and delay[39] of being sued before two different courts.

Thirdly, the recognition of choice of court agreements provides parties with the freedom to designate a 'neutral forum'.[40] That is to say that the parties can choose the most favourable forum, whose procedural rules are familiar, and in a country that is different from that of either party, to reduce the risks of partiality or parochial prejudice.

Accordingly, recognition of choice of court agreements seems crucial for the parties in their international business transactions, as it can reduce the litigation risks considered above. This conclusion is reinforced by empirical studies, which confirm the importance of choice of court agreements for international businesses. First, in 2008, the Oxford Justice

[37] Fentiman (n 17) 10.
[38] Bergman (n 25) 77.
[39] Gary Born, *Drafting and Enforcing* (n 9) 6; Brittain (n 33) 306; Solimine (n 9) 52.
[40] Gary B Born and Peter B Rutledge, *International Civil Litigation in United States Courts* (5th edn, Aspen 2011) 464; Solimine (n 9) 52; William W Park, *Neutrality* (n 33) 26.

Survey of the Institute of European and Comparative Law surveyed European businesses. The survey examined the extent to which 'businesses in Europe were influenced by their perceptions of national civil justice systems and contract laws when choosing the forum of litigation for cross-border transactions.'[41] From the survey outcomes it can be clearly seen that the majority of European businesses (61%) ranked being able to choose the dispute resolution forum in their international business transactions as very important, 36% thought it was important and 3% considered it was not that important.[42]

Secondly, a survey in the United States on different kinds of international contracts (one party had to be foreign to the United States) indicated that 67% of all those contracts contained a choice of court clause.[43]

Consequently, it can argued that if a state does not recognise or does not have effective rules for regulating choice of court agreements that would reduce litigation risks for the parties, there can be a significant negative impact on its economy and trade, because international businesses may not do business in these states.[44] In addition, international businesses may increase the cost of the transaction to cover any potential costs that might result from being sued in an unexpected forum, or the possibility of parallel litigation which would necessitate participation in two different courts.[45] Accordingly, developed countries have been keen to regulate the recognition of choice of court agreements in relation to both their prorogation and derogation effects. For instance, in 1968, the European Union (EU) introduced regulation of the recognition of choice of court agreements through the Brussels Convention.[46] Jenard's report on the Brussels Convention demonstrates: 'It is unnecessary to

[41] C Hodges and others, 'Costs and funding of civil litigation: a comparative study' (2009) University of Oxford Legal Research Paper Series 55/2009 cited in Ellen Xandra Kramer and H van Rhee Cornelis *Civil Litigation in a Globalising World* (TMC Asser Press 2012) 88.
[42] See Question 28 of the Survey <http://denning.law.ox.ac.uk/iecl/ocjsurvey.shtml> accessed 1 June 2015.
[43] Ya-Wei Li, 'Dispute Resolution Clauses in International Contracts: An Empirical Study' (2006) 39 Cornell Intl LJ 797–798.
[44] Fentiman (n 17) 7.
[45] Laurent (n 33) 124.
[46] See art 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and

stress the importance of this jurisdiction, particularly in commercial relations.'[47] In 2012, the rules regarding choice of court agreements were amended by the 'Brussels Recast'[48] to ensure the effectiveness of choice of court agreements.[49] More recently, in 2015 the EU signed and ratified the 2005 Hague Convention that seeks to harmonise the rules regarding choice of court agreements at an international level.[50] Thus, the EU is aware of the importance of regulating the recognition of choice of court agreements in international business transactions. In addition, the United Kingdom,[51] the United States[52] and Canada[53] regulate the recognition of both prorogation and derogation effects of choice of court agreements. The Supreme Court of the United States in the *Bremen* case stressed the importance of the recognition of choice of court agreements for American trade and the American economy: 'The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.'[54]

Accordingly, providing the parties in international business transactions with legal certainty and predictability by regulating the recognition of choice of court agreements should be important for the GCC States as well, as they strive to diversify their economies by developing non-oil trade sectors and attract investment by creating a competitive business

Commercial Matters 1968 (98/C27/01).

[47] P Jenard, 'Report on the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' [1979] OJ C59/1, 37.

[48] See art 25 of the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012].

[49] For details on the developments of choice of court agreements in the EU, see European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001' COM (2009) 174 final; Sophia Tang, 'Conflicts of Jurisdiction and Party Autonomy in Europe' (2012) 59 Netherlands International Law Review 3, 321–359; Justin P Cook, 'Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements' (2013) 4 Aberdeen Student L Rev 76; Lukasz Gorywoda, 'The New Design of the Brussels I Regulation: Choice of Court Agreements and Parallel Proceedings' (2013) 19 Colum J Eur L Online Supplement 1.

[50] Hague Convention on Choice of Court Agreements (30 June 2005) 44 ILM 1294 Status Table.

[51] *The Eleftheria* [1969] 2 All ER 641; *Aratra Potato Co Ltd v Egyptian Navigation Co* (The El Amria) [1981] Lloyd's Rep 119, CA.

[52] *M/S Bremen and Unterweser Reederei, GmbH v Zapata Off-shore Co* 407 US 1 (1972).

[53] *ZI Pompey v ECU-Line NV* (2003) SCC 27.

[54] *Bremen* case (n 52) 2–3.

environment. Such an environment goes hand-in-hand with a more reassuring legal environment. The importance of an effective legal framework for the facilitation of international trade and investment is widely acknowledged in an increasingly economically interdependent world. Therefore, the GCC States' economic development plans considered in chapter one attach considerable importance to the study of the possibility of improving the recognition of choice of court agreements in the GCC States to improve their jurisdiction rules, and thereby enhancing the predictability and certainty of litigation measures in international business transactions.

All of the GCC States regulate the recognition of arbitration agreements and the recognition and enforcement of arbitral awards by their domestic laws.[55] They are also all members of regional conventions, which harmonise the recognition and enforcement of arbitral awards.[56] More importantly, all of the GCC States are members[57] of the global convention in this area, namely the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).[58] The New York Convention harmonises the rules of recognition and enforcement of international arbitration agreements and foreign arbitral awards. Article II(3) of the New York Convention provides:

[55] See Kuwait Code of Civil and Commercial Procedure, Law no 4 of 1980 arts 173–188; Saudi Arabia KSA Arbitration Law issued by Royal Order no A/90, 7/8/1412H; Bahrain Rules of Arbitration of the Bahrain Chamber for Dispute Resolution effective 1 October 2017; Omani Law of Arbitration in Civil and Commercial Disputes Royal Decree 1997 47/97; United Arab Emirates Civil Procedure Code Federal Law no 11 of 1992 arts 233–281 UAE Official Gazette no 235 3/3/1992.

[56] See League of Arab States Riyadh Arab Agreement for Judicial Cooperation art 37 (6 April 1983) (English) <http://www.refworld.org/docid/3ae6b38d8.html> accessed 17 December 2017; the convention has been signed and ratified by Palestine (28 November 1983), Iraq (16 March 1984), Yemen (13 April 1984), Mauritania (16 June 1985), Sudan (26 November 1984), Syria (30 September 1985), Somalia (2 October 1985), Tunisia (29 October 1985), Jordan (17 January 1986), Morocco (30 March 1987), Libya (6 January 1988), United Arab Emirates (11 May 1999), Oman (28 July 1999), Bahrain (23 January 2000), Saudi Arabia (11 May 2000), Algeria (20 May 2001), Egypt (2004); Kuwait signed the Riyadh Convention on 6 April 1985, but has not yet ratified it.; also see article 12 of the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States 1995 (English) <http://arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf. accessed 17 December 2017. The Convention has been signed and ratified by Kuwait, Saudi Arabia, Oman, Bahrain, Qatar and United Arab Emirates.

[57] Kuwait ratified the New York Convention on 28 April 1978, Saudi Arabia on 19 April 1994, United Arab Emirates on 21 August 2006, Bahrain on 6 April 1988 and Oman on 25 February 1999. See the table status at <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed 1 January 2018.

[58] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (New York Convention).

'The court of a contracting state … shall, at the request of one of the parties, refer the parties to arbitration'. Article III ensures: 'Each Contracting State shall recognise arbitral awards as binding and enforce them'. According to articles II(3) and III, the GCC States' courts have to decline jurisdiction when there is an arbitration agreement, and furthermore recognise and enforce the foreign arbitral awards.[59] This begs the question of why it is necessary to regulate the recognition of choice of court agreements in the GCC States. Since the GCC States recognise international arbitration agreements and foreign awards under the New York Convention, the parties can minimise litigation risks, such as conflict of jurisdiction, parallel litigation and inconsistent judgments, simply by including an arbitration clause in their international business transactions.

The following will seek to answer this question by demonstrating that although arbitration agreements are important in international business transactions, and they have something in common with choice of court agreements, the arbitration mechanism is not without limitations or disadvantages, which therefore makes litigation and subsequently choice of court agreements also attractive in international business transactions.

Before delving into a comparative analysis between arbitration and litigation, it is important to stress that the purpose of this thesis is to explore the possibility of introducing effective rules for the recognition of choice of court agreements in the GCC States, in order to offer a way for the GCC States to improve their laws in this area. Thus, the main focus of the thesis is choice of court agreements rather than arbitration agreements. Therefore, the thesis will not consider how the issues faced by the arbitration mechanism might be revised, and it will not attempt to assess whether arbitration agreements or choice of court agreements are the best choice for international dispute resolution. The aim of this comparison between

[59] See the GCC States decisions in recognition of international arbitration agreements, Kuwait Cassation Court decisions 448/2000 Commercial, 30/4/2001; 35/2002 Civilian, 17/01/2003; 58/2005 Commercial, 18/4/2006; Bahrain Cassation Court decisions 19/2007 Civilian, 23/4/2007; Abu Dhabi Cassation Court decision no 679/ 2010 Commercial 6/6/2011.

litigation and arbitration is only to demonstrate that existing international arbitration agreement rules in the GCC States do not necessarily reduce or remove the need to examine how the rules of choice of court agreements might be improved.

2.4 Litigation Versus Arbitration

Arbitration has become popular as an alternative to litigation for the resolution of disputes in almost all aspects of international trade, commerce and investment, and the parties to an arbitration agreement can be states, individuals and corporations.[60] Halsbury's Laws of England defines arbitration agreements as:

> The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.61

Article 7 of the UNCITRAL Model Law[62] also defines arbitration as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.'[63]

Arbitration agreements as defined above reflect the fundamental principles and essential legal forms of this method of dispute resolution as an alternative to litigation. Arbitration can be international or domestic.[64] Domestic arbitration is beyond the scope of this thesis. The following discussion will consider and compare the advantages and disadvantages of international arbitration with choice of court agreements.

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[60] Martin Hunter, *Redfern and Hunter on International Arbitration* (OUP 2009) 315.
[61] *Halsbury's Laws of England* (4th edn, Butterworths 1991) para 601, 332.
[62] In 1998, the United Nations Commission on International Trade Law (UNCITRAL) established the Model Law on International Commercial Arbitration, amended in 2006. The aim of the Model Law is to make uniform the rules of international commercial arbitration and to introduce it for adoption by States, arbitral institutions and other interested bodies, such as chambers of commerce. Fifty jurisdictions have adopted legislation based on the Model Law. See the table status <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 25 September 2015.
[63] UNCITRAL Art 7.
[64] There is no standard definition to determine whether arbitration is international or domestic. Some consider that arbitration is international when it involves parties from different nations, when one party's nationality is foreign to the country of the arbitration seat, when the arbitration seat is in a country other than the country when enforcement of the arbitration award is requested; Hunter (n 52) 8–12.

2.4.1 The Advantages of Arbitration

Arbitration agreements have many advantages in common with choice of court agreements, such as providing parties with a neutral forum,[65] avoiding conflicts of jurisdiction[66] and minimising cost and speed[67] in international business transactions. However, there are also some advantages of arbitration that might not be present in litigation. These will be discussed below to demonstrate that these are different mechanisms for dispute resolution, each of which provides significant and unique advantages in international business transactions.

2.4.1.1 Commercial Competence and Expertise

The parties to an international commercial transaction, who designate an arbitral tribunal to resolve their dispute, can choose arbitrators or an arbitral institution which has the greatest expertise, competence and familiarity with the parties' transaction.[68] An arbitral tribunal is usually composed of three members (rather than a single trial judge),[69] which enables the parties to designate an arbitral tribunal composed of members who are legally competent in commercial transactions and technical experts in the type of transaction.[70]

This is important in international commercial disputes, especially those types of international transactions that include complex commercial matters, such as mergers and acquisitions or in oil and gas industry insurance

2.4.1.2 Confidentiality and Privacy of Dispute Resolution

[65] Hunter (n 60) 32; Julian DM Lew, Mistelis A Loukas and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 7.
[66] Born, *International Commercial* (n 36) 76.
[67] Born, *International Commercial* (n 36) 86; Hunter (n 60) 35; Lew and others (n 65) 9; Thomas J Stipanowich, 'Rethinking American Arbitration' (1987) 63 InD lJ 438–439; However, an empirical study illustrates that arbitration might be expensive and cause delay for the parties in their international transactions, see Price Waterhouse Coopers, *International arbitration: Corporate Attitudes and Practices* (2006) 7 <http://www.pwc.be/en/publications/ia-study-pwc-06.pdf.> accessed 15 December 2017.
[68] Born, *International Commercial* (n 36) 80.
[69] Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 13.
[70] Born, *International Commercial* (n 36) 81.

Another objective of arbitration is to provide confidentiality and privacy for the parties.[71] The desired nature of the arbitration process is to maintain privacy, so that only the parties can attend the arbitration hearing, and the subject matter, the evidence, the documents and the final decision must remain private between the parties.[72] The confidentiality and privacy of legal proceedings is an advantage for international businesses,[73] as companies may have business secrets or competitive practices to protect. Moreover, the details of the commercial dispute or the final decision might have a negative impact on the reputation of the company in the market, especially for the losing party.[74] Thus, normally parties prefer to keep their business and industrial practices and their trade secrets away from public scrutiny.

2.4.1.3 Finality of Decisions

One of the features of arbitration is that an arbitration award is final and binding.[75] In contrast, in most national judicial systems, any judgments cannot be final until the appellate review.[76] The absence of appellate review can be significant for the parties in international business transactions,[77] since it can reduce costs and delays.[78] On the other hand, the absence of appellate review can also be a disadvantage,[79] as the decision of arbitrators might not be reversed. However, in some cases, an arbitration award can be appealed to the courts,[80] such as, when arbitrators have exceeded their jurisdictional authority or have committed some

[71] Born, *International Commercial* (n 36) 89; Lew and others (n 65) 8.
[72] Lew and others (n 65) 8.
[73] An empirical study shows that privacy is the third advantage in arbitration agreements; Buehring-Uhle, 'A survey on Arbitration and Settlement in International Business Disputes' in C Drahozal and R Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law 2005) 35; Born, *International Commercial* (n 36) 89, fn 612.
[74] Hunter (n 60) 33.
[75] Lew and others (n 65) 7; Born, *International Commercial* (n 36) 83.
[76] Born, *International Commercial* (n 36) 83.
[77] An empirical study indicates that business users prefer the efficiency and finality of arbitral procedures; Buhring-Uhle (n 73) 83, fn 573.
[78] Born, *International Commercial* (n 36) 83.
[79] There is empirical evidence that shows that one of criticisms of international arbitration is the absence of appellate review, see Queen Mary University, 'International Arbitration Survey: Corporate Attitudes and Practices' (2006) 7 <http://www.pwc.be/en/publications/ia-study-pwc-06.pdf> accessed 15 October 2015.
[80] Lew and others (n 65) 7.

serious breach of natural justice.[81] Moreover, some legal systems allow the parties to agree that their arbitral award can be appealed.[82]

2.4.1.4 Procedural Flexibility

Most national arbitration legislation and arbitral institutions' rules provide parties with the freedom to determine the procedural rules of the arbitration process.[83] This is also one of the objectives of arbitration,[84] in that the parties and arbitrators can designate their own procedural rules to meet the requirements of each particular case.[85] For instance, the parties can agree upon the timetable for the arbitral process, the length of the hearing, the scope of disclosure, and the agreed processes for the presentation of fact, and expert evidence.[86] This might reduce costs and delays[87] and lead to a fair award.[88] By contrast, the fixed rules of national civil procedure present in litigation might not suit the parties.[89]

2.4.1.5 Enforceability of Arbitration Agreements and Awards

Arbitration agreements and awards are enforced by most national courts either based on national legislation or international conventions.[90] At the international level, article II(1) and article III of the New York Convention[91] ensure the recognition of arbitration agreements and the recognition and enforcement of foreign arbitral awards. More importantly, the adoption

[81] Lew and others (n 65) 7.
[82] Born, *International Commercial* (n 36) 83.
[83] AAA ICDR Rules art 16(1); ICC Rules art 15; LCIA art 14(2); NAI Arbitration Rules art 23(2); UNCITRAL Arbitration Rules art 15(1); WIPO Arbitration Rules art 38(a); National legislation: English Arbitration Act 1996 S 34(1); Belgium, Judicial Code art 1693; Germany, ZPO s 1042; Italy, CCP art 816; Netherlands, CCP art 1036; Sweden, Arbitration Act s 21; Switzerland, PIL art 182; Model Law art 19; Lew and others (n 65) 6.
[84] An empirical study proved that the flexibility of the arbitration procedure rules is one of the most significant advantages of international arbitration for businesses, see CPR Institute for Dispute Resolution Commission on the Future of Arbitration, *Commercial Arbitration as its Best: Successful Strategies for Business Users* xxiii (2000).
[85] Born, *International Commercial* (n 36) 84.
[86] ibid 85.
[87] Hunter (n 60) 33.
[88] ibid.
[89] ibid.
[90] Lew and others (n 65) 7; Born, *International Commercial* (n 36) 11; Hunter (n 60) 32.
[91] New York Convention (n 58).

by 157 countries [92] of the New York Convention has increased legal certainty and predictability in international business transactions, thereby enhancing the parties' confidence that their arbitration agreements and subsequent arbitral awards will be recognised in most countries in the world.[93]

The widespread enforceability of arbitration agreements and awards under the New York Convention is both theoretically[94] and empirically[95] the most attractive reason for the parties in international business transactions to conclude an arbitration agreement rather than a choice of court agreement. This is because the parties are assured, from the start of arbitration proceedings until the granting of the arbitral award, that their agreement and subsequent award will be recognised and enforced, not just in the place where they were made, but also internationally. [96] Without the widespread harmonisation of the rules in relation to arbitration agreements and awards, arbitration as an alternative to litigation might not have avoided the problem of conflicts of jurisdiction and judgments and would not have reduced costs and time and ensured legal certainty and predictability in international business transactions.

[92] States table of the New York Convention <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.> accessed 1 January 2018.
[93] Born, *International Commercial* (n 36) 77–80.
[94] Alan Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 22.
[95] In 2006, an empirical study was carried out on different types of international transactions in different regions of the world. One part of the study examined the advantages of selecting international arbitration as a dispute resolution method. The results demonstrate that the widespread enforceability of arbitration agreements and foreign awards, thanks to the New York Convention, is the most attractive advantage for selecting arbitration agreements in international business transactions; see Price Waterhouse Coopers, *International Arbitration: Corporate Attitudes and Practices* (2006) 6 <http://www.arbitration.qmul.ac.uk/docs/123295.pdf > accessed 1 January 2018. Also, in 2013, a survey was done on four types of transactions, industry sector, energy, construction sector and financial services, which shows that the enforceability of international arbitration agreements and awards is one of the most important attractions of selecting arbitration agreements: Queen Mary 'International Arbitration Survey: Corporate Choices in International Arbitration Industry Perspectives' (2013) <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> accessed 1 January 2018.
[96] Redfern, *Law and Practice* (n 94) 22.

In contrast, in litigation there remains, to an extent, a lack of certainty that the national courts will recognise choice of court agreements and foreign judgments,[97] as the 2005 Hague Convention is the first worldwide instrument that harmonises the rules of recognition of choice of court agreements and foreign judgments. To date, however, it is applicable only in 31 countries.[98] Therefore, the 2005 Hague Convention is still not as widely adopted as the New York Convention, which has been signed and ratified by 157 countries. The 2005 Hague Convention will be considered in detail in chapter six, where it will be observed that its aim is to make choice of court agreements as widely recognised as the New York Convention is for international arbitration agreements.[99] It does not mean that the 2005 Hague Convention aims to encourage the selection of choice of court agreements rather than arbitration agreements.[100] Both conventions can benefit parties in international business transactions, and the parties can choose the most appropriate method of dispute resolution. As outlined above, although choice of court agreements might share some advantages with international arbitration, arbitration is a dispute resolution mechanism that provides the parties with advantages, which are not available under litigation, such as commercial competence and expertise, confidentiality and privacy of dispute resolution, finality of decisions and procedural flexibility. However, as will be outlined in the following section, arbitration has certain disadvantages or limitations.

2.4.2 The Disadvantages of Arbitration

The following is a discussion of the disadvantages or limitations of arbitration that might not be present in litigation to demonstrate that, in some circumstances, choice of court

[97] Except within the European Union states, as the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] regulates the recognition of choice of court agreements and foreign judgments.

[98] Status table of the Hague Convention on Choice of Court Agreements in the Hague Conference on Private International Law <http://www.hcch.net/index_en.php?act=conventions.status2&cid=98> accessed 1 March 2018.

[99] Andrea Schulz, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements' (2006) 2 Journal of Private International Law 243, 268.

[100] ibid.

agreements may be more desirable than international arbitration agreements for international dispute resolution.

2.4.2.1 Provisional Measures

Provisional measures play a significant role in international business disputes.[101] Provisional measures, which are also known as conservatory, protective or interim measures,[102] aim to preserve a factual or legal situation in the case during the litigation/arbitration process to preserve evidence or prevent the transfer or dissipation of assets.[103] It has been argued that provisional measures are as important as a final award or even more so.[104] 'A final award may be of little value to the successful party if, in the meantime, action or inaction on the part of a recalcitrant party has delivered the outcome of the proceedings largely useless eg by dissipating assets or removing them from the jurisdiction'.[105] As a result, the availability of provisional measures may be considered significant for the parties in international business disputes.

Historically, the power to issue provisional measures rests with the national courts.[106] Arbitrators do not have the authority to issue such measures.[107] But, with the increasing number of companies using arbitration as an alternative form of dispute resolution, most national arbitration laws have started to give the power to arbitrators to issue provisional measures.[108] However, such a power is not without limitation[109] and might cause a delay in granting provisional measures compared with national courts. This criticism makes the

[101] Lawrence Collins, 'Provisional and Protective Measures in International Litigation (vol 234)' in *Collected Courses of the Hague Academy of International Law* (Brill 1992).
[102] See Verónica Ruiz Abou-Nigm, 'Ancillary Jurisdiction for Interim Measures of Protection in Support of Cross-Border Litigation' (2005) 10 Unif L Rev 759.
[103] Redfern, *Law and Practice* (n 94) 78.
[104] United Nations, Proceedings of the New York Convention, 'Enforcing arbitration awards under the New York Convention: Experience and prospects' (United Nations 1999) 117; Born, *International Arbitration* (n 9); Trevor C Hartley, 'Interim Measures under the Brussels Jurisdiction and Judgments Convention' (1999) 24 EL Rev 674.
[105] UN Doc A\CN 9/460, 117.
[106] Born, *International Commercial* (n 36) 2432.
[107] ibid 2432.
[108] ibid 2433–2440.
[109] ibid 2445–2454.

recourse to national courts to issue provisional measures preferable even if the power of the arbitrator to do so exists.[110] However, the problems concerning the availability of provisional measures might also exist in litigation that involves cross-border disputes,[111] such as when the assets of the defendant are located in a state other than the forum. Such an issue exists in cross-border disputes because of the absence of uniform rules in jurisdictional cooperation at the international level in governing the enforcement of provisional measures.[112] Nevertheless, it will be outlined below that the problems of the availability of provisional measures in arbitration seem more complex than in litigation. The criticisms of the availability of granting provisional measures in arbitration will be examined below.

(1) The limited power

The power of an arbitral tribunal to grant provisional measures is always limited to the parties to the contract that is in dispute.[113] Thus, the arbitral tribunal does not have the power to grant provisional measures over a third party, who has not agreed to arbitration, when bank accounts are to be attached.[114] The limited power of the arbitral tribunal over a third party is normally indicated by the arbitration law,[115] or, even if the arbitration law is silent, it will be illustrated below in detail that the contractual nature of arbitration agreements always limits the power of the arbitral tribunal to grant provisional measures exclusively to the parties that agree to arbitration.[116] This is in contrast to litigation, in which the chosen court in some circumstances has jurisdiction over a third party.[117]

(2) Provisional measures and the constitution of the tribunal

[110] Born, *International Commercial* (n 36) 2522–2523.
[111] Verónica Ruiz Abou-Nigm (n 102) 759.
[112] ibid.
[113] Born, *International Commercial* (n 36) 2445; Alan Redfern, 'Arbitration and the Courts: Interim Measures of Protection–Is the Tide about to Turn' (1995) 30:71 Tex Intl LJ 86.
[114] ibid 86.
[115] Born, *International Commercial* (n 36) 2446.
[116] ibid.
[117] See below in detail the issue of the non-party and the power of the arbitration at section 2.4.2.2

The arbitral tribunal cannot grant provisional measures until it has been constituted.[118] This is one of the main criticisms in relation to the use of arbitration, which might make it less effective than litigation in granting provisional measures,[119] because provisional measures require urgency and speed to prevent a party from dissipating his/her assets or dissipating the evidence relating to the case.[120] This might not be as achievable in arbitration, as in relation to a national court.[121] It might take months for an arbitral tribunal to be constituted.[122] In practice, in international commercial arbitration, the tribunal commonly consists of three arbitrators, one nominated by each party, and the third member appointed by an independent authority.[123] The constitution of the arbitral tribunal requires a meeting of the three arbitrators, which might cause delay.[124] The delay will be even longer when a nominated arbitrator challenges the granting of provisional measures against the party who nominated him/her.[125] This delay in the case of arbitration might give a party time to move his/her assets or to dissipate evidence. In contrast, in the case of litigation, a national court is a permanent institution and has the power to grant provisional measures at any time.[126] However, some arbitration laws now include provisions for making what is known as an 'emergency arbitrator'[127] to speed the process of granting provisional measures.[128] Nevertheless, despite the possible availability of an emergency arbitrator, granting provisional measures in

[118] Born, *International Commercial* (n 36) 2450.
[119] ibid 2451.
[120] Redfern, Arbitration and the Courts (n 113) 83.
[121] ibid.
[122] ibid 86.
[123] Redfern, Arbitration and the Courts (n 113).
[124] ibid.
[125] ibid.
[126] ibid.
[127] For the importance of the emergency arbitrator in arbitration mechanisms see Baruch Baigel, 'The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis' (2014) 31 Journal of International Arbitration 1, 1–18.
[128] See art 29 of the International Chamber of Commerce (ICC) Arbitration Rules 2012, as amended in 2017 < https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/>, accessed 1 July 2017; article 9B of The London Court of International Arbitration (LCIA) Rules <http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx > accessed 1 July 2017; see article 14 of the Bahrain Chamber for Dispute Resolution (BCDR) Arbitration Rules <http://www.bcdr-aaa.org/2017-arbitration-rules/> accessed 1 July 2017.

arbitration might not be as effective as in litigation,[129] because an emergency arbitrator can grant provisional measures only to the parties that agreed to arbitration.[130] Furthermore, any request by a claimant to an emergency arbitrator to grant provisional measures must be delivered or notified to all other parties to the arbitration.[131] Consequently, there is a risk that the party against whom the measures are sought will have time to transfer or move his/her assets or to dissipate the evidence before the provisional measures can be enforced.

(3) Lack of enforcement authority

Even if the arbitral tribunal is constituted and grants provisional measures, it does not have the power to enforce such measures. The enforcement of provisional measures is the responsibility of the national court. This is normally indicated by the arbitration law,[132] or, even if the arbitration law is silent, the contractual nature of the arbitration agreement does not give direct authority to enforce provisional measures.[133]

This matter could be a serious issue, because one of the important characteristics of provisional measures is that they should be enforced before the party to whom they apply becomes aware of them.[134] Otherwise, the party may move his/her assets once he/she knows about the granting of these measures, thus rendering them ineffectual. As a result, if a party is awarded provisional measures, that party must ask the national court to enforce the measures. This may cause delay and might lead the party against whom the measures will be applied to transfer his/her assets before the provisional measures can be enforced by the national

[129]Jason Fry, 'The Emergency Arbitrator-Flawed Fashion or Sensible Solution' (2013) 7 Disp Resol Intl 179; Aren S, 'Emergency Arbitrator Provisions Limit Access to Urgent Relief From Courts' (2016) Allen & Overy Litigation and Dispute Resolution Review <http://www.allenovery.com/publications/en-gb/Pages/Emergency-arbitrator-provisions-limit-access-to-urgent-relief-from-courts.aspx>.

[130] Art 9B of the LCIA Arbitration Rules; Art 14(1) of the BCDR Arbitration Rules.

[131] ibid.

[132] For example, the Belgian Judicial Code provides that, 'without prejudice to the powers accorded to the courts and tribunals by virtue of article 1683, and unless otherwise agreed by the parties, the arbitral tribunal may order any interim or conservatory measures it deems necessary. However, the arbitral tribunal may not authorise attachment orders.' Belgian Judicial Code, Art 1691; see also French Code of Civil Procedure Art 1468; Born *International Commercial* (n 36) 2446.

[133] ibid 2447.

[134] UN Doc A/CN 9/468. However, the party can claim the provisional measures after the enforcement.

court.[135] In contrast, in litigation, the national court both grants and enforces the provisional measures. In this case, it is unlikely that a party would know about the provisional measures before enforcement, which may ensure that choice of court agreements leading to litigation before a particular court are more desirable than arbitration agreements in connection with the granting of provisional measures.

This discussion has illustrated that provisional measures are an important issue in international commercial disputes. They aim to preserve the factual or legal situation of a case during the litigation/arbitration process. Moreover, in arbitration agreements, the arbitral tribunal is not as effective as a national court in granting provisional measures, because the arbitral tribunal does not have the power to grant provisional measures against anyone other than the parties to the arbitration agreement. In addition, the granting of provisional measures by an arbitral tribunal might cause some delays, as the latter needs to be constituted, and the power of enforcement of the provisional measures lies with the national court and not the arbitral tribunal. Thus, it can be concluded that litigation may at times be more attractive than arbitration, because the chosen court will be more competent in granting provisional measures.

It could be argued that the parties can select arbitration for determination of the substantive issues and leave any provisional measures to the national court, although such an arrangement has drawbacks. First, there might be more delay and costs, because there will be two fora: the arbitral tribunal and the national court. The parties will have to pay fees for the arbitrators and the national court, and they might need lawyers for the court proceedings, which would be an additional cost. Secondly, it seems more effective and ensures better justice if the same forum deals with substantive matters and provisional measures, rather than having two fora, an arbitral tribunal and a national court, because the forum which deals with

[135] For example, the party can be aware of the award, as indicated above. Normally in international commercial arbitration, the arbitral tribunal consists of three arbitrators, two of whom are nominated by the parties. Therefore, the arbitrator may tell the party about the award.

substantive matters is the closest to the dispute and it can decide whether provisional measures are needed. Finally, there is uncertainty about whether a national court will grant provisional measures in aid of the arbitration, if the arbitration seat is not in the state which has been asked to grant the provisional measures. Most arbitration laws, including those of the GCC States, do not regulate this issue. Even the New York Convention, which regulates international arbitration agreements and the recognition and enforcement of foreign arbitration awards, is silent about provisional measures.[136] As a result, there is a gap and uncertainty in the GCC States' laws regarding provisional measures in international arbitration. This creates uncertainty about whether the parties who have agreed to a foreign arbitral tribunal can come to one of the GCC national courts and request provisional measures in aid of foreign arbitration. However, this situation is unlikely to occur, if the parties agree to a choice of court agreement and exclude one of the GCC States' courts from hearing the case, because all of the GCC States' laws grant the domestic courts of the GCC States jurisdiction to grant provisional measures which need to be enforced in the forum, even when the forum does not have jurisdiction over the dispute.[137] Thus, in litigation where there is a choice of court agreement, it is clear that choosing a foreign court to hear the case does not exclude the GCC States' courts from granting provisional measures. In conclusion, litigation appears to be a more effective way to obtain provisional measures than arbitration. The next paragraph will illustrate the disadvantages of arbitration over litigation for parties in

[136] The absence from the New York Convention of provisional measures causes conflict in interpreting article II(3) as to whether the article forbids the national court from ordering provisional measures in US courts. *McCreary Tire and Rubber Co v CEAT SPA* 501 F2d 1032 (3d Cir 1974), in which the Court of Appeals indicated that article II(3) of the New York Convention forbids US courts from granting provisional measures in aid of foreign arbitration. However, there are other decisions from other US courts indicating that article II(3) of the New York Convention does not forbid US courts from granting provisional measures in aid of foreign arbitration, such as *Carolina Power and Light Co v Uranex* 451 FSupp 1044 (ND Calif 1977); Born, *International Commercial* (n 36).

[137] Art 27 of the Kuwaiti Code for Civil and Commercial Procedure no 38/1980; art 29 of the Saudi Arabia Enforcement Act 13/8/1433 Hijri, 2/7/2013 Gregorian; art 19 of the Bahraini of the Code of Commercial and Civil procedure no 12 of 1971; art 34 of the Omani Civil and Commercial Procedure Law No. 22 of 2002; and art 22 of the UAE Federal Law of the Civil Procedure Code 1992.

international business transactions, which in some circumstances makes choice of court agreements more desirable than arbitration agreements.

2.4.2.2 Arbitration and Third Parties

'Arbitration is the creature of a contract between the parties'.[138] Thus, the power of the jurisdiction conferred by arbitration is derived from the consent of the parties, which is called 'party autonomy'. Therefore, 'a party cannot be required to submit to arbitration in any dispute in which he has not agreed so to submit'.[139] Consequently, the arbitral tribunal does not have the power of jurisdiction over a third party,[140] because, in arbitration, the source of the jurisdiction of the arbitral tribunal is based only on the consent of the parties.[141] Therefore, the arbitral tribunal does not have jurisdiction/power over a third party, who has not agreed to the arbitration agreement. By contrast, in litigation, national courts might have jurisdiction based on different kinds of connecting factors of which the consent of the parties (party autonomy) is one, but not the only basis of exercising jurisdiction as in arbitration.[142] Therefore, in litigation, where there is a choice of court agreement between the parties, the chosen court will have jurisdiction over those who consent to be subject to its jurisdiction, and others might be brought in under other bases or connecting factors, eg domicile, residence or nationality.

Furthermore, there has been a significant development in North American courts whereby the court might exercise its discretionary authority and expand the scope of a choice of court agreement to be binding over a third party on the basis of 'closely related and global-

[138] Stewart Mcclendon and RE Goodwin, 'International Commercial Arbitration in New York' 3 (1986) cited in James Hosking 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (2003–2004) 4 Pepperdine Dispute Resolution Law Journal 3, 476.
[139] *AT&T Technologies Inc v Communications Workers of Am* 475 US 643, 648 (1986).
[140] For the purposes of this discussion, 'third party' refers to any person who has not physically signed the contract that contains a clause with a choice of arbitration agreement.
[141] Hunter (n 60) 21; John G Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: institutions and procedures* (Oxford University Press 2000) 208.
[142] Hunter (n 60) 21.

transaction' doctrines.[143] According to the closely-related doctrine if the third party is closely related to the contract where the choice of court agreement is concluded, or closely related to the transaction which that contract is part of, the court might extend the scope of a choice of court agreement to that third party.[144] For instance, in *Freeford Ltd v Pendleton*[145] the court held that, 'a non-party that is "closely related" to one of the signatories can enforce a forum selection clause … The relationship between the non-party and the signatory in such cases must be sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them'.[146] Therefore, if the court found that the third party has a close connection to the contract in which the choice of court agreement was concluded it can exercise its discretionary power to extend jurisdiction over a third party who is not a signatory to the choice of court agreement.

Furthermore, in *Solargenix Energy LLC v Acciona SA*[147], in which the claimant entered into a joint venture with American subsidiaries of two Spanish corporations, the agreement contained an exclusive choice of court agreement clause in favour of Illinois. When a dispute arose, the claimant sought to sue not only the subsidiaries, but also the Spanish parent corporations. Those two defendants moved to dismiss for lack of jurisdiction and the claimant relied on the choice of court agreement clause. The Appeal Court of Illinois held that:

> [A] court may exercise personal jurisdiction over a defendant by enforcing a forum selection clause against it, even though it was not a signatory to the contract containing the clause, where it was closely related to the dispute such that it became foreseeable that the non-signatory would be bound … Where there is a sufficiently close relationship between the non-signatory and the dispute and the parties, it does not defy the non-signatory's reasonable expectations that it would be bound by the

[143] V Ruiz Abou-Nigm, 'Choice of court agreements vis a vis third parties' in S Lamont-Black and R Thomas (eds), *Current Issues in Freight Forwarding: Law and Logistics* (Lawtext Publishing Ltd 2017) 276–297; Vaughan Black and Stephen GA Pitel,'Selection clauses: beyond the contracting parties'(2016) 12(1) Journal of Private International Law 26–59.
[144] ibid Verónica Ruiz Abou-Nigm 296.
[145] 53 AD 3d 32 (NY App Div, 2008).
[146] Verónica Ruiz Abou-Nigm ''Choice of court agreements' (n 143) 296.
[147] 17 NE 3d 171 (Ill App 1 Dist 2014); Black and Pitel (n 143) 18.

> clause, just as the signatory parties are. A non-signatory impliedly consents to the forum selection clause via its connections with [the] dispute, the parties, and the contract or contracts at issue.[148]

The court in *Solargenix Energy LLC v Acciona SA* considered that the two Spanish defendants were closely related to the contracts, the dispute and the American subsidiaries. They were the entities capable of achieving the overall aims of the joint venture with the claimant; they were involved in the negotiation and due diligence analysis for the joint venture and they played a significant role in decisions made by the subsidiaries after the joint venture was formed.[149] Therefore, the court found that it was reasonable to exercise its discretionary power and expand the scope of a choice of court agreement to be binding over the Spanish parent corporations on the basis of 'closely related'.[150]

In turn, under the doctrine of global-transaction the court might expand the scope of a choice of court agreement to be binding over a third party in order to protect the efficiency of the litigation process.[151] For instance, in *American Patriot Insurance Agency Inc v Mutual Risk Management Ltd*[152] there was a shareholder agreement that had an exclusive choice of court agreement clause in favour of Bermuda but there were also other agreements, related to the plaintiffs' claim, which had no choice of court agreement clause. The court held that the global-transaction doctrine should be applied to expand the scope of the choice of court agreement over the third party in order to refer all parties to a single forum, which is the chosen court, to avoid a multiplicity of proceedings and minimise the public costs associated with a multiplicity of proceedings.[153] Therefore, the court found that it was reasonable to apply the doctrine of global-transaction and expand the scope of a choice of court agreement in order to minimise the cost for the parties and avoid multiplicity of proceedings which

[148] 17 NE 3d 171 (Ill App 1 Dist 2014); Black and Pitel (n 143) 42.
[149] ibid 47-49.
[150] 17 NE 3d 171 (Ill App 1 Dist 2014); Black and Pitel (n 143) 42.
[151] Verónica Ruiz Abou-Nigm ''Choice of court agreements' (n 143) 296.
[152] 364 F 3d 884 (7th Cir 2004) in Black and Pitel (n 143) 8.
[153] ibid.

therefore protects the efficiency of the litigation.

Also, in *Freeford Ltd v Pendleton*, discussed above, there was a reference to the doctrine of the global-transaction in which there were signatories to a contract containing a choice of court agreement clause in favour of New York. However, the claimant was not a party to that contract. Other contracts had been executed on the same day, to which the claimant was a party, but the defendant was not. These contracts also contained choice of court agreement clauses in favour of New York. All of these contracts related to each other. The Appellate Division of the Supreme Court of New York held that the court had jurisdiction over the defendants in respect of the claimant's claim against them.[154] The claimant was allowed to invoke the choice of court agreement clause to which the defendants were parties, even though the claimant was not, because the various contracts were part of a 'global transaction'.[155]

According to the above decisions it can be argued that in litigation the national courts can exercise their discretionary power to expand the scope of a choice of court agreement to be binding over a third party who is not a signatory to the choice of court agreement. However, it is important to stress that expanding the scope of a choice of court agreement to be binding over a third party is not necessarily always a positive thing, as it might undermine the fundamental principles of 'privity of contract'[156] and party autonomy.[157] Abou-Nigm argued that, in general, a choice of court agreement should be binding over only the parties and the exception to this might be justified on the basis of the efficiency of the litigation process.[158] Therefore, expanding the scope of a choice of court agreement to be binding over a third part is an exception and the courts should not expand on this exception in order not to

[154] *Freeford Ltd v Pendleton* (n 152) 39–40.
[155] *Freeford Ltd v Pendleton* (n 152) 39–40.
[156] According to *Black's Law Dictionary* 'privity of contract' means that a contract cannot impose obligations or grant rights upon any person who is not a a party to the contract (9th edn, Westlaw Blacks 2009).
[157] In this regard see Black and Pitel (n 143) 21–26.
[158] Verónica Ruiz Abou-Nigm ''Choice of court agreements' (n 143) 296.

override the principle of 'privity of contract'. This section does not aim to critically analyse the approach of the national courts in expanding the scope of a choice of court agreement to be binding over a third party. It only aims to stress that the power of the national court in expanding the scope of a choice of court agreement might not be available in the arbitration mechanism, which therefore makes litigation a more effective way of bringing a third party to the chosen forum than in arbitration.[159]

The reason why there are difficulties in bringing a third party to the proceedings in an arbitration mechanism is because, as discussed above, the source of the jurisdiction of the arbitral tribunal is based only on the consent of the parties. Therefore, the arbitral tribunal does not have jurisdiction/power over a third party, who has not agreed to the arbitration agreement. This characteristic of arbitration, whereby there is no power of jurisdiction over a third party, may have several drawbacks which will be discussed below.

First, as has been indicated above, provisional measures may be an important matter in international business disputes. However, an arbitral tribunal does not have the power to grant provisional measures over a third party. For instance, an arbitral tribunal cannot attach bank accounts.[160]

Secondly, in international business disputes, disclosure and evidence-taking is significant. However, arbitral tribunals do not have disclosure or evidence-taking power over third parties.[161] For example, an arbitral tribunal does not have jurisdiction to order the attendance of witnesses or the disclosure of documents under penalty of a fine.[162] In contrast, most civil procedure rules give national courts the power to require a third party to produce documents or other materials that are crucial to the resolution of a dispute.

[159] Schulz (n 99) 268.
[160] Redfern, Arbitration and the Courts (n 113) 86.
[161] However, some arbitration laws allow in some circumstances the arbitral tribunal to ask a third party for evidence; Born, *International arbitration: law and practice* (n 69) 140; Kuwait arbitration rules expressly give the arbitral tribunal a disclosure power against third parties; see article 180 of the Code of Civil and Commercial Procedure.
[162] Hunter (n 60) 36.

It could be argued that the parties can select arbitration to settle their dispute, and, when they need evidence from a third party, they can seek support from a national court. This is possible, if the arbitration seat is in the same country as the evidence. However, it might be costly and more time-consuming, because there will be two fora: the arbitral tribunal and the national court. Thus, the parties will have to pay fees for the arbitrators and the national court, and they might need lawyers for the national courts, which would be an additional cost. Furthermore, there is uncertainty about whether the national court will force a third party to disclose evidence in aid of the arbitration, if the arbitration seat is not in the same country as the national court, as there is no international judicial cooperation that regulates such matters. In contrast, in litigation, there is an international convention that aims to facilitate mutual judicial cooperation on the taking of evidence abroad in civil or commercial matters. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[163] has been signed and ratified by 61 countries, Kuwait being one of them.[164] According to article 1 of the Convention, any judicial authority of a contracting state in civil or commercial matters can request to obtain evidence from the courts of another contracting state. Accordingly, the Convention facilitates the obtaining of evidence in international litigation disputes, and the Convention applies only to support judicial authority not arbitration.[165] As a result, the power of a national court to obtain evidence from a third party and this form of judicial international cooperation which regulates the taking of evidence in aid of foreign proceedings might make settlement of the dispute through litigation, in accordance with a choice of court agreement, more desirable than international arbitration.

Thirdly, in international business disputes, the claimant might need to bring a third party into the proceedings. A typical example arises when a contract between the claimant

[163] Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, opened for signature 18 March 1970, 23 UST 2555, 847 UNTS 241.
[164] Status table (n 118).
[165] Born, *International Commercial* (n 36) 2422.

and a subsidiary of a major international corporation contains an arbitration clause.[166] However, the claimant will want to bring both companies, namely the subsidiary and its parent, to the arbitration to improve the likelihood of being paid.[167] Because of the nature of arbitration agreements, it is unlikely that the claimant will be able to involve the international corporation, where the latter was not a party to the arbitration agreement.[168] However, in litigation, national civil procedure rules, in general, contemplate the possibility of a third party joining proceedings at the request of one of the litigants without the consent of the third party.[169]

The final criticism derives from the third issue, which is where there are multiple parties and multiple contractual arbitration agreements.[170] If the dispute involves multiple parties or multiple contracts, it would be more efficient to deal with all of them in one set of proceedings to reduce time and cost for the parties[171] and further to reduce the risk of inconsistent decisions,[172] since all of the issues would be settled by the same proceedings at the same time. Again, the nature of arbitration agreements is likely to render it impossible for the arbitral tribunal to handle multiple party or multiple contract disputes in the same set of proceedings.[173] As a working group of the ICC's Commission on International Arbitration indicated in their 'Final Report on Multi-Party Arbitrations':

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[166] Hunter (n 60) 37.
[167] ibid.
[168] See for instance Egypt Cassation Court decisions no 7595/81 Commercial 13/2/2014 and no 4729/72 Civil 2004, in both decisions the Egyptian Cassation Court indicated that the arbitration agreement did not extend to the third party, unless all other parties to the arbitration agreement agreed otherwise.
[169] Collier and Lowe (n 141) 208–209; For example, article 86 of the Code of Civil and Commercial Procedure provides: 'A litigant may ask the court to join in the case whoever would rightfully have been a litigant when the case was filed'.
[170] Voser, *Party Dispute and Joinder of Third Parties* (ICCA Congress Series, Kluwer Law International 2008); Irene Ten Cate, 'Multi-party and multi-contract arbitrations: procedural mechanisms and interpretation of arbitration agreements under US law' (2004) 15 American Review of International Arbitration 133; Isufi; Arben, 'Multiple parties and multiple contracts in arbitration' (2006) 3 South Carolina Journal of International Law and Business 1, 40; Dalma R Demeter, and Kayleigh M Smith. 'The Implications of International Commercial Courts on Arbitration' (2016) 33 Journal of International Arbitration 5, 441–469, 443.
[171] Born, *International Commercial* (n 36) 221; Hunter (n 60) 149.
[172] ibid; see also Kuwait Cassation Court decision no 20-21/2002 Commercial 26/11/2005. It indicates that the arbitration agreement does not extend to another contract, even if the latter is between the same parties and is related to the original contract that has an arbitration clause.
[173] Hunter (n 60) 150; Redfern, Arbitration and the Courts (n 113) 25.

> The difficulties of multi-party arbitrations all result from a single case. Arbitration has a contractual basis; only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person and oblige that other person to appear before it. The greater the number of such persons, the greater the degree of care which should be taken to ensure that none of them is joined in the proceeding against its will.[174]

However, in litigation, the national civil procedure rules in general provide for the possibility of the intervention and the joining of multiple parties and multiple contracts in the same proceedings.[175]

Taking into account the discussion above, one can argue that the issue of third parties is significant in international commercial transactions in several instances; namely, in the granting of provisional measures, taking evidence, joining a third party to the proceedings and joining multiple parties and multiple contracts in one set of proceedings. However, as indicated above, under arbitration, the power of the arbitral tribunal is limited to the parties that agreed to arbitration, whereas, where there is litigation involving a choice of court agreement, the chosen court has jurisdiction over those who consent to be subject to the court's jurisdiction, but other parties may be brought in under various connecting factors.

Overall, in comparing between litigation and arbitration, it can be concluded that each method has unique advantages that might be crucial for the parties in their international business transactions. Arbitration provides the parties with commercial competence and expertise, confidentiality and privacy of dispute resolution, and finality of decisions and procedural flexibility, whereas litigation might not. On the other hand, as has been outlined, the disadvantages or limitations of arbitration that might not exist in litigation consist of the lack of provisional measures and the power of a national court over third parties. Accordingly, international arbitration agreements and choice of court agreements are

[174] ICC Commission on International Arbitration, 'Final Report on Multi-party Arbitration' (1994) 6(1) ICC Ct Bull, 26.

[175] Hunter (n 60) 149; Collier and Lowe (n 141) 208–209; Article 87 of the Kuwaiti Code of Civil and Commercial Procedure which provides: 'Any person having an interest may intervene in the case by joining a litigant or requesting a judgment for himself on a matter related to the case'; Article 88 provides that under some circumstances: 'The court on its own may order the joinder of whoever it feels should be joined'.

different agreements involving alternative forms of dispute resolution and they can provide the parties with different advantages in international business transactions. Thus, one type of dispute resolution method does not necessarily fit all types of transactions.[176] Every transaction is different, and the most appropriate type of dispute resolution method will depend on the circumstances of the transaction.

Accordingly, the recognition of arbitration agreements and arbitral awards under the New York Convention in the GCC States does not necessarily reduce the need for and importance of examining how the rules in relation to choice of court agreements might be improved in the GCC States. Chapter three will illustrate that, despite the recognition of arbitration agreements in the GCC States, there are several cases that have appeared before GCC courts in which the parties included in their contracts a choice of court clause nominating a foreign court for the resolution of disputes. Therefore, it is clear that the recognition of choice of court agreements is a great interest to parties in international business transactions.

2.5 Summary

This chapter has defined, first, the concept of choice of court agreements. It has distinguished between exclusive and non-exclusive choice of court agreements. It then considered the significant importance of rules providing for the recognition of choice of court agreements for international business transactions, as such rules minimise the risk of parallel litigation and inconsistent judgments and increase the level of legal certainty and predictability. The chapter has also referred to an empirical study demonstrating that international businesses might refrain from doing business in jurisdictions where there is uncertainty over the recognition of choice of court agreements, which, therefore, might negatively impact upon the economic and international trade of those jurisdictions. Finally, the chapter critically

[176] Born, *International Arbitration* (n 69) 4.

compared litigation with arbitration and concluded that each method has unique advantages that might be crucial for the parties in their international business transactions. Therefore, the recognition of arbitration agreements does not necessarily reduce the need and importance for regulating the recognition of choice of court agreements. Subsequent chapters will consider the approach to recognition of choice of court agreements in the GCC States to examine how the rules of choice of court agreements in the GCC States might be improved.

CHAPTER 3: RECOGNITION OF CHOICE OF COURT AGREEMENTS IN THE GCC STATES

3.1 Introduction

It was argued in the previous chapter[1] that rules providing for the regulation and recognition of exclusive choice of court agreements are significant for the parties in their international business transactions, because such recognition might minimise litigation risks. It was argued that the recognition of choice of court agreements might avoid a conflict of jurisdiction and parallel litigation in different national courts and therefore uncertainty and unpredictability, as the parties will be able to predict in which jurisdiction any dispute between them will be resolved. Furthermore, avoiding parallel litigation reduces the risk of inconsistent judgments, because a single forum will resolve any particular dispute and render a final decision.

It was also argued in the previous chapter[2] that the regulation and recognition of choice of court agreements may have significant economic implications for the state, as market actors may be dissuaded from entering transactions connected with jurisdictions that either do not recognise or are ambiguous and unclear about the recognition of choice of court agreements. Even though the recognition of choice of court agreements is an important consideration in international business transactions, as the provision of effective rules may reduce the risk of litigation, the approach of the GCC States discussed in detail below needs significant improvement. A recommendation of the Doha conference that was outlined in chapter one[3] demonstrates that the GCC States should research 'the benefits of predictability and legal certainty provided by the 2005 Hague Convention on Choice of Court Agreements[4]

[1] See chapter 2 section 2.3.2.
[2] ibid.
[3] See chapter 1 section 1.2.
[4] Hague Convention on Choice of Court Agreements (30 June 2005). <http://www.hcch.net/index_en.php?act=conventions.text&cid=98>accessed 7 September 2017.

and its resulting advantages for cross-border trade and investment',[5] and consider the adoption of that Convention. To that end, this chapter will focus on the uncertainty and gaps in the legal provisions relating to choice of court agreements in the GCC States, as litigation risks are likely to exist in international business transactions with GCC States. It will argue that the GCC States should revise their approach to the recognition of choice of court agreements to help the parties in international business transactions avoid litigation risks.

The chapter will begin by identifying the sources of jurisdiction rules in the GCC States. Secondly, it will demonstrate the current position, within those rules, on the recognition of choice of court agreements beginning with the positions in Kuwait, Saudi Arabia, Bahrain and Oman, before moving on to consider the United Arab Emirates (UAE). As will be discussed below, UAE legislation and courts do not regard the recognition of choice of court agreements in the same manner as other GCC States. Finally, this chapter will critically assess the position of the GCC States regarding recognition of choice of court agreements.

3.2 Sources and an Overview of Jurisdiction Rules in the GCC States

3.2.1 The Sources of Jurisdiction Rules in the GCC States

All of the GCC States have enshrined jurisdiction rules in their respective codified legal systems. They specify clearly when the forum has jurisdiction over a dispute and should hear the case and when the forum must decline jurisdiction. The provisions of the legal codes of each of the foregoing states dealing with the rules of jurisdiction will be considered below.

- Kuwait

Kuwait was the first of the GCC States to introduce into its legislation jurisdiction rules. These were contained in the Code Regulating Relationships with Foreign Elements no

[5] First Gulf Judicial Seminar on Cross-Frontier Legal Cooperation in Civil and Commercial Matters (Doha, Qatar, 20–22 June 2011) 3 <https://www.hcch.net/en/news-archive/details/?varevent=225> accessed 1 November 2016.

5/1961. The Code aimed to govern relationships that have a foreign element (private international law provisions). It was divided into two chapters. Chapter one contained the civil jurisdiction rules, and chapter two contained the choice of law rules. However, in 1980, chapter one was repealed, and the jurisdiction rules were incorporated into articles 23 to 27 of chapter one of the Code for Civil and Commercial Procedure no 38/1980. Therefore, jurisdiction rules are now part of the latter code, not the former.

- The Kingdom of Saudi Arabia

The Kingdom of Saudi Arabia started to introduce jurisdiction rules into its legal code in 2000 in articles 24 to 30 of the Law of Procedure before Sharia Court no 19 of 2000.[6]

- The UAE

The UAE is a federation of seven Emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Um Al Quwain, Fujairah and Ras Al Khaimah). It was established on 2 December 1971. In March 1992, the UAE adopted jurisdiction rules that are applicable in all seven Emirates; these were included in Federal Law no 11 of 1992 of the Civil Procedure Code. The provisions in the Code that relate to jurisdiction rules are contained in articles 20 to 24. This Code applies to all of the UAE states[7] except the Dubai International Financial Centre (DIFC) Court[8] located in the UAE Free Zones in Dubai. The DIFC Court was established specifically to resolve international commercial disputes[9] and has its own jurisdiction rules that are different from the UAE Federal Civil Procedure Code.[10] Accordingly, the DIFC Court will be considered in a later separate chapter.[11]

- The Kingdom of Bahrain

[6] Royal Decree no M/21, 20 Jumada I, 1421 Hegira [19 August 2000].
[7] UAE Federal Law of the Civil Procedure Code, art 1.
[8] Law no 9 of 2004 In Respect of the Dubai International Financial Center (2004) art 8 (English) <http://www.dubaicourts.gov.ae/portal/page/portal/dc/Legislation_Details?_piref292_457219_292_455214_455214.called_from=3&_piref292_457219_292_455214_455214.law_key=1221> last accessed 3 January 2017.
[9] DIFC Court Web Page (in English) <http://difccourts.ae/about-the-courts/> last accessed 3 January 2017.
[10] ibid.
[11] See chapter 4 section 4.3.

The Kingdom of Bahrain's jurisdiction rules are contained in articles 14 to 20 of the Code of Commercial and Civil procedure no 12 of 1971. This Code applies to all courts in Bahrain except the Bahrain Chamber for Dispute Resolution Court (BCDR Court).[12] The BCDR Court is similar to the DIFC Court located in Dubai, having been established specifically to resolve international commercial disputes,[13] and it has its own jurisdiction rules that are different from the Bahrain Civil Procedure Code.[14] Both the BCDR Court and the DIFC Court will be considered in a later separate chapter.[15]

- Oman

In Oman, jurisdiction rules are contained in chapter one, articles 29 to 35 of the Civil and Commercial Procedure Law no 22 of 2002.

Having outlined the sources of the jurisdiction rules in the GCC States, it is important to provide, briefly, the basis for exercising jurisdiction in these States before delving into a critical discussion of the exercise of jurisdiction based on choice of court agreements in the GCC States.

3.2.2 An Overview of Jurisdiction Rules in the GCC States

The decision whether to exercise jurisdiction by the courts in the GCC states is determined by one or more of three factors. Firstly, there are the general jurisdiction rules that are derived from the connection between the parties and the state. Secondly, there are special jurisdiction rules that depend on the connection between the dispute and the state. Thirdly, there is jurisdiction determined by the choice of the parties, exercising their autonomy to choose where to litigate. The first two types of jurisdiction will be briefly outlined below, while the last basis, agreement by the parties, will be considered in detail in the following sections as it is the central focus of this thesis. It should also be noted that this section aims only to provide

[12] Legislative Decree no 30 of 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution http://www.bcdr-aaa.org/bcdr-court/ accessed 7 September 2017.
[13] ibid article 2.
[14] ibid article 9.
[15] See chapter 4.

an overview of the bases of jurisdiction for courts in each of the GCC States and it does not aim to critically analyse them. A critical analysis of those rules in the GCC States will be provided later in this chapter.[16]

3.2.2.1 General Jurisdiction

General jurisdiction is based on the first article of the international jurisdiction rules in each set of GCC legislation.[17] The exercise of general jurisdiction is based on three connected factors: the nationality of the defendant,[18] his/her domicile[19] and his/her place of residence.

Nationality is a basis for exercising jurisdiction in all of the GCC States.[20] It depends on the legal relationship between the state and the defendant. For each GCC State, the rules of nationality as a basis of jurisdiction provides that if the defendant is a citizen of the state, then the state courts have jurisdiction over the dispute.[21] The nationality of a legal entity is that of the country in which the entity is registered or incorporated.[22]

In addition to exercising jurisdiction on the grounds of nationality, the GCC States have also adopted domicile and place of residence as bases of jurisdiction for non-citizens.[23] Kuwait,[24] the UAE,[25] Bahrain[26] and Oman[27] have adopted both domicile and the place of

[16] See below section 3.5.4.
[17] See article 23 of the Kuwait's Civil and Commercial Procedure Code; articles 24 of the Saudi Arabia's Law of Procedure before Sharia Court; article 20 of the UAE's Federal Civil Procedure Code; article 14 of the Bahrain's Code of Commercial and Civil procedure; article 29 of the Omani's Civil and Commercial Procedure Law No. 22 of 2002.
[18] ibid.
[19] ibid.
[20] See art 23 of the Kuwait's Civil and Commercial Procedure Code; art 24 of the Saudi Arabia's Law of Procedure before Sharia Court; art 20 of the UAE's Federal Civil Procedure Code; art 14 of the Bahrain's Code of Commercial and Civil procedure; art 29 of the Omani's Civil and Commercial Procedure Law No. 22 of 2002; see also Kuwait Cassation Court decisions no 749/2002 Commercial 3/6/2003.
[21] Abu Dhabi decision no 747/ 2012 Commercial 17/7/2013; Kuwait decision no 316, 318/97 and Commercial 24/5/1998.
[22] ibid.
[23] See art 23 of the Kuwait's Civil and Commercial Procedure Code; art 24 of the Saudi Arabia's Law of Procedure before Sharia Court; art 20 of the UAE's Federal Civil Procedure Code; art 14 of the Bahrain's Code of Commercial and Civil Procedure; art 29 of the Omani's Civil and Commercial Procedure Law no 22 of 2002.
[24] ibid.
[25] See art 20 of the UAE's Federal Civil Procedure Code.
[26] See art 14 of the Bahrain's Code of Commercial and Civil Procedure.
[27] See art 29 of the Omani's Civil and Commercial Procedure Law no 22 of 2002.

residence as grounds of jurisdiction, while Saudi Arabia[28] has adopted only the place of residence.

The GCC States do not share the same definition of place of residence and domicile. These terms are defined differently under the domestic laws of each state. Furthermore, the distinction between the place of residence and domicile is unclear in each of the GCC States. In Kuwait, the UAE, Bahrain and Oman, domicile refers to the place of permanent residence of the person,[29] and for a legal entity domicile refers to the business location of the entity.[30] In contrast, the codes of these states do not define the place of residence per se. Although their jurisdiction rules state that the place of residence of the defendant is a basis for seising jurisdiction in international matters, there is no indication of what is meant by place of residence. The only definition of place of residence in the GCC States is in the explanatory note to the Kuwaiti Civil Procedure clarifying article 23, which the latter establishes the place of residence as a basis of jurisdiction albeit without defining it. The explanatory note states that anyone other than a transitory resident is considered to be a resident without any qualification about the permanency of the residence unlike the case of domicile, where the residency must be permanent. On the other hand, the Saudi Arabian Procedure Act provides only the place of residence as the basis for jurisdiction and does not mention domicile. However, article 10 of the Saudi Arabian Procedure Act defines the place of residence as being where the person lives permanently. Therefore, the definition of the place of residence in Saudi Arabia appears to resemble the definition of domicile in Kuwait, the UAE, Bahrain and Oman and not the definition of the place of residence at least insofar as defined by the explanatory note to the Kuwaiti Civil Procedure Code. Having outlined the bases of general

[28] See art 24 of the Saudi Arabia's Law of Procedure before Sharia Court.
[29] Kuwait Procedure Act, art 13; UAE art 75(2) of the Civil Act; Bahrain Civil Code art 12(A); Oman art 37(1) of the Civil Act.
[30] Kuwait Procedure Act, art 14; UAE art 93(d); Oman Civil Act art 49(d).

jurisdiction in the GCC States, the special jurisdiction bases adopted by the GCC states in exercising jurisdiction will be considered below.

3.2.2.2 Special Jurisdiction

Special grounds for jurisdiction mean that when the defendant is not a citizen of the state and has neither domicile nor place of residence in that state, the state will seise jurisdiction only where there is a special connection between the state and the dispute. The jurisdiction rules of the GCC States define precisely the required connections between the dispute and the state which would lead the state to exercise jurisdiction over the dispute. The operation of special jurisdiction is illustrated below;

- Chosen domicile

The first basis for the exercise of jurisdiction on special grounds adopted in all the GCC States is the chosen domicile of the defendant.[31] Chosen domicile is different connecting factor to the domicile that discussed above. Chosen domicile refers to the place that the person designates for the delivery of any or all communications relating to a specific contractual relationship.[32] For example, the person may designate an attorney's office in a state in order to send or receive any legal correspondence relating to a specific contractual relationship. In the context of exercising jurisdiction, the GCC States have adopted the domicile chosen by the defendant for the purposes of a specific contractual relationship as a basis for exercising jurisdiction over any dispute related to that relationship. Accordingly, if the defendant has a chosen domicile in a GCC State for the purposes of a specific contractual relationship, that state will have jurisdiction only over any dispute related to that relationship.

- Place of assets

[31] See article 24(a) of the Kuwait's Civil and Commercial Procedure Code; articles 25 of the Saudi Arabia's Law of Procedure before Sharia Court; article 21(1) of the UAE's Federal Civil Procedure Code; article 15(1) of the Bahrain's Code of Commercial and Civil procedure; article 30(a) of the Omani's Civil and Commercial Procedure Law No. 22 of 2002.

[32] Ahmad Alsamdan, *International Arbitration and Foreign Arbitration in Kuwati Private International Law* (1999).

All the GCC States have adopted the place of assets as a basis for exercising jurisdiction.[33] The place of assets as a connecting factor means that when litigation concerns assets that are located in the state, the state has jurisdiction over the dispute regardless of whether the assets are movable or immovable.[34]

- The place of an obligation

The GCC States have adopted the place of an obligation as a basis for exercising jurisdiction in either contractual or non-contractual relationships.[35] All GCC States have established three different situations related to the obligation in which the forum will have jurisdiction.

First, where the obligation is deemed to have originated in the forum. This basis of jurisdiction applies in both contractual and non-contractual relationships.[36] An example of the former is the forum where a contract is signed. It can also be applied in non-contractual relationships such as in delict/tort when the harm occurs in the forum.

Secondly, if the obligation has been performed in the forum. This basis of jurisdiction can be applied in contractual relationships.[37] For example, in a contract of sale the place where the buyer pays the seller constitutes a connecting factor for the purpose of deciding jurisdiction.

[33] See article 24(b) of Kuwait's Civil and Commercial Procedure Code; articles 26(a) of Saudi Arabia's Law of Procedure before Sharia Courts; article 21(2) of the UAE's Federal Civil Procedure Code; article 15(2) of Bahrain's Code of Commercial and Civil procedure; article 30(b) of the Omani Civil and Commercial Procedure Law no 22 of 2002.
[34] The text of the place of assets as a connecting factor in the jurisdiction rules of the UAE, Oman, Saudi Arabia and Bahrain states the term 'property'. Therefore, this can refer to moveable or immoveable property while article 24 (b) of the Kuwait legislation clearly states that if the moveable or immoveable property is located in Kuwait the state has jurisdiction.
[35] See article 24(a) of Kuwait's Civil and Commercial Procedure Code; articles 25 of Saudi Arabia's Law of Procedure before Sharia Courts; article 21(1) of the UAE's Federal Civil Procedure Code; article 15(1) of Bahrain's Code of Commercial and Civil procedure; article 30(a) of the Omani Civil and Commercial Procedure Law No. 22 of 2002.
[36] ibid.
[37] ibid.

Thirdly, if the forum is the place where the obligation is to be enforced.[38] For instance, if the parties contractually designated a place for delivery of goods, that place can be the place where an obligation is to be enforced for the purpose of exercising jurisdiction.

- Joint basis of jurisdiction

Joint basis of jurisdiction means that the state has jurisdiction over all the defendants if one of them has an appropriate or sufficient contact with the state. All the GCC States (except Oman) adopted joint basis of jurisdiction in their jurisdiction rules.[39] The GCC States have defined precisely the required level of contact between the defendant and the state which leads the state to exercise jurisdiction over all defendants. The contact between the defendant and the state according to the joint connecting factor is different from state to state in the GCC states.

Kuwait has adopted four types of contact which may arise between Kuwait and the defendant.[40] If any one of them arises, the Kuwaiti courts will have jurisdiction over all of the defendants. The required contact is established if one of the defendants is a citizen of Kuwait or has residence or domicile or elected domicile in Kuwait, in which case Kuwait will have jurisdiction over all the defendants.

Unlike Kuwait, Bahrain[41] and the UAE[42] consider only the residence or the domicile of the defendant as sufficient types of contact between the state and the defendant in order to exercise jurisdiction over all of the defendants jointly. Saudi Arabia[43] has limited the requisite contact to only the place of residence of one of the defendants in order to exercise

[38] See article 24(a) of Kuwait's Civil and Commercial Procedure Code; articles 25 of Saudi Arabia's Law of Procedure before Sharia Courts; article 21(1) of the UAE's Federal Civil Procedure Code; article 15(1) of Bahrain's Code of Commercial and Civil procedure; article 30(a) of the Omani Civil and Commercial Procedure Law No. 22 of 2002.
[39] See article 24(h) of Kuwait's Civil and Commercial Procedure Code; articles 25 of Saudi Arabia's Law of Procedure before Sharia Courts; article 30 of the UAE's Federal Civil Procedure Code; article 15(9) of Bahrain's Code of Commercial and Civil procedure.
[40] Art 24(h) of Kuwait's Civil and Commercial Procedure Code.
[41] Art15 (9) of Bahrain's Code of Commercial and Civil Procedure.
[42] Art 30 of the UAE's Federal Civil Procedure Code.
[43] Art 25 of Saudi Arabia's Law of Procedure before Sharia Courts.

jurisdiction jointly.

Having outlined briefly the sources and bases of general and special jurisdiction in the GCC States, the following sections will focus on choice of court agreements as a basis for exercising jurisdiction by the courts in the GCC States. However, before delving into the critical discussion of the choice of court agreement it is significant to stress that the GCC States' jurisdiction rules have been influenced in large measure by the Egyptian jurisdiction rules, which are contained in articles 28 to 35 of the Egyptian Code of Civil and Commercial Procedure no 13/1968. Before oil was discovered in the GCC States, these countries were simple societies dependent on the pearl trade and sheep and camel farming.[44] Therefore, their legal systems served to regulate only simple individual relationships based on Sharia law in family and criminal matters, and based on custom in commercial and civil matters.[45] However, once oil was discovered in the mid-twentieth century and began to be exported abroad, a more sophisticated legal system was required to keep abreast of the development of the economies, human resources and social life in these states.[46] At that time, in the Middle East, Egypt was starting to develop its legal system by codifying laws influenced by the French legal system and Sharia thanks to the Egyptian scholar Professor Abdel Razzak Al-Sanhouri,[47] who studied law in France.[48] Accordingly, it proved convenient to transplant the codified Egyptian law, especially in civil and commercial matters, to the GCC States and

[44] Ahmad Salama, *The Doctrine of International Procedure* (Dar Al Matbaat Aljamiaa, Research Institute of Arab 2000) chapter 1; P Reda and Abdul Rasoul, 'A Summary of the Legal and Judicial System in the State of Kuwait' (1991) ALQ 267, 277 and Abdulaziz Alrasheed, *The History of Kuwait* (Dar Maktaba Al-Hiat 1987) 61.

[45] ibid; *Kuwait Justice System and National Police Handbook*, vol 1 (International Business Publication 2017) 28–29; Ahmed Al-Suwaidi, 'Developments of the legal systems of the gulf Arab states' (1993) ALQ 289–301, 289; Butti Sultan Butti Ali Al-Muhairi, 'The Development of the UAE Legal System and Unification with the Judicial System (1996) 11 ALQ 2, 116–160.

[46] J El-Ahdab, *Arbitration with the Arab countries* (Kluwer Law International 2011) 536; Ahmed Al-Suwaidi (n 45) 292.

[47] For more details in the role of the Abdel Razzak Al-Sanhouri in establishing a legal system influenced by both Sharia and the French legal system see Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar 1895-1971* (American University in Cairo 1987)).

[48] El-Ahdab (n 46) 155.

other Middle Eastern states.[49] The transplanting of Egyptian laws to the GCC States is also attributed to Al-Sanhouri, who contributed to the drafting of laws in several Arab states. He also helped to draft many of the Arab States' constitutions and laws, especially civil law codes. It is no surprise, therefore, that the current day jurisdiction rules in the GCC States mirror almost exactly those contained in articles 28–35 of the Egyptian Code of Civil and Commercial Procedure, a point acknowledged in an explanatory memorandum to the Kuwait Civil Procedure Code regarding its jurisdiction rules.[50] The influence of Egypt is germane even now, because most published material on jurisdiction rules in the Arabian Gulf and used in this research originates from Egyptian academic sources. To date, there has been very little academic discussion in the GCC States regarding jurisdiction rules and, as considered in chapter one, there has been no study on the concept of choice of court agreements.[51] In contrast, there are several Egyptian academic sources regarding jurisdiction rules. Therefore, the note attached to the Egyptian Code of Civil and Commercial Procedure, together with the Egyptian academic sources will be relied heavily in this chapter.

Having identified the sources of jurisdiction rules in the GCC States and outlined briefly the bases of jurisdiction in each of the GCC States, it is important to consider the regulation of the recognition of choice of court agreements in these GCC States' jurisdiction rules.

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[49] El-Ahdab (n 46) 101, 305; See also Jalila Sayed Ahmed, 'Enforcement of Foreign Judgments in Some Arab Countries-Legal Provisions and Court Precedents: Focus on Bahrain' (1999) 14 ALQ 2, 169–176; Ahmed Al-Suwaidi (n 45) 292; Al-Muhairi (n 45) 126; Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates: A Detailed Guide to Litigation and Arbitration in the United Arab Emirates Based on Federal Laws, Laws Specific to the Individual Emirates, Judgments Delivered by the Court of Cassation and International Conventions to which the United Arab Emirates is a Member* (Kluwer Law International 2003) 5 and Hassan Ali Radhi, *Judiciary and Arbitration in Bahrain: a historical and analytical study* (Vol. 25. Brill 2003) 77.

[50] Explanatory note of the Kuwait Code for Civil and Commercial Procedure no 38/1980.

[51] It seems that all the materials regarding international jurisdiction rules in the GCC States are textbook, not considering the rationale behind those rules; See for example Alsamdan A, *Kuwait Private International Law* (3rd edn, 2008); Ashraf Mohamed, *Private International Law of Oman* (Dar Al Nahda Al Arabiya 2015); Awadallah Al Said, *The Rules of Choice of Laws and International Jurisdiction in United Arab States* (Dubai Police Academy 2001); Majid Al Halwani, *Private International Law* (Kuwait University 1974).

3.3 Recognition of Choice of Court Agreements in Kuwait, Saudi Arabia, Oman and Bahrain

Where there are effective jurisdiction rules regulating the impact of choice of court agreements, as considered in chapter two,[52] generally these rules provide for such agreements to be either non-exclusive or exclusive. The effect of a non-exclusive choice of court agreement is only that of prorogation,[53] whereby the chosen court has to accept jurisdiction, as the parties in a non-exclusive agreement designate a state or court of their choice to resolve a dispute, but they do not exclude other courts that are otherwise competent from exercising jurisdiction.[54] However, in exclusive choice of court agreements there is an additional effect, which is the derogation effect, whereby the non-chosen court has an obligation to decline jurisdiction in favour of the one chosen by the parties.[55] Accordingly, in relation to exclusive choice of court agreements the forum must distinguish between two different types of agreement. The first is a choice of court agreement nominating the forum, while the second is a choice of court agreement nominating a foreign court, because the effect of the two types of agreement would be different. In the first agreement, a prorogation effect should be granted by accepting jurisdiction, while in the second agreement a derogation effect should be granted by declining jurisdiction in favour of the chosen court.

It has been argued that recognition of exclusive choice of court agreements might avoid uncertainty and unpredictability, parallel litigation and inconsistent judgments because, by recognising the two effects of these agreements, namely the prorogation effect where the forum is the chosen court and derogation effect where the forum is not the chosen court, only one forum can resolve the dispute, which is the chosen court.[56] Accordingly, considering both the prorogation and derogation effects in the GCC States is important for the purpose of this

[52] See chapter 2 section 2.2.
[53] The effect of exclusive and non-exclusive choice of court agreements has been demonstrated in detail above in chapter 2 section 2.2.
[54] ibid.
[55] ibid.
[56] ibid.

thesis. Both terms, prorogation and derogation effects, will be used throughout this thesis to refer to the effect of a choice of court agreement nominating the forum and the effect of a choice of court agreement nominating a foreign court.

3.3.1 Recognition of the Prorogation Effect

Before considering the extent to which the prorogation effect of choice of court agreements is recognised in the GCC States, it is important to stress that recognition of the prorogation effect, unlike the derogation effect, as will be discussed in detail below, does not present a challenge to state authority and does not offend the concepts of territorial sovereignty and control.[57] This is because the recognition of the prorogation effect does not prevent the state from exercising jurisdiction over a dispute over which it has jurisdiction. However, the challenging aspect regarding the recognition of the prorogation effect is whether the parties can oblige the chosen court to assume jurisdiction by virtue of their agreement, even if the chosen court has no connection to the parties or to the dispute.[58]

In this respect, Nygh has argued that the only point that involves real autonomy arising from the prorogation effect is when the parties can oblige the chosen court to assume jurisdiction by virtue of their agreement, even if the chosen court has no connection to the parties or the dispute.[59] Mills also suggests that a restriction that limits party autonomy only to courts that have a connection with the dispute or the parties is not a new basis for jurisdiction. It is instead 'a rule of jurisdictional priority',[60] because the courts that have a connection with the dispute or the parties may already have jurisdiction on territorial or personal grounds.[61] The autonomy of the parties limits these courts by specifying one forum

[57] Nygh, *Autonomy in International Contracts* (OUP 1999) 19.
[58] ibid.
[59] ibid.
[60] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BYIL 1, 187–239, 231.
[61] Examples of the territorial ground in exercising jurisdiction are the 'domicile of the defendant' or the 'place where the contract has been signed'; 'nationality' is an example of the personal ground. Both territorial and personal grounds in exercising jurisdiction will be considered in detail in chapter four.

to hear the case.[62] For example, Nygh considered that historically western states did not exercise jurisdiction based on party autonomy, unless there was some connection between the party or the dispute and the state.[63] For example, until 1985, the Dutch courts would not recognise the prorogation effect, unless the defendant had an elected domicile in the Netherlands.[64] French courts also did not recognise the prorogation effect, unless there was some connection between the parties or the dispute with France.[65]

Also, similar provisions to those in western states might be found under Chinese PRC Civil Procedure Law 2012, where a territorial connection is required between the chosen court and the parties or the dispute. Article 34 of the Chinese Civil Procedure Law provides:

> Parties to a dispute over a contract … may, through written agreement, choose the court of the place where the defendant has his domicile, where the contract is performed, where the contract is concluded, where the claimant has his domicile, where the subject matter is located, or other places which have practical connections with the dispute to exercise jurisdiction[66]

According to article 34 of the Chinese Civil Procedure Law, it might be argued that China adopts an approach to recognising choice of court agreements, if at least one of the territorial connections specified by article 34 exists between the parties or the dispute and China. Therefore, China seems to follow the approach discussed above of balancing the recognition of choice of court agreements with state sovereignty rather than recognising the complete autonomy of the parties.

In conclusion, it might be argued that ensuring that civil and commercial rules of jurisdiction reflect the fundamental contractual principle of party autonomy might be achieved only through the recognition of choice of court agreements without requiring any connection between the parties or the dispute with the chosen court. Such recognition of the

[62] Mills, *Rethinking Jurisdiction* (n 60) 231.
[63] Nygh (n 57) 16–17; See also Lenhoff, 'The Parties' Choice of Forum: Prorogation Agreements', (1960-61) 15 Rutgers L Rev 414, 476–490.
[64] Nygh (n 57); Lenhoff (n 63).
[65] ibid.
[66] Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 116.

prorogation effect of choice of court agreements is compatible with the interests of international business considered in chapter two, because the parties will be able to choose a natural forum that does not have a connection with either party. In addition, the parties will be able to choose the most suitable forum to settle their dispute regardless of whether the forum has a connection with the dispute or the parties.

Accordingly, consideration will be given below to the recognition of the prorogation effect in GCC States' legislation and case law to examine whether these states recognise the real autonomy of the parties that are free from any restrictions.

The jurisdiction rules in the legislation in Kuwait,[67] Saudi Arabia,[68] Bahrain[69] and Oman[70] explicitly provide grounds for exercising jurisdiction based on the agreement of the parties. The text of the articles regarding the recognition of the prorogation effect in all of the above GCC States is similar. The articles provide that the state has jurisdiction if the 'opponent',[71] 'defendant'[72] or 'litigants'[73] agreed to litigate in the courts of that state.

According to the text of the articles in these GCC States, only the agreement of the defendant, opponent, or litigant is required for their state courts to recognise the prorogation effect. The articles in the legislation of these GCC States do not require any connection between the parties or the dispute and the chosen GCC State for the prorogation effect to be recognised by the GCC chosen court. Furthermore, the draft of the articles regarding the recognition of the prorogation effect in all of the above States uses the phrase 'the court has jurisdiction'[74] if the defendant has agreed to be sued in their courts. Accordingly, the legislation in the above GCC States does not allow the GCC States' courts any flexibility

[67] Kuwaiti Code for Civil and Commercial Procedure no 38/1980 art 26.
[68] Saudi Arabia Law of Procedure before Sharia Court no 19 of 2000 art 28.
[69] Bahraini Code of Commercial and Civil procedure no 12 of 1971 art 17.
[70] See Omani Civil and Commercial Procedure Law no 22 of 2002 art 23.
[71] See Kuwaiti Civil Procedure Code art 26; Bahraini Civil Procedure Code art 17.
[72] See Omani Civil Procedure Law art 23.
[73] Art 28of Saudi Arabia Law (n 68).
[74] See the provisions regarding the prorogation effects in the GCC laws above (n 67), (n 68), (n 69) and (70).

when considering whether to recognise a valid jurisdiction agreement, when the parties have chosen the courts of that State. The phrase 'the court has jurisdiction' means that if the jurisdiction agreement nominating one of the above GCC States is valid, that State's courts have jurisdiction regardless of the circumstances of particular case.[75]

For instance, in Kuwait, the original text of the article regarding prorogation jurisdiction formerly stated that 'the court may have jurisdiction'.[76] The term 'may' has been interpreted as meaning that the Kuwaiti court has the discretion to decide whether to recognise the jurisdiction agreement that favoured the courts of Kuwait.[77] Whether Kuwaiti courts would recognise the agreement would depend upon whether they deemed it appropriate to do so based on the circumstances surrounding each case. However, there has been no case in Kuwait in which a Kuwaiti court has exercised its discretion and refused to assert jurisdiction based on the agreement of the parties.

Nevertheless, revising legislation by changing the words 'may have' to 'has' by article 26 of the Kuwait Civil Procedure Code seems to remove any flexibility for the court to decide whether to recognise a valid jurisdiction agreement or not. By this amendment, the Kuwaiti legislator has created a conclusive presumption that a Kuwait court is the appropriate one to hear the dispute where it has been chosen by the parties regardless of the circumstances surrounding the case. The provisions of Saudi Arabia, Bahrain and Oman as outlined previously are the same as the current amended legislation of Kuwait, which states that the court 'has' rather than 'may have' as applied to the recognition of the prorogation effect.

Therefore, it can be argued that the courts of the above GCC States must recognise the prorogation effect provided that there is a valid choice of court agreement. Hence,

[75] Alsamdan (n 51) 357.
[76] Art 19 of the superseded Code of Regulating the Relationships with Foreign Elements no 5/1961.
[77] Alsamdan (n 51) 357; It is important to stress that no case illustrates that the Kuwaiti court uses its discretion to decline jurisdiction, if there is a choice of court agreement that nominates Kuwaiti courts.

according to the application of prorogation jurisdiction in Kuwait, Saudi Arabia, Bahrain and Oman, a valid choice of court agreement nominating one of the above GCC States will be recognised, even if there is no connection between the parties or the dispute and the chosen court.

There have been several cases, in those GCC States, in which the recognition of the prorogation effect has been considered, and in none of these cases did the chosen court require a connection between the parties or the dispute with the chosen court.[78] For instance, in Kuwait,[79] a case in 2002 involved a contract of sale of two apartments located in Lebanon. The claimant, who was the buyer of the two apartments, sued the defendant in a Kuwaiti court on the basis of prorogation jurisdiction, since article 9 of the contract contained a choice of court agreement nominating Kuwaiti courts to settle any potential dispute that might arise out of the contract.[80] The buyer claimed that the seller did not transfer ownership of the two apartments to him on the respective due dates.[81] Accordingly, the buyer sought the revocation of the contract and return of the amount that the buyer had paid for the two apartments, which was 29,000 Kuwaiti Dinars, plus legal interest.[82]

The seller challenged the jurisdiction of the Kuwaiti court at all stages of the proceedings in the case by arguing that the claim related to immovable property located in Lebanon, as the result of which the Kuwaiti courts were not competent to take jurisdiction according to the immovable property exception in Article 25 of the Kuwaiti Procedure Code.[83]

[78] Kuwait Cassation Court decisions no 418/2002 Commercial 17/3/2003; Oman Supreme Court decision no 56/ 2004 Commercial 31/10/2004; Bahrain Cassation Court decision no 255/2005 Civil and Commercial 13/2/2006.
[79] ibid no 418/2002.
[80] ibid 2.
[81] ibid 2.
[82] ibid.
[83] ibid 2.

The Kuwait Cassation Court refused to decline jurisdiction in favour of Lebanon's courts and upheld the decision of the lower courts, which annulled the contract and obliged the seller to repay the 29,000 Kuwaiti Dinar to the buyer.[84]

The Kuwait Cassation Court refused to apply the immovable property exception and decline jurisdiction by holding that the immovable property exception falls under Article 23 of the Kuwait Procedure Code, which regulates only general grounds of jurisdiction.[85] The prorogation of jurisdiction is regulated by Article 26 of the Code. Accordingly, it held that, immovable property exception under Article 23 does not apply to the prorogation of jurisdiction, which is regulated by Article 26.[86] The Kuwait Cassation Court stressed that, when the parties have agreed explicitly or implicitly to litigate in Kuwait, then, according to Article 26, the Kuwaiti court must exercise jurisdiction and cannot decline jurisdiction, and the defendant cannot challenge the jurisdiction of Kuwaiti courts, having agreed to litigate before them.[87]

This significant decision suggests that the Kuwaiti legal system does not require the existence of any connection between the parties or the dispute and Kuwait to exercise jurisdiction based on party autonomy, since Article 26 of the Kuwait Procedural Code does not specify any connection as a condition precedent for the prorogation effect to be recognised by the Kuwaiti courts. Moreover, the above decision indicates that the court considered only the existence of a choice of court agreement in the contract without examining whether there was a connection between the dispute or the parties with Kuwaiti courts in deciding whether to accept jurisdiction. For instance, it did not assess whether either party was a citizen of Kuwait, whether the dispute had a connection with Kuwait, whether the applicable law was Kuwaiti law, or whether any Kuwaiti court judgment given in the dispute

[84] Kuwait Cassation Court decisions no 418/2002 (n 78) 5.
[85] Kuwait court decisions (n 78) 3; General grounds of jurisdiction according to the Kuwait Procedural Code are the nationality of the defendant and the place of resident domicile of the defendant.
[86] ibid 3.
[87] ibid.

would be recognised in Kuwait or in a foreign country. It considered only the fact that the parties had chosen to litigate in Kuwait by concluding a choice of court agreement in article 9 of their contract. As a result, it is reasonable to conclude that Kuwait has adopted an approach to the exercise of jurisdiction, at least in relation to the prorogation effect of a choice of court agreement, that is based on party autonomy without requiring any connection between the parties or the dispute with Kuwait.

Furthermore, the Omani High Court[88] dealt with a case involving the interpretation of Article 32 of the Omani Civil and Commercial Procedure Law, which regulates the recognition of the prorogation effect of choice of court agreements. The dispute concerned financial claims of up to 34,083,134 Omani Rials.[89] The claim was for the repayment of a loan and also for expenses and damages for injury and paralysis to the claimant.[90] According to the contract of service, which the claimant and the defendant had signed, the latter agreed to cover all treatment expenses if the claimant sustained any injury as a result of an accident.[91]

The claimant sued the defendant in the Omani courts on the basis of a choice of court agreement that was included in the loan agreement and also in the contract of service.[92] The claimant claimed that both of the agreements gave jurisdiction to the Omani courts and that therefore an Omani court should hear the case.[93] However, the defendant challenged the validity of the choice of court agreements in their contracts.

The Omani High Court indicated that when there is a choice of court agreement favouring an Omani court, the Omani courts should exercise jurisdiction regardless of

[88] Oman Supreme Court decision no 56/2004 (n 78).
[89] ibid 2.
[90] ibid.
[91] ibid.
[92] ibid.
[93] ibid.

whether the dispute is related to movable or immovable propriety.[94] It did not require any territorial or personal connection between the parties or the dispute and Oman. However, the two jurisdiction agreements made by the parties in their contracts did not nominate the Omani courts. The two contracts agreed that 'the parties are free to choose to litigate in any competent court'.[95] The Omani High Court stressed that, according to the jurisdiction rules of Oman, Oman was not competent to exercise jurisdiction, as no basis of jurisdiction existed in the case.[96] Therefore, the Omani court declined jurisdiction.[97]

The Omani High Court declined jurisdiction in the case because the parties did not nominate the Omani courts in their contract, and not because the Omani court would not recognise the prorogation effect of an effective choice of court agreement. Accordingly, the approach of the Omani High Court is similar to Kuwait's approach in that the recognition of the prorogation effect does not require any connection between the parties or the dispute and Oman.

Moreover, in 2006, the Cassation Court of Bahrain[98] recognised the prorogation effect without imposing any limitations. The Cassation Court observed that the defendant had mounted a substantive defence in the First Instance Civil Court and did not challenge jurisdiction there.[99] According to Article 17 of the Bahraini Civil Procedure Act, Bahraini courts have jurisdiction if the parties agreed to litigate in Bahrain explicitly or implicitly (prorogation effect). The Cassation Court of Bahrain stressed that attending the court and starting the substantive defence without challenging the jurisdiction of the forum meant that the defendant had implicitly agreed to a choice of court agreement favouring Bahraini courts,

[94] Oman Supreme Court decision no 56/2004 (n 78) 4.
[95] ibid.
[96] ibid 5.
[97] ibid 6.
[98] Bahrain Cassation Court decision no 255/2005 (n 78).
[99] ibid 1.

according to the meaning of Article 17 [100] which regulates implied choice of court agreements.

This decision demonstrates that the Cassation Court of Bahrain followed Kuwait and Oman by not requiring any connection between the parties or the dispute with Bahrain to recognise the prorogation effect of choice of court agreement. In recognising the prorogation effect, the Cassation Court of Bahrain depended only on the failure of the defendant to challenge the jurisdiction of Bahraini courts in the first instance court and regarded this attitude from the defendant as an implicit agreement to be sued before Bahrain's courts.[101]

The Cassation Court did not consider other factors in the case, such as whether the applicable law was Bahraini law, the foreign law of the chosen court, whether the Bahraini judgment would be recognised in Bahrain or in the foreign chosen court, or whether the dispute and the parties had a close connection with Bahrain or with the foreign court. Accordingly, Bahrain does not seem to require any physical or personal connection between the parties or the dispute and Bahrain to exercise jurisdiction based on the prorogation effect. Bahrain also recognises the prorogation effect in claims that are related to movable and immovable assets located outside of Bahrain.

It appears that there has been no case considering recognition of the prorogation effect of choice of court agreements in the courts of Saudi Arabia. However, as has been outlined above, the provisions regarding the recognition of the prorogation effect in Saudi Arabia are similar to those in the legislation of Kuwait, Oman and Bahrain. Therefore, the Saudi Arabian courts are likely to follow the approach of these states to the recognition of the prorogation effect.

Accordingly, it can be concluded from the discussion of the regulation of the prorogation effect in the legislation of the these GCC States and the case law of Kuwait,

[100] Bahrain Cassation Court decision no 255/2005 (n 78)2.
[101] ibid

Oman and Bahrain that these GCC States have adopted an approach in which the exercise of prorogation jurisdiction is based mainly on the concept of party autonomy and is free from any requirement of a connection between the parties or the dispute and the chosen court. This approach is compatible with the interests of international businesses, at least regarding the recognition of the prorogation effect as considered in chapter two, because the parties will be able to choose the most suitable forum for their dispute regardless of whether the forum has any connection with the parties or the dispute. Nevertheless, as will be considered below, there are several issues related to the regulation of the prorogation effect in these states that require to be addressed to ensure best practice for the parties in the recognition of the prorogation effect.

3.3.2 The Validity and Interpretation of the Prorogation Effect

3.3.2.1 Exclusive and Non-Exclusive

A choice of court agreement can be exclusive or non-exclusive. The parties in non-exclusive choice of court agreements designate a state or states without excluding the states that are competent to have jurisdiction over a dispute. In contrast, in exclusive choice of court agreements, the parties designate a state to resolve a dispute and exclude all other competent states. The parties can clarify in their contract whether their choice is exclusive or non-exclusive.

In the absence of a clear indication by the parties as to whether their choice is exclusive or non-exclusive, the distinction between the two jurisdiction agreements might be problematic.[102] To avoid uncertainty about whether the choice of court agreement is exclusive, a presumption might be created by the states that the choice of the parties is

[102] Sophia Tang and Yongping Xiao Zhengxin, *Conflict of Laws in the People's Republic of China* (Elgar Asian Commercial Law and Practice series 2016) 64; Felix WH Chan, 'Antisuit Injunctions and the Doctrine of Comity' (2016) 79 MLR 2, 341–354.

exclusive, unless the parties expressly agree otherwise,[103] or that the choice is not exclusive unless the parties expressly agree otherwise.[104] As will be outlined in chapter six, the 2005 Hague Convention, for example, specifies that 'jurisdiction shall be deemed to be exclusive unless the parties have expressly provided otherwise'.[105]

The rules on the application of choice of court agreements in Kuwait, Saudi Arabia, Bahrain and Oman are silent on the classification of exclusive and non-exclusive choice of court agreements,[106] perhaps because the important difference between the two agreements is in determining whether the derogation effect of exclusive choice of court agreements is recognised.[107] When the derogation effect is recognised, the non-chosen court will decline jurisdiction in favour of the chosen court. Accordingly, the non-chosen court must indicate whether the choice is exclusive or not in order to decide whether to decline jurisdiction in favour of the chosen court. If the choice of court agreement is non-exclusive, the non-chosen court, even where that court's legal system recognises the derogation effect of choice of court agreements, will not have to decline jurisdiction in favour of the chosen court, as the choice of the parties was not exclusive.

Therefore, the distinction between exclusive and non-exclusive agreements is significant only for those legal systems that accept to recognise the derogation effect.[108] It will be outlined below that the GCC States do not recognise the derogation effect of choice of court agreements, if the parties seek to exclude their courts from exercising jurisdiction by drafting a choice of court agreement in favour of the courts of another legal system.[109] Therefore, it is not surprising that the rules on choice of court agreements in the GCC States

[103] See article 25 of the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012].
[104] In the United States and Australia, a jurisdiction clause is regarded as non-exclusive unless the parties agreed otherwise; see Tang and others (n 102) 64.
[105] See Hague Convention art 3(b).
[106] See the provisions regarding the prorogation effects in the GCC laws above (n 67), (n 68), (n 69) and (70).
[107] Tang and others (n 102) 69.
[108] ibid.
[109] See part one of chapter four.

do not classify whether any choice of court agreement is exclusive or non-exclusive. However, this thesis will argue that the GCC States should recognise both the prorogation and derogation effects of choice of court agreements. Therefore, it would be necessary for the GCC States to determine whether the parties' agreement is exclusive or non-exclusive. This can be achieved, as will be considered in detail in chapter six, by the adoption of the 2005 Hague Convention, as this creates a presumption that the agreement of the parties is exclusive unless they specify otherwise.

3.3.2.2 Explicit or Implied Choice of Court Agreement

The prorogation effect of choice of court agreements in Kuwait, Bahrain and Oman can be explicit or implied.[110] A choice is made explicitly when the parties include an explicit choice of court agreement in the terms of their contract. An implied choice might arise when the terms of the contract or the circumstances of the case indicate that the parties agreed to litigate in a specific state.[111] In an implied choice situation, the burden is on the claimant to prove that the defendant agreed to litigate in the state where the claimant has brought the action.[112] However, Article 28 of the Saudi Arabia Procedure Act provides that Saudi Arabian courts have jurisdiction only if the defendant agreed to litigate in the Saudi Arabian courts.[113] Therefore, Saudi Arabia does not stress that the agreements of the parties should be explicit or implied. Consequently, it is unclear whether Saudi Arabia recognises implied choice of court agreements. Moreover, Saudi Arabian courts have not been required to consider the issue of recognition of implied choice of court agreements.

The recognition of an implied choice of court agreement might be accepted in non-exclusive choice of court agreements, when the parties do not exclude the jurisdiction of other competent courts. However, it will be difficult for the courts to determine that the

[110] See the provisions regarding the prorogation effects in the GCC laws above (n 67), (n 69) and (70).
[111] Kuwait, Oman and Bahrain Cassation Court decisions (n 78).
[112] ibid.
[113] See the provisions regarding the prorogation effects in Saudi Arabia Law (n 68).

parties, pursuant to an implied agreement, intended to choose a forum exclusively and exclude all other competent courts. Accordingly, exclusive choice of court agreements must be sufficiently clear in order to exclude all other competent courts. However, as has been considered above, those GCC States do not classify whether any choice is exclusive or non-exclusive, as in any event they do not recognise the derogation effect of exclusive choice of court agreements. Therefore, it is not unexpected that choice of court agreements can be recognised whether the agreement is explicit or implied. However, this thesis, as mentioned previously, will argue that the GCC States should recognise both prorogation and derogation effects of choice of court agreements. Therefore, the GCC States should require that any agreement be in 'writing' to minimise any risk that the parties' agreement will be misinterpreted by the GCC courts. This can be achieved by adopting the 2005 Hague Convention as will be discussed later. The 2005 Hague Convention clearly states that exclusive jurisdiction agreements must be concluded in 'writing'[114] or 'by any other means of communication which renders information accessible so as to be usable for subsequent reference'.[115]

3.3.2.3 The Terms 'Defendant', 'Opponent' and 'Litigants' in Regulating the Prorogation Effect

Article 26 of the Kuwaiti Procedure Act and Article 17 of the Bahraini Procedure Act provide that the state has jurisdiction if the 'opponent' agreed to be sued in the state. In Article 32 of the Omani Act, the term 'defendant' is used, while Article 28 of the Saudi Arabia Act refers to 'litigants'. None of the terms 'opponent', 'defendant' or 'litigants' may be appropriate in regulating choice of court agreements, as these terms refer to the status of one or both parties after an action is raised. Before any lawsuit is filed, the 'opponent', 'defendant' and 'litigants' are known only as a 'party' or 'parties' to a contract.

[114] Hague Convention art 3(c)i.
[115] ibid 3(c)ii.

The use of the above terms may suggest that a choice of court agreement is valid only if made after the dispute, because, before then, the parties are not classified as defendants, opponents or litigants. Therefore, it may be argued that any agreement made simply as a 'party' to a contract prior to any litigation could be viewed as being invalid.

This argument, though tenuous, has been used to question the validity of a choice of court agreement. In 2004, before the Omani Supreme Court,[116] the defendant challenged the validity of a choice of court agreement that favoured the Omani courts. The claimant sued the defendant in the Omani courts relying upon the prorogation of jurisdiction, as there was a choice of court agreement nominating the Omani courts in the contract between the parties. However, the defendant argued that the agreement was not compatible with Article 32, which governs when Omani courts can take jurisdiction on the basis of prorogation of jurisdiction.[117] Article 32 of the Omani Procedural Act stated that Oman had jurisdiction over the dispute, if the 'defendant' had agreed to it. The defendant argued that the term 'defendant' could only be applied to a party after any dispute arises.[118] When the choice of court agreement was concluded between the parties, the current defendant was not a defendant.[119] Therefore, according to Article 32, he could not be subject to the jurisdiction of Omani courts, because the choice of court agreement was concluded before he became a defendant.[120]

The Omani cassation court rejected the defendant's argument and held that any agreement nominating the Omani courts concluded by the parties obliged the parties to be subject to the jurisdiction of the Omani courts, and that the defendant could not challenge such jurisdiction by arguing that he was merely a party and not a defendant at the time when

[116] Oman Supreme Court decision no 56/2004 (n 78).
[117] ibid 2.
[118] ibid.
[119] ibid.
[120] ibid.

the agreement was concluded.[121] The Court stated that it is the view of private international jurists in different jurisdictions that a choice of court agreement concluded by the parties in their contract should have effect whether the agreement was concluded before or after the start of the legal action.[122] Accordingly, the Omani Cassation Court regarded the term 'the agreement of the defendant' as meaning the agreement of the party, even though a so-called 'defendant' only came into existence after the initiation of legal action. Therefore, the Omani Cassation Court made no distinction between a 'party' and a 'defendant' in regulating choice of court agreements.

This interpretation by the Omani Supreme Court favours the interests of the parties in international business transactions and vindicates the use of choice of court agreements, which should provide the parties legal certainty and predictability through knowing in advance where the dispute will take place. However, the terms 'opponent' in Kuwait and Bahrain and the term 'litigants' in Saudi Arabia might be used by one of the parties to challenge the validity of the choice of court agreement as occurred in Oman. Accordingly, the above terms are not conducive to ensuring legal certainty and predictability for the parties in international business transactions, as the parties might suppose that their agreement will be recognised by the above GCC States, only if it was concluded after the start of the legal action.[123]

It will be outlined in chapter six that the 2005 Hague Convention uses the term 'parties' rather than 'defendant', 'litigants' or 'opponent'. The term 'parties' is more appropriate in regulating choice of court agreements than the terms used by the above referenced GCC States, as it avoids any potential misunderstanding highlighted by the Omani case discussed above. Therefore, Kuwait, Saudi Arabia, Bahrain and Oman should reconsider

[121] Oman Supreme Court decision no 56/2004 (n 78) 4.
[122] ibid.
[123] But it might not be a significant issue for the parties if the courts of Kuwait, Bahrain and Saudi Arabia adopt the same sensible approach as the court in Oman.

the use of those terms and revise them to include the term 'parties' in their legislation regarding the application of prorogation of jurisdiction to avoid any potential misinterpretation.

3.3.2.4 The Meaning of the Word 'International' in the Jurisdiction Rules of the GCC States

All of the provisions that regulate the prorogation effect in Kuwait, Saudi Arabia, Bahrain and Oman come under the title of 'international jurisdiction rules' in their civil procedure codes.[124] Accordingly, the prorogation effect under those provisions applies to cross-border disputes rather than domestic disputes. There is an important issue regarding the meaning of the phrase 'international' under those articles in terms of the prorogation effect. For example, both parties to a contract are domiciled or resident in the same foreign state, the contract is signed in that state and all of the other factors of the transaction relate only to that foreign state, but the parties choose one of the above GCC States to settle a dispute. In these circumstances, does the choice of the parties make the transaction 'international' for the purposes of the prorogation effect?

None of the provisions that regulate the prorogation effect in Kuwait, Saudi Arabia, Bahrain and Oman explicitly specify the meaning of 'international'. In addition, none of the jurisdiction rules in the above referenced GCC States define the word 'international', except in Bahrain in connection with the BCDR Court, which will be outlined below in detail in chapter four.[125] However, the definition of 'international' in the BCDR legislation applies only for the BCDR Court to determine when it has jurisdiction over international disputes and does not cover the prorogation effect in the Bahraini traditional courts. Nevertheless, the

[124] See section one of chapter one of part two of the Kuwaiti Code for Civil and Commercial Procedure (n 67); chapter one of part two of the Saudi Arabia Law of Procedure before Sharia Court (n 68); section four of chapter one of the Bahraini of the Code of Commercial and Civil Procedure (n 69); and section one of chapter one of the Omani Civil and Commercial Procedure Law (n 70).
[125] Art 19 of the BCDR Legislative Decree 2009 (n 12); for more detail see chapter 4 section 4.2.1.

traditional Bahraini courts might use the definition of 'international' provided in the BCDR legislation to determine whether any particular dispute is international or domestic.

Accordingly, the absence of any definition of the word 'international' in the context of the international jurisdiction rules in Kuwait, Saudi Arabia, the traditional Bahraini courts and Oman might create uncertainty and unpredictability for the parties in relation to recognition of the prorogation effect. It is not clear how international the dispute must be for the prorogation effect to be recognised. Several controversial questions might arise, such as whether it is enough for the parties to be domiciled in different states for the dispute to be international and for the prorogation effect therefore to be recognised? Should the contract be signed in a state other than the state in which the parties are domiciled? Should the place of performance be different from the place in which the parties are domiciled? All of these questions might arise because of the absence of a definition of the word 'international' in the context of the international jurisdiction rules. Accordingly, all the GCC States should include a definition of the term 'international' in their provisions governing the prorogation of jurisdiction to avoid any misinterpretation of whether a dispute is international in the context that the party can choose to litigate before a foreign court or whether a dispute is purely a domestic one where the parties cannot conclude a choice of court agreement favouring a foreign court. It will be observed in chapter six that the 2005 Hague Convention provides a specific definition of the word 'international',[126] which therefore avoids any uncertainty about the meaning of the word 'international' in relation to the impact of choice of court agreements.

3.3.2.5 The Lack of Choice of Law Rules

The issue of the applicable law might arise in deciding whether any particular choice of court agreement is valid. It is arguable whether a choice of court agreement should be treated like

[126] Hague Convention art 1(2).

every other term of the contract and covered by the law that applies to the other terms of the contract, or whether it should be treated in a different manner and always assessed under the *lex fori.*[127] The outcome might be different, because the agreement of the parties might be valid under the applicable foreign law and null under the *lex fori* and vice versa. Accordingly, providing clear rules that specify what is the applicable law of the choice of court agreement is significant for the parties. It improves certainty for the parties in international business transactions, since they need to know in advance what law shall apply to their choice of court agreement, so that they may draft their agreement bearing in mind that law.

The provisions regarding the application of the prorogation effect of choice of court agreements in Kuwait, Saudi Arabia, Bahrain and Oman are silent about the issue of the applicable law on the validity of a choice of court agreement. This may lead to uncertainty for the parties in relation to the application of those international jurisdiction rules. Similar issues existed in the European Union under Brussels I Regulation,[128] as the Regulation did not provide clear choice of law rules on the validity of choice of court agreements. This, in turn, could cause uncertainty and unpredictability, because of potential conflict between the interpretations of the validity of the agreement, which might lead to the result that one state may decide that the clause is valid, while another may find it invalid.[129] However, this issue was addressed by the Brussels Regulation 2012 (Recast),[130] as article 25 of the Recast provides uniform choice of law rules on the validity of any particular choice of court agreement.[131] Therefore, in order to minimise the uncertainty and unpredictability about the applicable law governing such choice of court agreements, the GCC States should include in

[127] Tang, *Jurisdiction and Arbitration* (n 66) 22; Sophia Tang, 'Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study' (2012) 61 ICLQ 2, 459–484, 462.
[128] Brussels I Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
[129] Justin P Cook, 'Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements' (2013) 4 Aberdeen Student L Rev 76; Sophia Tang, 'Conflicts of Jurisdiction and Party Autonomy in Europe' (2012) 59 Netherlands International Law Review 3, 243.
[130] Brussels Regulation (Recast) (n 75).
[131] Tang, *Conflicts of Jurisdiction* (n 129) 243; Justin (n 129) 76.

their provisions governing the prorogation of jurisdiction a clear choice of law rule for determining the validity of choice of court agreements. The 2005 Hague Convention, as discussed in chapter six, clearly specifies that *lex fori* is the law applicable to choice of court agreements,[132] which should increase legal certainty and predictability for the parties.

3.3.2.6 The Lack of the Recognition of the Principle of Severability

The basic idea behind the *severability* principle is that the forum treats the choice of court agreement as separate from the other terms of the contract, so that the invalidity of the contract would not necessarily lead to the invalidity of the choice of court agreement.[133] Briggs has argued that *severability* is 'a technique which protects the jurisdiction agreement or other severable provision from attacks upon the validity of the contract to which it belongs'.[134]

The principle of *severability* aims to ensure the effectiveness of choice of court agreements,[135] as the court chosen by the parties will still be competent to hear the dispute, even if the contract is invalid.[136] The laws of the GCC States do not specify any rules for the separate recognition of choice of court agreements. In addition, it seems that there is no case law addressing the principle of *severability* in any of the GCC States. Therefore, there is uncertainty as to whether the principle of *severability* would be recognised by the GCC courts. The absence of any rules addressing the principle of *severability* in the GCC States creates a serious risk that the parties might not be able to litigate before the chosen GCC court if the contract is determined to be invalid irrespective of the validity of the choice of court agreement itself.

[132] Hague Convention art 5(1).
[133] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 12; Tang, *Jurisdiction and Arbitration* (n 66) 67.
[134] ibid Briggs 12.
[135] Ahmed Mukarrum. *The Nature and Enforcement of Choice of Court Agreements: a comparative study*. (Bloomsbury Publishing 2017) chapter 10, section IV.
[136] Tang, *Jurisdiction and Arbitration* (n 66) 68.

Other jurisdictions recognise the *severability* principle in applying their rules on the recognition of choice of court agreements to avoid the issue that the choice of court agreement becomes invalid because of the invalidity of the contract rather than the agreement itself.[137] For instance, article 25(5) of the Brussels Regulation 2012 (Recast) clearly provides that the agreement of the parties shall be treated as an agreement independent of the other terms of the contract.[138] A similar provision should be established in all the GCC States to avoid any potential risk that the invalidity of the contract leads to the invalidity of the choice of court agreement. Chapter six will explain in detail that the 2005 Hague Convention regulates the principle of severability.[139] This means that adoption of the 2005 Hague Convention by the GCC States would be a viable solution regarding the principle of severability.

In conclusion, it has been argued that Kuwait, Saudi Arabia, Bahrain and Oman recognise the prorogation effect of choice of court agreements without any restrictions based on the sovereignty and authority of the state in exercising jurisdiction. Such recognition seems compatible with the interests of the parties in their international business transactions, as they can choose the most suitable and neutral forum to resolve their dispute. However, the regulation of the provisions regarding the recognition of the prorogation effect in the above GCC States may limit the effectiveness of the recognition of choice of court agreements in various ways. Chapter six of this thesis will consider the 2005 Hague Convention, which is an international measure seeking to harmonise the rules in relation to choice of court agreements, to find how the 2005 Hague Convention might improve the recognition of prorogation jurisdiction in the above GCC States. Having considered the rules on recognition of the prorogation effect by the above GCC States, it is important for the underlying research

[137] See cases in English courts *Harbour Assurance v Kansa General International Insurance* [1942] QB 7011, in United States, *M/S Bremen and Unterweser Reederei, GmbH v Zapata Off-shore Co* 407 S 1 (1972) and in the European Court of Justice, Case C-269/95 *Benincasa v Dentalkit* [1997] ECR I-3767.
[138] Brussels 2012 Recast art 25(5); For more details see Tang, Conflicts of Jurisdiction (n 129) 243.
[139] Hague Convention art 3(d).

question of this thesis to consider also the rules regarding recognition of the derogation effect in these GCC States.

3.3.3 Recognition of the Derogation Effect

Unlike the recognition of prorogation effect, the legislation regarding jurisdiction rules in Kuwait, Oman, Saudi Arabia and Bahrain is silent on the subject of derogation, whereby the parties may derogate the jurisdiction of a state court that would otherwise have jurisdiction. None of these GCC States legislation explicitly provides a basis either for recognition or refusing the derogation effect. The position of these states that are silent on the subject of derogation in their legislation, with regard to court recognition of the principle was considered by a search of judgments regarding jurisdiction rules in these states. Accordingly, the approach to the derogation effect in these GCC States will be outlined below relying mainly on cases and judgments delivered from these GCC States.

3.3.3.1 Kuwait

The first case regarding non-recognition of the derogation effect of choice of court agreements in any of the GCC States was decided in Kuwait in 1975.[140] It involved a dispute between a Kuwaiti trader and a shipping company about damage to goods under a shipping contract for the carriage of a shipment of onions from Mumbai Port to Kuwait Port. When the goods arrived in Kuwait Port, 1,549 bags of onions were found to be damaged because of the water leakage during the journey. The trader filed a claim against the shipping company in a Kuwaiti court for losses amounting to 1,128,033 Kuwaiti Dinars. The shipping company claimed that article 22 of the shipping contract included a clause that constituted an exclusive choice of court agreement, which specified that all disputes arising from the contract had to be resolved exclusively in the Indian courts. The issue was whether the parties could by their agreement derogate jurisdiction from the Kuwaiti courts, as the Kuwaiti courts had

[140] Cassation Court decision no 38/74 Commercial 21/5/1975.

jurisdiction by virtue of article 12 of the Foreign Element Law 1961, which is now article 23 of the Code of Civil and Commercial Procedure, on the basis that the shipping company had an elected domicile in Kuwait.

The Kuwait Court of Cassation in a ruling on 21 May 1975 held the following:

> Securing justice is in the public interest, and a state undertakes to protect this interest by establishing, within its jurisdiction, courts of law which it deems worthy of realising this objective without resorting to a foreign court. Jurisdiction rules established by Kuwait legislation relate to the public policy of Kuwait because of its link to national sovereignty. Accordingly, Kuwaiti courts may not be excluded in favour of foreign courts by agreement of the party, and any such agreement shall be considered null and void.[141]

Thus, the Kuwait Court of Cassation asserted that Kuwait's jurisdiction rules were mandatory for the parties. Therefore, the parties could not agree otherwise, because the application of the jurisdiction rules is a manifestation of the public policy of Kuwait and is linked to the notion of state sovereignty.

That decision by the Kuwait Cassation Court in 1975 to refuse to recognise the derogation effect of choice of court agreement by refusing to decline jurisdiction in favour of the chosen court has been reflected in several subsequent cases.[142] The most recent case was in 2014,[143] and a search of Kuwaiti judicial decisions has not produced any subsequent judgment in which a court has recognised the derogation effect of a choice of court agreement, resulting in proceedings in a Kuwaiti court being stayed in favour of the chosen court. Therefore, according to the Kuwaiti Cassation Court, the current Kuwaiti jurisdiction rules do not recognise the derogation effect of choice of court agreements. The conflict between recognition of the derogation effect of a choice of court agreement and state sovereignty and public policy and how this issue might be resolved will be discussed in detail

[141]Cassation Court decision no 38/74 (n 140) 2–3.
[142] Kuwait Cassation Court decision no 1710/2013 Commercial 17/6/2014; Kuwait Cassation Court decision no 1232/2004 Commercial 12/6/2007; Kuwait Cassation Court decision no 1175/2005 Civil 3/4/2007; Cassation Court decision no 436/2006 Civil 21/5/2006; Cassation Court decision no 448/ 2000 Commercial 30/4/2001; Cassation Court decision no 316, 318/97 (n 21); Cassation Court decision no 97/1992 Commercial 31/1/1993; Cassation Court decision no 208/1984 Commercial 20/11/1985 and Cassation Court decision no 155/1982 Commercial 30/1983.
[143] ibid, decision no 1710/2013.

later in this chapter.[144] However, it should be stressed at this stage that the non-recognition of choice of court agreements by the Kuwaiti courts creates several problems that were discussed in chapter two, such as uncertainty and unpredictability, parallel litigation, inconsistent judgment, all of which the parties in international business transactions seek to avoid. Some examples of these issues that have occurred in Kuwait will be highlighted below.

In 2007,[145] the Kuwait Cassation Court refused to recognise the derogation effect on the basis that the application of the Kuwaiti jurisdiction rules related to sovereignty, where jurisdiction was asserted on the basis of the domicile of the defendant. The dispute related to a contract between a Kuwaiti company and a shipping company.[146] According to the shipping contract, the shipping company was obliged to deliver a shipment containing 166 boxes of clothes from Italy to Kuwait. The Kuwaiti company sued the shipping company in a Kuwaiti court arguing that the shipment arrived in Kuwaiti Port with only 58 boxes rather than 166 and that, therefore, 108 boxes were missing from the shipment. The Kuwaiti company alleged that the shipping company was liable for breaching the shipping contract and was obliged to pay the Kuwaiti company damages estimated at 54,777,632 Kuwaiti Dinars.[147] The shipping company claimed that article 2 of the shipping policy included an exclusive choice of court agreement clause, which required that all disputes arising from the contract had to be resolved exclusively in the Bremen Court in Germany. Therefore, the shipping company argued that the Kuwaiti courts should decline jurisdiction in favour of the Bremen court.[148]

The Kuwait Cassation Court refused to decline jurisdiction in favour of the Bremen court on the basis of the exercise of the principle of sovereignty, because the shipping company had an agent who was domiciled in Kuwait and who had received the amount of the

[144] See below section 3.5.
[145] Decision no 1175/ 2005 (n 142).
[146] ibid 2.
[147] Decision no 1175/ 2005 (n 142) 3.
[148] ibid.

transaction from the Kuwaiti company. Accordingly, the Kuwait courts had jurisdiction over the dispute on the basis of the domicile of the defendant.[149] Therefore, the Cassation Court upheld the decision of the lower courts, which awarded the claimant, namely the Kuwaiti company, 27,000 Kuwaiti Dinars in damages and refused to decline jurisdiction. The case highlights the potential for uncertainty and unpredictability in international business transactions arising from an ineffectual choice of court agreement. Initially, the shipping company expected to be sued only in the Bremen Court according to the parties' agreement under article 2 of the shipping policy. However, the Kuwait court refused to decline jurisdiction. Therefore, the shipping company had to defend itself in an unexpected and perhaps unfamiliar forum and legal system. This could potentially have had serious consequences for the shipping company, such as having to face higher costs than it would have done if Bremen had been the litigation location, where it had legal representation.

The issue of parallel litigation between two different courts may also arise between the courts of Kuwait and another legal system because of the non-recognition of choice of court agreements by Kuwaiti courts. There are also cases in Kuwait which highlight this risk of parallel litigation in international business transactions. One example occurred in 1997,[150] when the Kuwait Cassation Court refused to recognise the derogation effect of a particular choice of court agreement and therefore decline jurisdiction. The dispute was between a Kuwaiti merchant, who signed a shipping contract with a transportation company for the delivery of vegetable oil from a Kuwaiti Port to Basra and Baghdad in Iraq.[151] In 1994, the transportation company sued the Kuwaiti merchant in a Kuwaiti court arguing that the defendant did not pay for the first shipment and had also stopped providing the other shipments of the oil to be delivered to Iraq. Accordingly, the claimant company had suffered

[149] Decision no 1175/ 2005 (n 142) 3.
[150] Decision no 316, 318/97 (n 21) held on 24 May 1998 and published in the Kuwait Journal of Law and Judiciary.
[151] ibid 2.

a significant loss, as it had bought several trucks and had adapted them to be suitable for delivering vegetable oil.

The claimant claimed a breach of the shipping contract and sought damages estimated at $60,410,275 plus 7% interest.[152] The defendant argued that the claimant had already obtained a final decision in the same dispute from a Turkish court, as article 18 of the shipping contract contained a choice of court agreement clause that the nominated Turkish courts to resolve any dispute that might arise out of the shipping contract.[153] Accordingly, the defendant argued that the Kuwaiti court had to decline jurisdiction and recognise the Turkish judgment. Instead, the Kuwait Cassation Court held that, because the defendant was a Kuwaiti citizen, Kuwait had jurisdiction over the dispute according to article 23 of the Kuwait Civil Procedure Act, which provides that Kuwaiti courts have jurisdiction if the defendant is a Kuwaiti citizen. Therefore, any agreement by the parties to exclude the Kuwaiti courts was null and void. The parties could not by their agreement exclude Kuwaiti courts, as jurisdiction rules are a manifestation of state sovereignty and public policy. In addition, the foreign judgment rendered by the Turkish court could not be recognised in Kuwait, as it did not meet the general requirements of recognition and enforcements in Kuwait.[154] The issue of non-recognition of a foreign judgment rendered by the chosen court will be considered in detail below in chapter five.[155]

This Kuwait Cassation Court judgment vindicates the concern expressed by international businesses about the existence of litigation risks[156] in Kuwait. In that case, the transaction was between two businesses that had already agreed to litigate before the Turkish

[152] Decision no 316, 318/97 (n 21) 2.
[153] ibid.
[154] ibid 4.
[155] The Kuwaiti Cassation Court refused to enforce the Turkish judgment on the basis of the absent of the 'reciprocity requirement', for more details on the issue of the reciprocity requirement, see chapter 5 section 5.2.4.
[156] The issue of litigation risks and their negative impact upon international business transactions has been discussed in detail in chapter 2 section 2.4.

courts exclusively by virtue of article 18 of the shipping contract. Therefore, the defendant, who was a Kuwaiti merchant, expected to be sued only in a Turkish court, where he defended himself. However, the Turkish court's judgment did not satisfy the claimant, who thereafter sued the defendant again before a Kuwaiti court. This forced the defendant to defend himself a second time and to pay a second set of defence costs.

Another case in Kuwait in 2007[157] highlights the issue of parallel litigation, in which a claimant sued the defendants in Kuwait's commercial court regarding non-payment of the amounts due on 60 promissory notes that had been signed by the defendants. The claimant argued that the notes were not honoured on their respective due dates. The amount of the 60 promissory notes represented the price of immovable property in the Kingdom of Jordan that the defendants had bought from the claimant.[158] The Kuwaiti Commercial Court of First Instance held that the defendants must pay the claimant 63,360 Jordanian Dinars or the equivalent value in Kuwaiti Dinars. The Commercial Appeal Court agreed with the First Instance Court's decision. The defendants appealed to the Cassation Court and argued that the First Instance Court and the Appeal Court did not consider the defence that the Kuwaiti courts did not have jurisdiction over the dispute and should have declined jurisdiction on the following grounds. First, there was a choice of court agreement nominating the Jordanian courts in article 5 of the immovable property contract. Secondly, the dispute concerned immovable property in the Kingdom of Jordan, as a result of which the Kuwaiti courts were not competent to seise jurisdiction according to article 25 of the Kuwait Procedure Code. Thirdly, the same dispute with the same parties was being heard by a Jordanian court. Fourthly, there were three defendants, none of whom had any connection with Kuwait except that one of them had become domiciled in Kuwait after the 60 promissory notes were signed.

[157] Decision no 1232/2004 (n 114).
[158] ibid 2.

Accordingly, they asked Kuwait's Cassation Court to decline jurisdiction in favour of the Jordanian court.

The Kuwait Cassation Court upheld the appeal decision and held that the Kuwaiti courts had jurisdiction according to Kuwait's jurisdiction rules, because one of the defendants was domiciled in Kuwait before the case was filed, even though the domicile had started after the contract was signed. Therefore, according to article 23 of the Kuwait Procedure Code, the Kuwaiti court had jurisdiction over the defendant who was domiciled in Kuwait. Kuwait's courts had jurisdiction over the other defendants according to the joint basis of jurisdiction granted in article 24(h).[159]

In support of the decision not to decline jurisdiction in favour of the Jordanian court, the Kuwait Cassation Court stated that Kuwaiti courts cannot be excluded in favour of foreign courts by the parties' choice of court agreement and that any such agreement shall be considered null and void, as jurisdiction rules that are based on the domicile of the defendant are based on the sovereignty and public policy of the state.[160] Secondly, regarding the argument that the immovable property was located in the Kingdom of Jordan, the Kuwait Cassation Court held that the dispute related to movable property and not immovable property, as the claim was for the payment of the amount on the 60 promissory notes, regardless of what the amount related to. The promissory notes were regarded as movable intangible property. Accordingly, the immovable property exception that would have allowed the Kuwaiti courts to decline jurisdiction based on article 24 was not applicable to the dispute.[161] Finally, the Kuwait Cassation Court did not consider the last reason that the defendants put forward for declining jurisdiction, which was that the dispute was already being heard by a Jordanian court. Even though the Jordanian court was more closely connected to the facts and more appropriate to hear the dispute than the Kuwaiti court for the

[159] For the meaning of the joint connecting factor above section 3.2.2.2.
[160] Decision no 1232/2004 (n 142) 3.
[161] ibid 3.

several reasons discussed above, the Kuwait Cassation Court refused to recognise the derogation effect of the choice of court agreement. Instead, it retained jurisdiction, relying on the jurisdiction rule relating to the domicile of the defendant and, hence, relied on the overriding principle of the sovereignty of the state. It is argued that the Kuwaiti courts, by emphasising the primacy of domicile as a basis of jurisdiction over any derogation effect of a choice of court agreements, pose litigation risks in an international business transaction.

The case demonstrates litigation risks that the parties hope to avoid in their international business transactions. It highlights the issues of uncertainty and unpredictability. Since the two parties had agreed to litigate before a Jordanian court, the defendant did not expect to have to litigate before any other court. It also demonstrates the potential for parallel litigation, as the case was already being heard by the Jordanian court, and being sued in Kuwait as well gave rise to an additional set of defence costs. Furthermore, the case highlights the potential for inconsistent judgments, as there were two judgments, from the Kuwaiti courts and Jordanian courts, respectively.

This case illustrates how the absence of clear rules in the Kuwait legislation regarding recognition of the derogation effect led the Kuwaiti courts to refuse to recognise the choice of court agreement on the basis that it assaulted the sovereignty of Kuwait and its public policy, on the basis that jurisdiction rules are manifestations of state sovereignty and authority. Hence, it is argued that the tendency of courts in Kuwait to refuse to recognise the derogation effect of choice of court agreements exposes parties to international business transactions connected with Kuwait to the risks of uncertainty, unpredictability, parallel litigation between two different courts and inconsistent judgments. International businesses seek to avoid jurisdictions that might impose litigation risks as highlighted in chapter two.[162] Therefore, the

[162] See chapter 2 section 2.4.

approach to recognition of choice of court agreements in Kuwait can negatively impact upon international trade and the economy of the Kuwaiti state.

3.3.3.2 Oman

The author could find no Omani court decisions that specifically involved the derogation effect of choice of court agreements, which suggests that no such agreements have ever appeared before any Omani court. However, a judgment by the Oman Supreme Court in 2003[163] may demonstrate how the Omani courts would approach the issue if asked to recognise the derogation effect of choice of court agreements.

A dispute was brought before the Omani Commercial Court involving an Omani bank located in Oman as the claimant against two defendants. The first defendant was a former director of the Omani bank; the second defendant was a branch of an Egyptian bank located in London. The claimant argued that the former director of the Omani bank signed a loan agreement with the Egyptian bank for 20 million US Dollars in the name of the Omani bank.[164] The claimant contended that both of the defendants had acted in bad faith and did not follow the legal procedures of the Omani bank for the signature of a loan agreement in the bank's name, and that the former director had already been convicted and sentenced for fraud by an Omani criminal court for his conduct.[165] Therefore, the claimant sought rescission of the loan agreement and damages of 20 million Omani Rials as compensation for the harm to the reputation of the bank caused by the two defendants. The second defendant, which was a branch of an Egyptian bank, challenged the jurisdiction of the Omani courts at all levels of the proceedings, claiming that the same dispute was being heard by a London court. Therefore, the defendant argued, the Omani courts should decline jurisdiction in favour of the London courts.[166]

[163] Oman Supreme Court decision no 110/ 2002 Commercial 30/4/2003.
[164] ibid.
[165] ibid.
[166] ibid 3.

The Cassation Court of Oman held that there were three grounds for retaining jurisdiction according to Oman's jurisdiction rules contained in articles 29 to 35 of the Omani Procedure Act.[167] Accordingly, the Omani courts could not decline jurisdiction even though the same dispute involving the same parties was being heard in another state. The Court reasoned that as jurisdiction rules are based on the public policy of the state, Omani courts cannot decline jurisdiction if grounds exist for asserting jurisdiction under Oman's jurisdiction rules.[168] The three grounds of jurisdiction that existed in the case were, first, that the defendant, who was the former director of the Omani bank, was a citizen of Oman. Therefore, Oman had jurisdiction over the dispute on the basis of the first part of article 29 of the Oman Procedure Act, which states that an Omani court has jurisdiction if the defendant is a citizen of Oman.[169] Secondly, the first defendant was also domiciled in Oman. Therefore, the Omani court had jurisdiction over the dispute on the basis of the second part of article 29 of the Oman Procedure Act, which states that if the defendant is domiciled in Oman an Omani court shall have jurisdiction over the dispute.[170] Thirdly, the contract was signed in Oman. According to Omani contract law, the time and place of the conclusion of a contract between the two parties located in different places shall be where the offeror received the acceptance of the offer without regard to where the offer was accepted.

In this case, the offeror, who was an Omani citizen domiciled in Oman, received the acceptance of the offer in Oman. Therefore, the contract was deemed to have been concluded in Oman, even if the offer was accepted in London, as the result of which the obligation of the parties under the contract arose in Oman. Consequently, the Omani court had jurisdiction

[167] Decision no 110/ 2002 (n 163) 4.
[168] ibid 6.
[169] ibid.
[170] ibid.

based on article 30(b) of the Oman Procedure Act, which provides that an Omani court has jurisdiction if the obligation arises in Oman.[171]

It can be argued that the Omani court would reach the same result and refuse to decline jurisdiction if the defendant were challenging the jurisdiction of the Omani court on the basis of a choice of court agreement, rather than on the basis that the dispute was being heard by another court, which was in this case. The decision of the Cassation Court of Oman in this case clearly demonstrates that the application of the national jurisdiction rules is a matter of public policy of the state. Therefore, the Omani courts cannot decline jurisdiction, if grounds exist for seising jurisdiction under Oman's jurisdiction rules.

Moreover, when considering whether to seise or decline jurisdiction in that case, the Cassation Court of Oman considered only whether any grounds for jurisdiction existed according to articles 29 to 35 of the Oman Procedure Act. It did not consider whether the court in London, rather than the Omani court, was the more appropriate forum in which to resolve the dispute. Secondly, it did not examine whether the judgment that was delivered by the Omani court could be enforced in Oman or London. The Omani judgment was unlikely to be enforceable in London, because the same dispute was being heard by a London court, unless the London court deferred to the jurisdiction of the Omani court. Thirdly, the Cassation Court did not consider whether any problem might arise due to the potential here for 'parallel litigation'[172] and 'inconsistent judgments',[173] which existed in the case.

In conclusion, the Omani court considered only whether any grounds of jurisdiction existed in the case when deciding whether to assert or decline jurisdiction. It did not consider the other factors of the case, such as the interests of the parties and whether justice might have been better achieved by declining jurisdiction. Therefore, despite the absence of clear

[171] Decision no 110/ 2002 (n 163) 6.
[172] Parallel litigation is considered to be a litigation risk that the parties prefer to avoid in international business transactions; For more details see chapter two of this thesis.
[173] Inconsistent judgments are considered to be litigation risks that the parties prefer to avoid in international business transactions; For more see chapter two of this thesis.

rules in Omani legislation governing when the parties may derogate Omani courts, arguably the approach of Omani courts is likely to be the same as in Kuwait, the courts of which refuse to decline jurisdiction in favour of a chosen court under a choice of court agreement. Accordingly, in the absence of clear rules in Omani legislation governing recognition of the derogation effect, the litigation risks in relation to uncertainty and unpredictability, parallel litigation and inconsistent judgments that were highlighted as existing in Kuwait might also exist in international business transactions connected with Oman.

3.3.3.3 Saudi Arabia

In Saudi Arabia, it seems that only one case has been heard by the Saudi Arabian courts regarding jurisdiction being declined.[174] The dispute involved a foreign company that had a representative office in Egypt.[175] The company was pursued in a Saudi Arabian court for alleged financial speculation. The company challenged the jurisdiction of the Saudi Arabian court, arguing that the company did not have any connection with Saudi Arabia and was not registered there.[176] Instead, it had a representative office in Egypt and was licensed by the Ministry of Trade and Industry of Egypt.

Therefore, the company argued that Saudi Arabia should decline jurisdiction in favour of an Egyptian court.[177] The Saudi Arabian court observed that the dispute was about a transaction that had been concluded by a representative of the company, who was a Saudi Arabian citizen. The latter carried out the transaction in his own name, not in the company's name. On these facts, the Saudi Arabian court held that it had jurisdiction on the basis of the nationality of the defendant.[178]

[174] The Judiciary Principles and Precedents from the year 1907 Hegira of the Board of Grievances Diwan Al-Mathalem Court decision no 37_49/1913 Hegira Commercial 29.
[175] ibid.
[176] Judiciary Principles no 37_49/1913 (n 174).
[177] ibid.
[178] ibid.

In the case, the Saudi Arabian court held that it could retain jurisdiction according to the Saudi Arabian jurisdiction rules based solely on the nationality of the defendant. It is arguable that the court would have reached the same conclusion if the defendant had challenged the jurisdiction of the Saudi Arabian court on the basis of choice of court agreement nominating, for example, the Egyptian courts, rather than on the basis that the company had a representative office in Egypt and therefore did not have any connection to Saudi Arabia. In deciding which court should hear the case, the Saudi Arabian court did not consider whether the transaction had been concluded in Egypt or Saudi Arabia, whether the elements of the dispute were more connected with Egypt or with Saudi Arabia, or whether the judgment of this dispute rendered by Saudi Arabia would most likely be enforced in Saudi Arabia or Egypt.

Therefore, it can be argued that similar to cases in Kuwait and Oman, Saudi Arabia considered only whether any grounds of jurisdiction in favour of the courts of Saudi Arabia existed, and that was determinative irrespective of any argument that it should consider declining jurisdiction. It did not consider other factors in the case, such as whether justice as between the parties might have been better served by the Saudi court declining jurisdiction. Therefore, despite the absence of clear rules in Saudi Arabian legislation governing when the parties may derogate Saudi Arabian courts, arguably the approach is likely to be the same as in Kuwait, the courts of which refuse to decline jurisdiction in favour of a chosen court under a choice of court agreement. Accordingly, the litigation risks highlighted above in connection with Kuwait might also exist in international business transactions connected to Saudi Arabia.

3.3.3.4 Bahrain

Only one case[179] has been heard by the Bahraini courts regarding recognition of the derogation effect of choice of court agreements. Although the case has been discussed above[180] in connection with the recognition of the prorogation effect of choice of court agreements, it is important to consider the case again here, because the Cassation Court of Bahrain also considered the derogation effect of choice of court agreements. The case was heard in 2006 and concerned a claim for breach of a shipping contract between the claimant and a shipping company to deliver a consignment of furniture from Salman Port in Bahrain to Germany. The furniture belonged to the Bahraini Ministry of Information Affairs and was needed for a cultural exhibition being held in Germany.[181] The claimant argued that the shipment did not arrive within the agreed timescale and that, as a consequence of the delay, the claimant had to ship another consignment of furniture by air to be ready for the exhibition. Therefore, the claimant claimed that the defendant had breached the shipping contract and had caused the claimant to suffer damages in the estimated amount of 33,000 Bahraini Dinars plus interest.[182] Before the Bahraini First Instance Civil Court, the defendant began the substantive defence of the case without challenging the jurisdiction of the Bahraini Courts. However, the defendant did challenge the Bahraini courts' jurisdiction by arguing that the bill of lading contained a clause in which the parties had chosen the Luxembourg Courts to resolve any dispute that might arise out of the shipping contract.[183]

The Cassation Court of Bahrain held that Bahraini courts had jurisdiction over the case and refused categorically to decline proceedings in favour of the chosen foreign court in Luxembourg. The Cassation Court observed that the defendant mounted the substantive defence in the First Instance Civil Court and did not challenge jurisdiction there.[184]

[179] Bahrain Cassation Court decision no 255/2005 (n 78).
[180] See above section 3.3.1.
[181] ibid.
[182] ibid.
[183] Decision no 255/2005 (n 78).
[184] See above section 3.3.1.

According to article 17 of the Bahraini Civil Procedure Act, Bahrain courts had jurisdiction if the parties agreed to litigate in Bahrain explicitly or implicitly. By attending the court and starting the substantive defence without challenging the jurisdiction of the forum, the defendant had implicitly agreed to Bahraini jurisdiction according to article 17.[185] Although this case was concerned with the derogation effect of choice of court agreements in Bahrain, the approach of the Bahraini courts is still uncertain and not clear compared with Kuwait's approach discussed above, because the Bahraini Cassation Court did not consider whether the parties could derogate the Bahraini court according to Bahrain's jurisdiction rules. In this case, it is not certain whether if, for example, the defendant had challenged the jurisdiction of the Bahraini court according to the clause of the choice of court agreement that favoured the Luxembourg courts before starting the substantive defence, the Bahraini Cassation Court would have declined jurisdiction in favour of the Luxembourg court, or would it have followed the Kuwaiti approach by refusing the derogation effect of choice of court agreements. In addition, the details of the case did not indicate whether Bahrain had jurisdiction on any basis other than the implied choice of court agreements that were empowered under article 17 of the Bahraini Civil Procedure Act. If Bahrain did not have jurisdiction other than through implied agreement, and if the defendant had challenged the court's jurisdiction, the Cassation Court would most probably have declined jurisdiction. However, jurisdiction would have been declined on the basis of the lack of jurisdiction, according to the jurisdiction rules of Bahrain, rather than on the basis of recognition of the derogation effect of the particular choice of court agreement.

Accordingly, the approach of Bahrain regarding recognition of the derogation effect of choice of court agreements is uncertain, since Bahraini legislation regarding jurisdiction rules is silent on the matter, and the approach of the Bahraini courts towards this issue is also

[185] See above section 3.3.1.

unclear. The absence of clear rules in Bahrain regulating the recognition of the derogation effect of choice of court agreements might also present a source of uncertainty and unpredictability in international business transactions connected to Bahrain, as the parties would not be able to predict whether their choice of court agreement would be recognised by Bahraini courts.

From the foregoing, it may be concluded that the GCC States of Kuwait, Saudi Arabia, Bahrain and Oman recognise the prorogation effect of a choice of court agreement in favour the courts of that State, and have adopted an approach whereby the exercise of prorogation jurisdiction is based mainly on the concept of party autonomy and is free from any requirement of connection between the parties or the dispute with the chosen court. However, as discussed, there are issues associated with the recognition of the prorogation effect in the above GCC States that limit the effectiveness of the recognition of choice of court agreements, and these issues need to be addressed. Unlike the issue of the prorogation effect, these GCC States are silent about the recognition or refusal of recognition of the derogation effect of choice of court agreements in their legislation. However, the Kuwaiti courts have made their position clear by refusing derogation in every case. They have refused to recognise the derogation effect of choice of court agreements, because the jurisdiction rules are compulsory for the parties, as they are based on public policy and state sovereignty.

It has been argued above that this approach of non-recognition of the derogation effect by the Kuwaiti courts exposes parties to international business transactions connected with Kuwait to the risks of uncertainty, unpredictability, parallel litigation between two different courts and inconsistent judgments. It has also been argued that Saudi Arabia, Bahrain and Oman would properly follow the Kuwait Cassation Court's approach of refusing derogation even though to date no case involving a choice of court agreement has been heard

in the courts of those three countries. This argument has been based on cases involving the refusal to decline jurisdiction.

It is clear from these cases that the jurisdiction rules related to state sovereignty and public policy take precedence over other considerations and would properly do so even if there were a choice of court agreement in favour of the courts of another state involved. This approach of these GCC States to the recognition of the prorogation effect without recognition of the derogation effect might not reflect the parties' best interests. Recognition of only the prorogation effect benefits the parties in non-exclusive jurisdiction agreements, because the parties in such agreements, as considered in chapter two, do not seek to exclude other competent courts from having jurisdiction. Therefore, recognition of the prorogation effect will benefit those parties irrespective of the issue of recognition of derogation effect. As was outlined in the second chapter of this thesis, for those parties who seek to avoid uncertainty and unpredictability in their international transactions by designating one forum to settle any dispute which might arise out of their contract, the benefit of exclusive choice of court agreements can be enhanced through the recognition of both effects of such agreements.[186] Full recognition of the effects of such agreements would lead the chosen court to accept jurisdiction and the non-chosen court to decline jurisdiction that it might otherwise have over the dispute. Therefore, without recognition of the twin effects of exclusive choice of court agreements, the parties will not be able to ensure legal certainty and predictability by designating one forum to resolve their dispute. If the GCC States are genuinely concerned about the parties' interests and international trade and commerce, they should recognise both the prorogation and derogation effects of choice of court agreements.

Accordingly, the contradictory approach to the recognition of the two aspects of choice of court agreements in these previously mentioned GCC States might lead to the

[186] Trevor Hartley, 'The Modern Approach to Private International Law: International Litigation and Transaction from a Common-Law Perspective (vol 319)' in *Collected Courses of the Hague Academy of International Law* (Brill 2006) 111.

conclusion that their position regarding the recognition of choice of court agreements is not compatible with the interests of the parties and international trade and commerce.

The issue of how reconciliation between the recognition of the derogation effect of choice of court agreements and state sovereignty and public policy might be achieved will be discussed in detail later in this chapter. However, before then, it is important to consider the United Arab Emirates, which seems to adopt a stricter approach about territorial sovereignty and public authority in exercising jurisdiction than the other GCC States discussed above.

3.4 Recognition of Choice of Court Agreements in the United Arab Emirates

The provisions relating to jurisdiction rules in the UAE are contained in articles 20 to 24 of the UAE Federal Law of the Civil Procedure Code, which clearly state the grounds for exercising jurisdiction. For example, article 20 provides that the UAE shall have jurisdiction over a dispute in which the defendant is a UAE citizen or has a place of residence or domicile in the UAE. From the jurisdiction rules in the UAE Civil Procedure Code, it seems that the UAE has a strict approach regarding the recognition of choice of court agreements, as it appears that the UAE jurisdiction rules reject the recognition of both prorogation and derogation effects. Unlike the other GCC States, none of the UAE provisions on jurisdiction rules provide a basis for exercising jurisdiction based on the consent of the parties (prorogation effect) or a basis for declining jurisdiction when the parties have agreed to litigate before a foreign court (derogation effect). Moreover, article 24 of the UAE Civil Procedure Code clearly provides that any agreement of the parties contrary to the jurisdiction rules set out in articles 20 to 23 shall be considered null and void. [187] Thus, the UAE Code of Civil Procedure expressly provides that jurisdiction rules are mandatory for the parties. Hence, the parties cannot establish a basis of jurisdiction by their agreement, when those courts do not have jurisdiction according to the UAE's jurisdiction rules. Moreover, they

[187] The UAE Federal Law of the Civil Procedure Code art 24.

cannot exclude the UAE courts by their agreement, when those courts have jurisdiction according to the UAE's jurisdiction rules. Accordingly, the UAE Civil Procedure Code explicitly does not permit the UAE courts by virtue of article 24 to recognise either the prorogation or derogation effects of choice of court agreements.

It is unclear why the UAE legislator adopted a stricter approach regarding the recognition of choice of court agreements than the other GCC States, because all of the other grounds for exercising jurisdiction in the UAE are almost the same as the jurisdiction grounds in the other GCC States. Moreover, they are also the same as the jurisdiction rules of Egypt, which, as has been mentioned, are the historical source of all of the GCC jurisdiction rules. However, with regard to recognition of choice of court agreements, the UAE has not explicitly provided grounds for jurisdiction based on the consent of the parties (prorogation effect), as have all of the other GCC States and Egypt.[188] Moreover, the UAE explicitly rejects the recognition of choice of court agreements by article 24. Such provision does not exist in any other GCC legislation and, to the best of the author's knowledge, does not exist in any other Arab country. There are no official documents in the UAE that clarify the rationale behind article 24. However, several judgments regarding the recognition of choice of court agreements have been delivered by courts in different states of the UAE.[189] In all of the cases, the UAE courts refused to recognise a choice of court agreement on the basis of article 24. In all of these decisions, the UAE courts confirmed that, according to article 24, the parties cannot agree to derogate the UAE courts, as the application of those jurisdiction rules are based on public policy and the sovereignty of the state, and hence the parties cannot

[188] See art 32 of Egypt's Procedure Code in Civil and Commercial no 13 of 1968 that provides a basis of prorogation of jurisdiction.

[189] Abu Dhabi Cassation Court decision no 674/2012 Commercial 28/3/2013; Abu Dhabi Cassation Court decision no 747/2012 (n 21); Abu Dhabi Cassation Court decision no 719/2011 Commercial 10/5/2012; Abu Dhabi Cassation Court decision no 719/2011 Commercial 10/5/2012; Abu Dhabi Cassation Court decision no 523–572/2011 Commercial 21/9/2011; Dubai Cassation Court decisions no 72/2011, 7/6/2011; Dubai Cassation Court decision no 143/2010, 2/1/2011 and Dubai Cassation Court decision no 79/2002, 12/5/2002.

derogate the courts from exercising jurisdiction by their agreement.[190] Therefore, it seems that the basis of article 24 for refusing derogation is the same as the approach of the Kuwaiti Cassation Court, which has ruled that derogation is not possible, based on the state's public policy which confers jurisdiction on a Kuwaiti court.

The question of the conflict between recognition of choice of court agreements and state sovereignty and public policy as stressed above will be discussed in detail later in this chapter.[191] However, it should be stressed at this stage that non-recognition of choice of court agreements by the UAE courts, similar to the approach in Kuwait, leads to the same problems identified in chapter two, such as uncertainty and unpredictability, parallel litigation and inconsistent judgments. Some examples will be given below where these issues have arisen in international business transactions connected to the UAE.

For instance, in 2011, [192] the Dubai Cassation Court refused to recognise the derogation effect of choice of court agreement on the basis of the application of its jurisdiction rules related to sovereignty, which was asserted on the basis of the domicile of the defendant. The case involved a contract for the sale of immovable property located in Qatar. The claimant sued two companies and claimed that they had sold him a floor of a commercial tower located in Qatar for 2,700 Emirates Dirhams per square metre.[193] Then, it was discovered that all of the other floors had been sold by the two companies for not more than 2,000 Emirates Dirhams per square metre. The claimant claimed that he had been defrauded by the companies and sought direct damages in the amount of 10,050,000 Emirates Dirhams plus 12% interest and one million Emirates Dirhams as consequential damages. The defendants argued that the Dubai courts should decline jurisdiction as first, the dispute was

[190] See the UAE Courts' decisions in (n 189).
[191] See below section 3.5.
[192] Decision no 72/2011 (n 189).
[193] ibid.

related to immovable property located in Qatar.[194] Therefore, the Dubai courts did not have jurisdiction and should decline jurisdiction in favour of the Qatari courts according to the immovable property exception based on article 20 of the UAE Federal Procedure Act. Secondly, the contract contained an exclusive choice of court agreement clause nominating the Qatar courts to resolve any dispute arising out of the contract. Furthermore, the first defendant did not have any connection with the UAE, and the contract was signed and enforced in Qatar. Accordingly, the claimant argued that the Dubai court should decline jurisdiction in favour of the Qatar courts.

The Dubai Cassation Court held that because the second defendant was a company that had a place of business in Dubai it was domiciled in Dubai. Accordingly, the Dubai courts had jurisdiction over the dispute on the basis of domicile according to article 20 of the UAE Federal Procedure, and they also had jurisdiction over the first defendant on the basis of a joint connecting factor.[195] The Dubai Cassation Court rejected the defence that the dispute was related to immovable property located in Qatar. It ruled that the exception allowing jurisdiction to be declined did not apply in the case, as the claim was related to the price of the property, and therefore it was a claim *in persona* not *in rem*. The exception for declining jurisdiction on the basis that the claim related to immovable property located outside the state applied only to claims *in rem*. Accordingly, the Dubai Cassation Court could not decline jurisdiction. The Cassation Court also rejected the defence that the contract contained an exclusive choice of court agreement. It refused to recognise the purported derogation effect of choice of court agreement on the basis that UAE jurisdiction rules are mandatory, and the parties cannot agree otherwise, as jurisdiction rules are based on the public policy of the UAE. Therefore, the Dubai Cassation Court could not decline jurisdiction.[196]

[194] Decision no 72/2011 (n 189).
[195] ibid, for the meaning of the joint connecting factor above section 3.2.2.2.
[196] Decision no 72/2011 (n 189).

This case illustrates that exercising jurisdiction without providing the parties the choice to derogate the court may lead to litigation risks in international business transactions. In the above case, the parties agreed to litigate exclusively in Qatari courts. However, the defendants were sued in the Dubai court, an unexpected and unfavourable court, even though the Qatar court was more closely related to the dispute than the Dubai court for several reasons. First, the dispute was about the real value of immovable property located in Qatar. Therefore, the Qatari court could appoint an expert to value the property according to the Qatar real estate market. Secondly, the contract was signed and enforced in Qatar. Finally, the parties had expressly agreed to litigate in a Qatari court which they believed to be the most suitable to settle their dispute rather than the Dubai court.

In 2007, there was another dispute before a Dubai court[197] between a company that owned ships and an insurance company. The ship owners filed suit against the insurance company in a Dubai court and argued that on 1 April 2006 an insurance contract had been signed with the insurance company to cover two ships against loss and damage from marine and fire hazards. On 11 April 2006, the first ship caught fire in Barawa Port, Somalia. On 30 June 2006, the second ship encountered a strong storm and sank. The company sued the insurance company in the Dubai courts and claimed for the amount of the insurance coverage. The insurance company challenged the jurisdiction of the Dubai courts by arguing that the insurance contract had a choice of court agreement nominating the English courts.[198] The Dubai Cassation Court refused to decline jurisdiction in favour of the English courts and awarded the claimant 1,200,000 US Dollars plus 9% interest on the basis that the Dubai courts had jurisdiction over the dispute, as the insurance company had a place of business in Dubai by virtue of its representative office located there. Accordingly, the Dubai court

[197] Decision no 143/2010 (n 189).
[198] ibid.

asserted jurisdiction on the basis of the domicile of the defendant.[199] The Dubai court asserted that, according to article 24 of the UAE Code of Civil Procedure, the parties cannot agree to derogate the UAE court, as exercising jurisdiction in the UAE depends on territoriality, which is, therefore, related to the public policy and sovereignty of the state. Accordingly, the parties could not derogate that court from exercising jurisdiction by their agreement. This case vindicates the concern expressed by international businesses about the risks of non-recognition of the derogation effect of choice of court agreements. The parties here agreed to litigate only before an English court. However, the Dubai court refused to decline jurisdiction. Therefore, the defendants were sued in the Dubai court, which was an unexpected and unfavourable forum for them.

Furthermore, there was a case before the Abu Dhabi courts in 2013[200] related to a contract for the supply of aviation fuel between a foreign supply company and an airline company operated in Abu Dhabi. A disagreement occurred between the two companies, as the result of which the airline company sued the supply company in the Abu Dhabi courts and claimed that the supply company had not fulfilled its entire obligation according to the contract.[201] The supply company argued that the Abu Dhabi court should decline jurisdiction, as there was a choice of court agreement in term 9 of the supply contract nominating the Texas courts to have exclusive jurisdiction over any potential dispute arising out of the contract. However, the Abu Dhabi Cassation Court refused to decline jurisdiction in favour of a Texas court and awarded the claimant 968,900,920 US Dollars plus 4% interest.[202] The Abu Dhabi courts seised jurisdiction, since the defendant, which was the supply company, was registered and incorporated in Abu Dhabi, and, according to article 24 of the UAE Code of

[199] Decision no 143/2010 (n 189).
[200] Decision no 747/ 2012 (n 189).
[201] ibid 4.
[202] ibid 6.

Civil Procedure, the parties could not agree to derogate the jurisdiction of the UAE court.[203] This case also exemplifies the concern expressed by international businesses about the risks of non-recognition of the derogation effect. The parties agreed to litigate only before a Texas court. However, the Abu Dhabi court refused to decline jurisdiction. Therefore, the defendant was sued in an unexpected and unfavourable forum for him, which was the Abu Dhabi court.

The above cases demonstrate clearly that the UAE has a strict approach regarding the recognition of the derogation effect of choice of court agreements. In addition, to the author's knowledge, no case has appeared before the UAE courts involving the recognition of the prorogation effect. However, as discussed above, article 24 of the UAE Civil Procedure Code explicitly rejects recognition of the prorogation effect. The above cases outline that the UAE approach to non-recognition of choice of court agreements potentially raises various problems that were discussed in chapter two, such as uncertainty and unpredictability, parallel litigation and inconsistent judgments. It was argued in that chapter that international businesses might avoid doing business in jurisdictions where such risks exist. Therefore, the approach to recognition of choice of court agreements in the UAE, similarly to other GCC States, might negatively impact upon international trade and commerce.

From the above discussion regarding the recognition of the derogation effect in Kuwait, Saudi Arabia, Bahrain and Oman, on the one hand, and the recognition of prorogation and derogation effects in the UAE, on the other hand, it can be concluded that the regulation of the recognition of choice of court agreements in the GCC States exposes a contracting party to litigation risks in an international business transaction connected with the GCC States. This creates uncertainty and unpredictability and the risk of parallel litigation and inconsistent judgments.

[203] Decision no 747/ 2012 (n 189).

At this stage it is important to clarify what is meant by 'exclusive jurisdiction' in the context of the recognition of choice of court agreement in the GCC States, as in the various cases discussed above the forum argued that it had exclusive jurisdiction over the dispute as the dispute related to immovable property located in the forum's region.

In general, exclusive jurisdiction means that the forum has exclusive jurisdiction over a dispute regardless of whether there are other courts which would otherwise have jurisdiction over the dispute.[204] The rationale for rules of exclusive jurisdiction is to protect the national interests of a state, so as to preserve state sovereignty and the fundamental economic and social interests of a state.[205] The scope of exclusive jurisdiction might be different from state to state depending on which fundamental interests a state seeks to protect.[206]

With regard to the GCC States and the concept of exclusive jurisdiction, a distinction is needed between exercising jurisdiction by the GCC courts on the one hand and declining jurisdiction by the GCC courts on the other hand.

Exercising jurisdiction

The GCC States, as outlined above, have adopted various bases of exercising jurisdiction, for instance, the nationality of the defendant, domicile, place of residence, the place where the contract was signed, and the place where the property is located.[207] None of the bases that have been adopted by the GCC States are explicitly regarded by the legislation of the GCC States as conferring exclusive jurisdiction. However, the GCC courts as outlined above have refused in all cases to decline jurisdiction in cases where there was a choice of court

[204] Tang and others (n 102) 56.
[205] In this matter see Tang ibid 56; Daniel J Cloherty, 'Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise' (1984) 82 Cal aw. Review 1287; Wienczyslaw J Wagner, 'The Original and Exclusive Jurisdiction of the United States Supreme Court' (1952) 2 Louis ULJ 111; Richard W Pogue, 'Exclusive Jurisdiction' (1973) 5 J Reprints Antitrust L & Econ 747.
[206] Tang and others (n 102) 56.
[207] See above section 3.2.2.

agreement in favour of a foreign court or where the dispute had a closer connection to a foreign court rather than the forum. Therefore, it seems that the GCC States treat all the bases for the exercise of jurisdiction as exclusive bases and as a matter of state sovereignty. However, there are various bases of jurisdiction adopted by the GCC States which do not necessarily protect nor are related to the fundamental interests of the forum and, therefore, should not be treated by the GCC Courts as conferring exclusive jurisdiction. For instance, as outlined above, all the GCC States have adopted the nationality of the defendant as a basis for exercising jurisdiction. Asserting exclusive jurisdiction on the basis of nationality might be problematic as it allows the claimant to sue the defendant in the state of which the latter is a national even if the defendant does not ordinarily reside in his native state. Moreover, exercising jurisdiction based on the nationality of the defendant might lead to difficulties in the recognition and enforcement of judgments in a state other than that where defendant is a national, such as the state in which the defendant resides or has his assets. Courts in the latter state might argue that the court that rendered the judgment did not have jurisdiction over the case, as the place of residence or the location of assets constitutes a closer link to the dispute than nationality alone.

Another example of unjustifiable exclusive jurisdiction adopted by the GCC States is where the forum takes jurisdiction on the basis that it is the place where the obligation is to be enforced.[208] In this case, the courts of that state will take jurisdiction only because it was named as a place of performance in the contract. This includes failure to carry out the contractual obligation in any location whatsoever. Asserting exclusive jurisdiction on that basis seems inappropriate, as there is no fundamental interest or significance in exercising jurisdiction on the basis of the intended place of performance if the obligation was never performed in the state. Therefore, the state which exercises jurisdiction based on the place of

[208] See above section 3.2.2.2.

intended performance might not have any contact with either the party or the dispute. A clear example might be found in a *Kuwaiti court decision in 2000.*[209] The decision was related to the dissolution of an investment contract in foreign currency that should have been performed in Kuwait. The parties in their contracts agreed to invest in foreign currency in Kuwait. However, before the investment started one of the parties lodged a claim before the Kuwaiti courts asking for the dissolution of the investment contract, even though the defendant in the case was not a Kuwaiti citizen nor resident and nor domiciled in Kuwait. In addition, there was a choice of court agreement in the investment contract favouring the Singapore courts exclusively. However, the Kuwaiti Cassation Court exercised jurisdiction and heard the case on the basis of the place where the obligation was to be enforced and refused to recognise the derogation effect of choice of court agreement on the grounds of sovereignty and public policy of the state.[210] Therefore, the Kuwaiti Cassation court ignored the fact that the defendant in the case was not a Kuwaiti citizen nor resident and nor domiciled in Kuwait and that there was an exclusive choice of court agreement in the investment contract nominating Singapore courts and treated the basis of where the obligation was to be enforced as grounds for exercising exclusive jurisdiction.

Accordingly, asserting exclusive jurisdiction on the basis of where the obligation is to be performed seems inappropriate and unjustifiable as it leads the state to exercise jurisdiction even if it did not have an actual connection with the dispute or the parties. Moreover, determining whether or not the state has jurisdiction on the basis of the place of intended performance might be problematic in the absence of a designated place of performance in the contract, since the place of performance might then have to be determined according to the applicable law in the contract which might be a foreign law. Therefore, in the absence of a designated place of performance, the state needs to determine first the

[209] Kuwait Cassation Court decision no 448/2000 (n 142).
[210] ibid 3.

applicable law according to its domestic choice of law rules in order to determine whether it has jurisdiction over the dispute or not.

Accordingly, it can be argued that treating all the bases of jurisdiction by the GCC Courts as rules equivalent to exclusive jurisdiction seems unjustifiable and incompatible with the rationale for the existence of rules of exclusive jurisdiction, which is the protection of the fundamental interests of the forum. There will be further discussion of the approach of the GCC States in exercising jurisdiction and the matter of state sovereignly in the following section. However, it is important to consider below how the GCC States deal with the second scenario, which where there is exclusive jurisdiction in favour of a foreign court.

Declining jurisdiction

In all of the GCC States there is only one instance when the courts of the GCC States should decline jurisdiction in favour of the foreign court even if the courts of the GCC Stat ought to have jurisdiction according to the jurisdiction rules. This exception applies to immovable property. If the dispute is related to immovable property located outside of the territory of the state, the state shall not have jurisdiction and should decline jurisdiction.[211] According to the immovable property exception, the courts of the GCC States will not have jurisdiction over the dispute even if one or more grounds of jurisdiction are applicable to the dispute.[212] Accordingly, the GCC states' jurisdiction rules do not leave room for flexibility by the courts

[211] See art 12 of Kuwait's Civil and Commercial Procedure Code; art 24 of Saudi Arabia's Law of Procedure before a Sharia Court; art 20 of the UAE's Federal Civil Procedure Code; art 14 of Bahrain's Code of Commercial and Civil procedure; art 29 of the Omani Civil and Commercial Procedure Law no 22 of 2002; Kuwait decision no 749/2002 Commercial 3/6/2003; Kuwait Cassation Court decision no 1232/2004 Commercial 12/6/2007. The scope of the immovable property exception is different across the GCC States. In Kuwait, Bahrain and Oman the exception is based solely on 'claims related to immovable property located outside the state'. There are three types of immovable property claims. First, there are claims *in rem*, secondly, immovable property claims *in persona*, and thirdly, mixed immovable property claims that have rights both *in rem* and *in persona*. In contrast, Saudi Arabia and the United Arab Emirates, in regulating the exception relating to immovable property, state that 'claims *in rem* relate to immovable property located outside the state'. Accordingly, the scope of the exception of immovable property is more restricted in Saudi Arabia and the United Arab Emirates when compared with Kuwait, Bahrain and Oman, as they extend only to claims *in rem*. Therefore, any immovable claims *in persona* or mixed claims fall outside of the scope of the exception of immovable property in Saudi Arabia and UAE.

[212] Kuwait Cassation Court decisions no 749/2002 Commercial 3/6/2003.

of those states whether to decline jurisdiction or not.[213] If the immovable property exception exists, the court has to decline jurisdiction, as it is not competent to hear the dispute. The exception for immovable property suggests that the GCC States acknowledge the exclusive jurisdiction of the foreign court in which the immovable property is located. The effect of this acknowledgment means that the GCC States will accept to decline jurisdiction in favour of the foreign court in which the immovable property is located even if the forum within the GCC States also has jurisdiction. This is a common approach by different jurisdictions around the world and seems compatible with the rationale for rules of exclusive jurisdiction.[214]Treating the place of immovable property as conferring exclusive jurisdiction is viewed as an attempt to avoid assaulting the sovereignty of the state in which the immovable property is located, in line with the territoriality principle under public international law. This territoriality principle, which will be discussed in detail later, provides that every state has the right and authority to exercise its jurisdiction over persons and things within its territory. The exercise of this jurisdiction by its courts does not have a direct effect within the territories of other states. Therefore, regarding the place where the immovable property is located by the GCC States as a grounds for the exercise of exclusive jurisdiction by that state seems compatible with the rationale for exclusive jurisdiction in protecting the fundamental rights of a state.

However, it is also important to stress that the GCC States, as outlined above in several decisions, have refused to decline jurisdiction in favour of the chosen court where there is an exclusive choice of court agreement nominating a foreign court on the basis that jurisdiction is a matter for the state, and it represents a manifestation of state sovereignty that

[213] The Oman Supreme Court has explicitly considered that there is no flexibility for the court to decline or accept jurisdiction on the basis of immovable property by decision no 64/ 2004 Civil 31/10/2004.

[214] For instance, art 24 of the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] states that the courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: (1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

cannot be overlooked or ignored by the parties to a contract. Therefore, it seems that the GCC States, on the one hand, respect and recognise the exclusive jurisdiction of the foreign court and decline jurisdiction where the dispute relates to immovable property located in a foreign country and, on the other hand, reject exclusive jurisdiction in favour of the foreign court where there is an exclusive of choice of court agreement. This inconsistency in dealing with exclusive jurisdiction suggests that the GCC States are still influenced by the traditional belief that jurisdiction is a matter for the state, and it represents a manifestation of state sovereignty.

This approach to choice of court agreements by the GCC States might negatively impact upon international trade and commerce, as considered in chapter two, because parties in international business transactions tend to avoid jurisdictions that do not recognise or do not have effective rules regarding the recognition of choice of court agreements. Accordingly, the GCC States should rethink their approach to the recognition of choice of court agreements if they are to promote international trade and encourage foreign investment. The following section will consider in detail how the recognition of choice of court agreements might be reconciled with the key principles of sovereignty and public authority in each of those States when their courts exercise jurisdiction.

3.5 The Assessment of the Position of the GCC States Regarding Recognition of Choice of Court Agreements in the Context of Sovereignty and the Authority of the State

As discussed above in relation to choice of court agreements, Kuwaiti courts refuse to recognise their derogation effect, and UAE legislation and court decisions refuse to recognise both prorogation and derogation effects. The rationale for non-recognition of either derogation or prorogation effects is that such recognition would limit state sovereignty and authority. It was also stated above that the courts of the other GCC States, which have not yet had to determine the issue of the recognition of the derogation effect, would probably follow

Kuwait's and the UAE's approach in rejecting the recognition of choice of court agreements, at least as far as the derogation effect is concerned, because in several decisions they have also deemed the exercise of jurisdiction to be a matter of state sovereignty and authority.[215]

Accordingly, in order to consider how the recognition of choice of court agreements might be reconciled with the sovereignty and authority of the state, it is important to understand the meaning of sovereignty and why the GCC States link the exercise of jurisdiction to sovereignty and why they believe that recognition of choice of court agreements would limit state sovereignty and authority.

3.5.1 Understanding Sovereignty, its Scope and Limitations

Sovereignty is a philosophical, political and legal idea; it expresses the idea of an independent state.[216] There is academic disagreement regarding the meaning of sovereignty,[217] the interpretation of which is highly debated.[218] Arguably, some believe that it plays a significant role in defining the independent state.[219] However, some argue that it is better without it, as it is an ambiguous term.[220]

Jean Bodin, the father of the modern theory of sovereignty, described sovereignty as 'the most high, absolute, and perpetual power over the citizens and subjects in a

[215] The previous chapter considered that the Cassation Court of Saudi Arabia and the High Court of Oman regard exercising jurisdiction as matters of sovereignty and state authority.
[216] Robert Jackson, 'Sovereignty in world politics: a glance at the conceptual and historical landscape' (1999) 47.3 Political Studies 431–456, 431.
[217] Ronald A Brand, 'Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice' (University of Pittsburgh School of Law Working Paper 25 June 2005); Jeremy Rabkin, 'Why Sovereignty Matters'(1998) 2; Jacques Maritain, 'The Concept of Sovereignty'(1950) 44 Am Pol Sci Rev 343; Roland R Foulke, 'A Treatise On International Law' (1920) 69; Helmut Steinberger, 'Sovereignty' (1987) 10 Encyclopaedia of Pub Int'l L 397, 398–400; Harold J Laski, 'The Foundations of Sovereignty and Other Essays' (1921) 2; Van Kleffens and Eelco Nicolaas, 'Sovereignty in International Law: Five Lectures' (1953); Miyoshi Masahiro, 'Sovereignty and International Law' (Paper, Aichi University Japan) 4–5, 2.
[218] Brand, *Balancing Sovereignty* (n 217) 4.
[219] Rabkin (n 217) 2; 'Sovereignty denotes independence. A sovereign state is one that acknowledges no superior power over its own government'.
[220] Louis Henkin, 'Notes from the President: Away with the "S" word!' (March 1993) Am Soc Intl L 1; Maritain (n 217) 'Political philosophy must eliminate Sovereignty both as a word and as a concept'; Foulke (n 217) 'The word sovereignty is ambiguous…We propose to waste no time in chasing shadows and will therefore discard the word entirely'.

Commonwealth'.[221] 'Bodin's sovereignty was subject only to Natural Law, and to no human law whatsoever, as distinct from Natural Law, and that [was] the core of political absolutism'.[222] Thomas Hobbes also observed that states derived the idea of sovereignty from the relationship that existed between the divine king and his subjects.[223] However, Hobbes stressed the role of sovereignty in ensuring peace and security at the national and international levels.[224] As he observed:

> The sovereign must: be judge both of the means of peace and defence, and also of the hindrances and disturbances of the same, and…do whatever he shall think necessary to be done, both beforehand (for preserving of peace and security, by prevention of discord at home and from abroad) and, when peace and security is lost, for the recovery of the same.[225]

Both Hobbes and Bodin express the idea of sovereignty as an internal relationship between the state and its subjects. Thus, the idea of sovereignty moved from the ancient idea of the relationship between God and man, to the idea that sovereignty regulates the relationship between the king and his citizens within a given territory.[226] Therefore, multiplicity of sovereignties existed, and the role of sovereignty was divided into two core areas:[227] internal sovereignty, which is the power and authority of the state to regulate its own affairs,[228] and outward sovereignty, which is the authority of the state to deal with foreign relations and not be subject to legal authority of other nations.[229]

The starting point for the acknowledgment of the multiplicity of sovereignties within international legal systems, at least in Europe, was in 1648 after the Thirty Years War.[230] The Peace of Westphalia confirmed the 'territorial sovereignty of the state' and 'sovereign

[221] Brand, *Balancing Sovereignty* (n 217) 5.
[222] Maritain (n 217) 344; Ronald A Brand 'Sovereignty: The State, the Individual, and the International Legal System in the Twenty-First Century' (2002) 25 Hastings Intl & Comp L Rev 282.
[223] Brand, *Balancing Sovereignty* (n 217) 5.
[224] ibid 6.
[225] Thomas Hobbes, *Leviathan* Part II, Ch. Xvii; Brand, *Balancing Sovereignty* (n 222) 12.
[226] Brand, *Sovereignty: The State Individual* (n 222) 284.
[227] Van Kleffens and Eelco Nicolaas (n 217) 17.
[228] ibid.
[229] ibid.
[230] Brand, *Sovereignty: The State Individual* (n 222) 284 fn 22; Van Kleffens and Eelco Nicolaas (n 217) 57; Miyoshi (n 178) 2.

equality between states'.[231] In 1933, the sovereignty of the state was accepted by the international community in the Montevideo Convention on Rights and Duties of States.[232] Moreover, in 1945, the United Nations Charter adopted the principle of sovereign equality,[233] the principle of refraining from the threat or use of force against the territorial integrity or political independence of any state,[234] and the principle of non-interference in the internal affairs of any country.[235] As a result, sovereignty in the present time is regarded as denoting the independence of the state within the international legal system. The courts of the GCC States adhere to this meaning of sovereignty when they refuse to recognise choice of court agreements as outlined above, because the constitutions of each GCC States stresses that sovereignty denotes the independence of the state.[236]

Therefore, a study of the scope and limitations of exercising sovereignty as a way of denoting independence of the state within the international legal system is needed to understand why the GCC States consider the recognition of choice court agreements as limiting state sovereignty.

In international society, states are considered equal, and the exercise of sovereignty depends on sovereign equality between states.[237] This means that, although a sovereign state is regarded as 'one that acknowledges no superior power over its own government',[238] the state cannot exceed the limits of its sovereignty to assault the sovereignty of another state.

[231] Brand, *Sovereignty: The State Individual* (n 222) 284 fn 22; Van Kleffens and Eelco Nicolaas (n 217) 57; Miyoshi (n 178) 2.
[232] Although 14 countries participated in the Montevideo Convention, the idea of state sovereignty has been accepted between the international community; Miyoshi (n 217) 3.
[233] UN Charter, art 2, para 1.
[234] ibid art 2, para 4.
[235] UN Charter, art 2, para 7.
[236] Art 1 of the Kuwait Constitution 1962 provides that 'Kuwait is an Arab, independent, fully sovereign State. There shall be no surrender of its sovereignty nor cession of any part of its territories' (English) <https://www.constituteproject.org/constitution/Kuwait_1992?lang=en> accessed 24 January 2017; similar provisions are in the Saudi Arabia Constitution 1992 art 1, Bahrain Constitution 1973 as amended 2002 art 1, Oman Constitution 1996 as amended 2011 art 1, United Arab Emirates Constitution 1971 as amended 2004 art 1.
[237] DW Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 BYIL 1, 15.
[238] Rabkin (n 217) 279.

The determination of the scope and limitations of the exercise of sovereignty in a way that does not assault the sovereignty of another state is a matter for public international law, as it regulates the relationships of states with each other. The scope and limitations of the exercise of sovereignty in public international law is to be found under the topic of the exercise of jurisdiction in the wider meaning outlined in chapter two, which includes jurisdiction in a legislative, executive or judicial context.

The Permanent Court of International Justice has outlined that every state is free to adopt rules that it regards as best and most suitable for it in exercising its jurisdiction in the context of public international law.[239] That includes all types of jurisdiction, whether in a legislative, executive or judicial context. However, public international law sets general principles to regulate and limit the exercise of jurisdiction by the state[240] to avoid coming into conflict with the sovereignty of other states. The main principles in public international law that limit the extent to which the state can exercise its jurisdiction in all aspects, whether legislative, executive or judicial, are territoriality and nationality.[241]

The principle of territoriality 'reflects the intimate connection between territorial control and statehood in international law'.[242] The principle of territoriality provides that every state has the right and authority to exercise its jurisdiction over persons and things within its territory and that this exercise does not have a direct effect within other states' territories.[243] For example, the state cannot exercise 'executive jurisdiction' by positive action in proceeding with an arrest within the territory of another state, unless permission has been granted by the latter.[244] Accordingly, the principle of territoriality reflects the idea of the

[239] *SS Lotus (France v Turkey)* (1927) PCIJ Ser A, No 10, 18-19; Mills *Rethinking Jurisdiction* (n 60) 190.
[240] Alex Mills 'Normative Individualism and Jurisdiction in Public and Private International Law: Toward a 'Cosmopolitan Sovereignty?' (2012) 6.
[241] RY Jennings, 'The Limits of State Jurisdiction' (1962) 32 Nordic Journal of International Law 1.4, 209–229, 212.
[242] Mills, *Normative Individualism* (n 240) 7.
[243] Jennings (n 241) 212.
[244] ibid.

sovereignty and authority of the state to exercise jurisdiction within its territory. However, in some cases, with limitations,[245] public international law will allow a state to regulate its own nationals, even when those nationals are within the territory of another state. This is the principle of nationality (or personality),[246] which reflects the 'ideas of individual subjectivity to sovereign power'[247] and determines the rights and obligations between individuals and states.[248] An example of the application of the nationality principle is that some states have the power to tax their nationals, who are living and working outside of the state's territory.[249] The principle of personality can also provide the state the right to protect its nationals, who reside outside of its territory, from, for example, crimes committed against them by foreigners outside of its territory; this is called 'passive personality'.[250]

Hence, exercising jurisdiction according to the meaning of public international law depends on the principles of territoriality and personality, and both principles reflect the scope of the state's sovereignty.[251] The latter is significant and related to the interest and authority of the state, since it demonstrates its independence in the international society. Accordingly, exercising jurisdiction is related to the sovereignty of the state and is a matter of state interest. As Mann argued:

> Jurisdiction it is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits.[252]

Having considered the meaning of sovereignty, its scope and limitations, which are represented by the principles of territoriality and nationality in the jurisdiction rules in public

[245] An example of the limitations is that the 'State cannot require conduct illegal under the *lex loci delicti commissi*' in Bowett (n 237) 7.
[246] For more details on the principle of nationality and its limitations see Bowett (n 237) 7.
[247] Mills, *Normative Individualism* (n 240) 7.
[248] Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009) 248.
[249] See Third Restatement (Foreign Relations) (1986) s 412 in Mills, *Normative Individualism* (n 240) 8.
[250] Mills, *The Confluence* (n 248) 248.
[251] Bowett (n 237) 1–26.
[252] FA Mann, 'The Doctrine of Jurisdiction in International Law (vol 111)' in *Collected Courses of the Hague Academy of International Law* (Brill 1964).

international law, it is important for the purpose of this chapter to consider how and why the recognition of choice of court agreements may conflict with such principles, as suggested by the approach adopted by the GCC States court decisions.

3.5.2 The Conflict of Recognition of Choice of Court Agreements with the Sovereignty and Authority of the State

Private international law, as considered in chapter one, regulates individuals' relationships by a particular legal system where a foreign element is involved in three core areas: determining what forum is available to hear the case (jurisdiction rules), what substantive law applies in deciding the case (choice of law rules) and which courts can enforce the resulting judgment (recognition and enforcement of foreign judgments rules).[253] In the context of private international law, a foreign element refers to a contact with another state other than the forum; for example, the nationality of one of the parties may be foreign to the forum, or the contract may have been made or intended to be performed in a country different to where the forum is located.[254] Accordingly, private international law may regulate two interests: first, the interests of the states, as cross-border transactions are connected with more one territory;[255] secondly, the interests of individuals or parties, as both litigants tend to be private parties rather than states.[256] To that end, it will be argued below that the recognition of choice of court agreements is viewed by the GCC States court decisions as an assault on state sovereignty and authority, because the GCC States consider that the exercise of jurisdiction according to the meaning of private international law shares the same bases as the rules for the exercise of jurisdiction under public international law, namely the principles of territoriality and personality. Since such principles, as considered previously, fall within the

[253] Hartley (n 186) 9; Mills, *The Confluence* (n 248) 3.
[254] In the context of private international law, a foreign element refers to a contact with a system of law other than the forum; for example, the nationality of one of the parties may be foreign to the forum, or the contract may have been made or intended to be performed in a foreign country; see Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 3.
[255] Mary Keyes, *Jurisdiction in International Litigation* (Federation Press 2005) 182.
[256] ibid 196.

interests of the states in exercising sovereignty and eliminating any potential conflict between the sovereignties of states, the decisions in the GCC States have viewed jurisdiction under their private international law rules to be purely a matter of state interests rather than party interests.

This approach by the GCC States' court decisions is set out clearly in the explanatory memorandum of the Kuwait Civil Procedure Code, as it explicitly provides that exercising jurisdiction in private international law is related to the sovereignty of the state, as the exercise of jurisdiction according to private international law is determined mainly by the principle of territoriality and also to some extent the principle of personality.[257] This view is also found in the explanatory memorandum of the Egyptian Civil Procedure Code,[258] which is the historical source of the jurisdiction rules in Kuwait and other GCC States as outlined above.[259]

The approach of the GCC States' courts that exercising jurisdiction in private international law is related to sovereignty and that it depends on territoriality and personality states is also based on the traditional theories of private international law. For instance, Joseph Story, who first introduced the term 'private international law'[260] stresses:

> Jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory or upon the thing being within the territory; for, otherwise, there can be no sovereignty exerted, upon the known maxim; *territorium jus dicenti impune non paretur* ... no sovereignty can extend its process beyond its own territorial limits, to subject wither person or property to its judicial decisions.[261]

The Story theory is based on the principle of territorial sovereignty in solving the conflict of jurisdiction between states and stresses that the conflict of jurisdiction is between

[257] Explanatory note of the Kuwaiti Code no 38/1980 (n 50) 4.
[258] Explanatory note of Egypt's Procedure Code in Civil and Commercial no 13 of 1968 160.
[259] See above section 3.2.
[260] Joseph Story, *Commentaries on the Conflict of Law* § 539 (2nd edn, 1841); Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 V and J Transnatl L 381–399.
[261] Story (n 260) in Gary B Born and Peter B Rutledge, *International civil litigation in United States courts* (5th edn, Aspen 2011) 84.

sovereignties of states.[262] Due to the very limited theoretical academic debate in relation to the function of jurisdiction rules in private international law, it is necessary to turn to the traditional theories of choice of laws, which was also addressed by the principles of territoriality and personality. For instance, Ulric Huber's theory[263] of the eighteenth century relies on 'territorial sovereignty' in determining the applicable law to the dispute. According to Huber's theory, in general, the law of the state applies within its territory to the people in the territory subject to its law whether they are permanent or temporary residents.[264]

The second theory which is considered relevant in this context is Mancini's nationality theory[265] from the nineteenth century. According to this theory, state sovereignty is not limited to the territory of the state. It should follow the state's citizens. Therefore, the law of the forum should be applied to its citizens wherever they may be. According to the nationality theory, if the state does not apply the foreign nationality law of the party, this is regarded as a violation of that state's sovereignty, as personal sovereignty is an extension of state sovereignty.[266]

Since exercising jurisdiction in private international law is based on territorial sovereignty and personality and therefore reflects the interests of the states in eliminating the conflict between the sovereignties of the states, the GCC States' courts consider the recognition of choice of court agreements as potentially in conflict with the interests of the states, because the recognition of choice of court agreements, as considered in chapter two, allows the parties to exclude a state that has jurisdiction over a dispute (derogation effect). Accordingly, if the excluded state exercises jurisdiction on the basis of territoriality and/or

[262] Story (n 260) in Gary B Born and Peter B Rutledge, *International civil litigation in United States courts* (5th edn, Aspen 2011) 84.
[263] Ulrich Huber, *De jure civitatis*, 111, 10, Nos I and 2 in AE Anton, PR Beaumont and PE McEleavy (eds), *Private International Law* (3rd edn, W Green 2011) 2.10.
[264] Ulrich Huber, *De jure civitatis*, 111, 10, Nos I and 2 in AE Anton, PR Beaumont and PE McEleavy (n 263).
[265] Published in his *Diritto Internazionale* (Marghieri 1873) 1-64 in Anton and others (n 263) 2.23.
[266] Anton and others (n 263) 2.23; Hessel E Yntema 'The Historic Bases of Private International Law' (1953) The American Journal of Comparative Law 297–317, 309; KH Nadelmann, 'Mancini's Nationality Rule and Non-Unified Legal Systems—Nationality Versus Domicile' (1969) 17 AmJCL 418.

personality, based on the sovereignty of the state, recognition of the derogation effect may be perceived as a direct assault on the territorial sovereignty of that excluded state, because it may assume that it has priority to regulate any persons or things that affect its territory or citizens. Moreover, if the chosen court accepts jurisdiction (prorogation effect), and it does not have any contact with either the parties or the dispute, it may infringe the sovereignty and power of any states that have contact with the parties or the dispute. Consequently, recognition of choice of court agreements is rejected by the GCC States, as outlined above, and has also been rejected in developed countries in theory[267] and in practice by courts.[268] However, the developed countries have now changed their approach and have agreed to recognise both prorogation and derogation effects of choice of court agreements.[269] Accordingly, the fundamental question that will be discussed below is how to reconcile the

[267] Litigation of domestic disputes in foreign courts is sometimes said to be inconsistent with the sovereignty of the state of origin; 'Dictatory Procedure in Federal Court' (1988) 57 Fordham L Rev 291, 303 (stressing that the choice of forum has implications for sovereignty, because '[t]he notion of forum access, regulated by subject matter jurisdiction, is a fundamental governmental attribute intricately tied to the power and authority of the state'); William W Park, 'Illusion and Reality in International Forum Selection' (1995) 30 Tex Intl LJ 135, 200 (noting, implicitly, that a statute allowing choice of court clauses would further erode the sovereignty of national courts). With respect to substantive corporate law, commentators have made a similar argument; Kent Greenfield, 'Democracy and the Dominance of Delaware in Corporate Law' (2004) 67 Law & Contemp Probs 101, 101 ('Even if Delaware's dominance is a race to the top resulting in a corporate law framework that efficiently serves the interests of shareholders, it is still illegitimate.'); Jens Dammann and Henry Hansmann, *Globalizing Commercial Litigation* 25.

[268] Historically, states were unwilling to recognise choice of court agreements; US cases: *Carbon Black Export Inc v The Monrosa*, 254 F2d 297, 300-301 (5th Cir 1958); *United Fuel Gas Co v Columbian Fuel Corp* 165 F2d 746, 749 (4th Cir 1948); See generally Michael Karayanni, 'The Public Policy Exception to the Enforcement of Forum Selection Clauses' (1996) 34 Duq L Rev 1009; UK cases: *The Athenee* [1922] LILR 6 and *The Fehmarn* [1958] 1 WLR 815; [1958] 1 WLR 159 9 (CA); see also other states, for example Brazil: the Brazilian unanimous appellate court in *Sideral Trading SA v Repsol YPF Brasil SATJRJ*, Ap No 2003.001.03058, 7 May 2003; Brazil refused to abdicate jurisdiction in favour of the Spanish chosen court and held that Article 88 of the Brazilian Civil Code provided jurisdiction to the Brazilian court and it 'cannot be avoided by the parties, as Brazilian jurisdiction is directly related to Brazilian sovereignty'; See Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way' (2005) 44 Colum J Transnatl L 959.

[269] See in the United Kingdom, *The Eleftheria* [1969] 2 All ER 641; *Aratra Potato Co Ltd v Egyptian Navigation Co* (The El Amria) [1981] Lloyd's Rep 119, CA; New Zealand case law followed *The Eleftheria* in *Apple Computer Inc v Apple Corp SA* [1990] 2 NZLR 598; United States *M/S Bremen and Unterweser Reederei GmbH v Zapata Off-shore Co* 407 US 1 (1972); Canada *ZI Pompey v ECU-Line* NV 2003 SCC 27; Brussels Regulation (Recast) (n 75), Article 25: 'if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction; Also, states other than the developed countries started to recognise choice of court agreements. For instance, Brazil changed its traditional approach by amending the Brazilian Civil Procedure Code on 16 March 2015, article 25 of the Brazilian Civil Procedure Code allows the parties to choose to litigate before a foreign court exclusively; see also Egyptian Cassation Court decision no 80/ 2014 Civil and Commercial 24/3/2007, which changed the traditional approach of Egypt in rejecting the recognition of choice of court agreements.

recognition of choice of court agreements with the view that jurisdiction in private international law is based on the principles of territoriality and personality that reflect state sovereignty and power.

3.5.3 Reconciliation Between Recognition of Choice of Court Agreements and State Sovereignty and Authority

Two different arguments about the recognition of choice of court agreements might be reconciled with the exercise of jurisdiction as a reflection of state sovereignty and authority. The first argument is to simply ignore any connection between private international law and public international law in the sense that private international law should not share the same bases, namely territoriality and personality in public international law in the exercise of jurisdiction.[270]

This argument rejects all traditional theories of private international law that focus on the conflict of interest between states in exercising their sovereignty rather than focusing on the interests of the parties.[271] According to this argument, the rules of private international law should be based on the interests of the parties rather than the interests of the states in balancing sovereignty, since the litigants are always individuals, including corporations or other business entities rather than nations.[272] Therefore, a justification for the recognition of choice of court agreements might be possible if one ignores the state relations that have so far

[270] This argument is based on the idea that private international law is completely different from public international law and therefore should be treated differently. For more details about this belief, see Peter North, 'Private International Law in Twentieth Century England' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (OUP 2004) 483, 508; Mukarrum (n 135) chapter 2, section II, footnote 4; Sir Peter North notes that in the early decades of the twentieth century public and private international laws were considered to be completely different in England; See AV Dicey, *Conflict of Laws* (3rd edn, Stevens & sons 1922) 14, when referring to public and private international law mentioned that the 'two classes of rules which are generically different from each other'; GC Cheshire, *Private International Law* (1935) 20, stated that 'there is, of course, no affinity between Private and Public International Law'.

[271] Lehmann (n 260) 390.

[272] ibid 399 and 418.

been the focus of the classic theory and put the interests of parties as the central issue in the rules of private international law.[273]

Although this argument provides a reasonable justification for the recognition of choice of court agreements, it might be difficult to persuade the GCC States' legislators and courts to accept such an argument and to change their approach regarding the recognition of choice of court agreements. The explanatory note of the Kuwait Civil Procedure Code, as outlined above, explicitly provides that exercising jurisdiction is related to state sovereignty and is based on the principle of territoriality and to some extent on the principle of personality. Moreover, the court decisions of the other GCC States have similar provisions as outlined above. Accordingly, it might be difficult to persuade the GCC States to change their approach and accept the recognition of both the prorogation and derogation effects of choice of court agreements simply by rejecting the argument that exercising jurisdiction in private international law is a matter of state sovereignty and authority. Therefore, it is important to discuss the second argument that justifies the recognition of choice of court agreements, which might be more compatible with the approach of the GCC States than the first argument.

The second argument that attempts to justify the recognition of choice of court agreements is based on the view that the roles of jurisdiction and sovereignty under public international law have changed from purely reflecting state interests to considering individuals' interests as well.[274] Consequently, developed states have started to ensure that

[273] Lehmann (n 260) 415.

[274] Brand, *Sovereignty: The State Individual* (n 222) 279; Ronald A Brand 'External Sovereignty and International Law' (1995) 18 Fordham Int'l LJ 1685; Brand, *Balancing Sovereignty* (n 178); also see in general how the development in individual's rights challenges the traditional exercise of international jurisdiction rules in Brand, *Sovereignty: The State* (n 222); Mills, *The Confluence* (n 248) 264; Mills, *Normative Individualism* (n 240); Mills, *Rethinking Jurisdiction* (n 60) 187–239; The deference to party autonomy in private international law was described as reflecting 'the sovereign will of the parties' by Judge Bustamente in his separate opinion in the Serbian and Brazilian loans cases *France v Yugoslavia*; *France v Brazil* (1929) PCIJ Ser A, nos 20–21, Judgments 14-15, 53; Nygh argues that party autonomy itself has the status of a rule of customary international law: Nygh (n 57) 45. Note the recognition of the affinity between international norms and private international

their jurisdiction rules in the context of private international law reflect individuals' interests.[275] One of the changes involves recognising party autonomy in choice of court agreements.[276] Therefore, this chapter will follow such an argument in justifying effective recognition of choice of court agreements by illustrating the transition of the theories of sovereignty and jurisdiction in public international law from reflecting solely state power and interests to theories that also take into account individuals' rights and interests.

Traditionally, international law dealt only with the relationships between states, which mainly focused on the concept of sovereign states in determining the rights and obligations of their states with other states.[277] The rights of individuals were protected only through the discretionary exercise of diplomatic protection by their state.[278] However, after the Second World War, international treaties were drafted to ensure rights for individuals in different civil, political, and economic matters, such as the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights. These three instruments collectively have been called an international bill of human rights.[279] They were signed, ratified and adopted by a General Assembly resolution of the United Nations and have become a part of international customary law.[280] Therefore, these instruments are binding on all signatory states, which must provide their citizens with those rights or be held internationally accountable.[281]

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law rules on party autonomy in the resolution of the Institute of International Law on 'The Autonomy of the Parties in International Contracts between Private Persons or Entities' (1991).

[275] States started to establish and decline their jurisdiction on the ground of the denial of justice to foreign nationals, human rights and access to justice and party autonomy; Mills, *Normative Individualism* (n 240).

[276] ibid.

[277] Mills, *The Confluence* (n 248) 264.

[278] ibid.

[279] Louis B Sohn, 'New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32 Am UL Rev 12.

[280] ibid.

[281] ibid.

Several regional conventions have also been ratified to protect human rights.[282] Furthermore, regional human rights courts are open to individuals, which allow them to sue their states to enforce their rights.[283] This development in individual rights might infringe state sovereignty according to the traditional meaning of sovereignty,[284] as Hobbes considered it was the right of the sovereign to punish its citizens who refuse to obey their king.[285] However, with the development of human rights, states' authority and powers towards their citizens are limited in international law.[286] Other international organisations have been established to achieve economic cooperation, the clearest example of which is the European Union. The Parliament of the European Union can enact laws that directly impact upon individuals within each Member State.[287] This law might give individuals more rights and limit the conduct of states in their relationship with individuals.[288] Therefore, the existence of such an international organisation that has the authority to enact laws that have a direct effect on individuals might limit state sovereignty in the traditional meaning, as the state no longer has exclusive power over its individuals. Thus, sovereignty is no longer just about the power and authority of the state.

Moreover, individuals are becoming active agents under public international law rather than passive objects, which was the traditional view.[289] Under international law, individuals are now viewed as 'international legal persons', who have direct rights.[290] For

[282] American Convention on Human Rights (1969); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (1988); African Charter on Human and Peoples' Rights (1981); African Charter on the Rights and Welfare of the Child (1990); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); European Social Charter (1961); Revised European Social Charter (1996).
[283] Sohn (n 279) 12.
[284] Brand, *Sovereignty: The State Individual* (n 222) 292.
[285] ibid.
[286] Brand, *Sovereignty: The State Individual* (n 222).
[287] Brand (n 222) 289.
[288] Brand (n 222) 289.
[289] Mills, *Rethinking Jurisdiction* (n 60) 12.
[290] 'States have had to concede to ordinary human beings the status of subjects of international law, to concede that individuals are no longer mere objects, mere pawns in the hands of states'; Sohn, 'The New International

example, in the context of economic relationships, the World Trade Organisation (WTO) formalised the GATT organisation to provide peaceful settlement of disputes between states. The economic disputes settled in the WTO might involve the interests of individuals indirectly or directly.[291] The International Centre for the Settlement of Investment Disputes (ICSID) is a forum that provides the peaceful settlement of disputes arising directly between states and individuals.[292]

In addition, states in the twenty-first century enter into commercial activities with individuals, and the law applicable to these activities might be an international law that provides an individual's right to negotiate with the state as a party to the contractual relationship.[293] This can be seen in the recognition of international foreign investment conventions that apply between states and individuals and in the creation of ICSID.[294] More importantly, individual foreign investors may bring a claim against the host state regarding an investment contract in a private arbitral tribunal rather than the national courts of the host state.[295] As a result, individuals are able to enter into a contractual relationship with states through international investment law. They have power to negotiate with states, and any claim can be resolved by a neutral arbitral tribunal.

According to the traditional view of sovereignty, these rights of individuals might limit state sovereignty. However, with the development of the individual's rights and public international law discussed above, the recognition of an individual's rights does not limit state sovereignty. Indeed, recognition of an individual's rights may be viewed as the proper exercise of state sovereignty, as sovereignty should no longer simply reflect the state's power

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Law' 1 in Mills, *Rethinking Jurisdiction* (n 60) 220.
[291] Brand, *Sovereignty: The State Individual* (n 222) 289.
[292] Brand (222) 290
[293] ibid.
[294] ibid.
[295] Mills, *Rethinking Jurisdiction* (n 60) 217.

and authority and should instead reflect individuals' rights and interests.[296] Since exercising sovereignty always affects individuals, as illustrated above, the origin of the concept of sovereignty is internal sovereignty that related to the authority/power of the sovereign in regulating the relationship of the individual.[297] However, it has also been outlined above that there is also the concept of outward sovereignty, which regulates the relationship of the states within the international legal system.[298] Such sovereignty may also affect the individual, as when the state enacts a law to determine its relationship with another state that may impact upon individuals whether they are within or outside of the state.[299] Therefore, exercising both internal and outward sovereignty of the state has implications for individuals.

Given the development of individuals' rights and interests in the twenty-first century, discussed above, the rights and obligations of the individual should be considered alongside the rights and obligations of states when considering state sovereignty.[300] Kofi Annan stressed:

> States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights.[301]

Furthermore, the increase in quantity and quality of the norms of human rights and discourse about the concept of human security in public international law challenges the meaning of sovereignty, from being just a right of the state in exercising its power and authority to the responsibility of the state to ensure individuals' rights.[302] Therefore, the development in the meaning of sovereignty has several implications.

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[296] Brand, *Sovereignty: The State Individual* (n 222) 285.
[297] ibid.
[298] ibid 4.
[299] Brand, *Sovereignty: The State Individual* (n 222) 285, 286.
[300] Brand (n 222).
[301] Kofi Annan, 'Two Concepts of Sovereignty', *The Economist* (London, 16 September 1999) http://www.economist.com/node/324795 accessed 30 April 2016.
[302] Report of the International Commission on Intervention and State Sovereignty (2001) <http://responsibilitytoprotect.org/ ICISS%20Report.pdf4> accessed 30 April 2016, 13–14.

> First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promoting their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.[303]

In light of the above discussion, it can be argued that, even if exercising jurisdiction according to private international law is viewed as related to the sovereignty of the state, the evaluation of the individual's rights and the meaning of sovereignty in public international law may indirectly support an argument which would justify the recognition of choice of court agreements. As considered in chapter two, the recognition of choice of court agreements is significant for the parties in protecting their interests and legitimate expectations in international business transactions. Accordingly, even if the GCC States still view the exercise of jurisdiction according to private international law as related to state sovereignty, there will not be any potential conflict between the recognition of choice of court agreements and state sovereignty, if individuals' rights have been acknowledged. It will be considered below that, although the explanatory note of the Kuwait Civil Procedure Code together with the GCC States' court decisions demonstrate that exercising jurisdiction according to private international law is based mainly on the principles of territoriality and personality, in some circumstances those states' jurisdiction rules may also reflect individuals' interests, which contradicts the approach of non-recognition of choice of court agreements. Therefore, the approach of the GCC States in dealing with choice of court agreements is in need of revision in order to reflect the interests of the parties by recognition of both prorogation and derogation effects of choice of court agreements.

3.5.4 Exercising Jurisdiction in the GCC States and Aspects of Awareness of Individuals' Rights

3.5.4.1 Nationality as a Basis for Exercising Jurisdiction

[303] Report of the International Commission on Intervention and State Sovereignty (2001) <http://responsibilitytoprotect.org/ ICISS%20Report.pdf4> accessed 30 April 2016, 13–14.

Nationality as discussed above is a basis for exercising jurisdiction in all of the GCC States.[304] The nationality of the defendant as a basis of jurisdiction is influenced by the principle of personality under public international law.[305] As discussed earlier,[306] the personality principle asserts the state's authority and sovereignty by enabling the state to have power over its nationals regardless of their place of residence, be it in the state's territory or elsewhere.

The exercise of jurisdiction based on the nationality of the defendant is also found in the Egyptian Civil Procedure Code.[307] The explanatory note to that Code explicitly states that 'the basis of jurisdiction for the Egyptian citizen is personality, so Egypt has judicial jurisdiction over its citizens regardless of their place of residence'.[308] Accordingly, when Egyptian legislators adopted the nationality of the defendant as a basis of jurisdiction, they were influenced by the principle of personality, which in public international law reflects the concept of sovereignty and the authority of the state in exercising jurisdiction over the citizens of the state.[309] In the legislation or in the explanatory notes regarding jurisdiction rules, the legislators of the GCC States have not explicitly stated that the basis of nationality of the defendant is derived from the principle of personality, as in the Egyptian legislation.

However, it is possible to argue that in adopting the nationality of the defendant as a basis of jurisdiction, the GCC States have also considered the best outcome for the parties in private disputes. If the GCC States had intended nationality to solely reflect state sovereignty and authority over its nationals based on the personality principle, they would not have limited it to the nationality of the defendant; they would have included the nationality of the

[304] See above section 3.2.2.1.
[305] Alsamdan (n 32) 322; Ezaldeen Abdullah, *Private International Law* (9th edn, General Egyptian Book Organization 1986) 674; Hassan Al Hadawi, *Conflict of Law in Kuwaiti Private International Law* (Kuwait University 1974) 216.
[306] See above section 3.5.1.
[307] See Egyptian Civil Procedure Code 28.
[308] See the explanatory note of Egypt's Code no 13 of 1968 (n 258).
[309] Ezaldeen (n 305) 674; Hassan Al Hadawi (n 305) 216.

claimant as well. According to the personality principle under public international law discussed above, the state has power over its nationals regardless of whether the national is a defendant or a claimant. For instance, where the Brussels Regulation (Recast) 2012[310] is not applicable, articles 14 and 15 of the French Civil Code grant jurisdiction to French courts if any of the parties, whether a claimant or a defendant, is French.[311] However, the GCC States have connected the exercise of jurisdiction to the nationality of the defendant only.

Basing jurisdiction on the nationality of the claimant, as in France, enables a citizen to sue a defendant from anywhere in the world in the claimant's home court, even if the defendant or the dispute has had no contact with the state of which the claimant is a national. Therefore, exercising jurisdiction based on the nationality of the claimant, first, is unfair to the defendant, when either the dispute or the defendant has no connection with the claimant's state. Furthermore, if the defendant does not have assets in the claimant's state, any judgment delivered by the court of that state might lead to difficulties in the recognition and enforcement of that judgment in another state; for instance, the state in which the defendant resides or has his assets. The latter state might argue that the court that delivered the judgment did not have jurisdiction over the case, as the place of residence or the location of assets constitutes a closer link to the dispute than the nationality of the claimant alone.

Following this discussion, the policy of adopting the nationality of the defendant as a basis for exercising jurisdiction in the GCC States does not seem strictly based on the traditional meaning of personality that provides the state with the power to control their citizens whether they are defendants or claimants. Therefore, it can be argued that the recognition of choice of court agreements by the GCC States courts would not infringe the GCC States' sovereignty, because the GCC States are aware of the individuals' rights. One

[310] As the domicile of defendant is the main jurisdiction in the Brussels Regulation (Recast) (n 103), see article 4 of the Recast.
[311] Arthur Taylor von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983, 2008) 63 Boston University Law Review 279, 55.

may conclude that exercising jurisdiction on the basis of personality in the GCC States takes into consideration the interests of the parties as well.

3.5.4.2 Place of Residence and Domicile as Bases for Exercising Jurisdiction

The GCC States as outlined above have also adopted domicile and place of residence as bases of jurisdiction for non-citizens.[312] The rationale for exercising jurisdiction based on domicile and place of residence is the subject of debate. Some Egyptian scholars hold the view that domicile and place of residence are based on the principle of territoriality,[313] because the jurisdictional basis of domicile and place of residence depend on the objective factual connection between the individual and the territory of the state in which they are claimed.[314] The territoriality principle, as outlined above, reflects the concept of the sovereignty and authority of the state to exercise jurisdiction over the residents within its territory. Therefore, according to this view, domicile and place of residence more or less reflect state authority and power in regulating individuals' relationships.

However, for the following reasons, the exercise of jurisdiction based on the domicile and place of residence of the defendant is intended to provide the best outcome for the parties.[315] First, the use of domicile and place of residence as connecting factors form part of contract law in the civil law systems of the GCC States, which states that the onus is on the creditor to go to the debtor's home to demand payment of a debt from the debtor.[316] Therefore, if the claimant claims a right, he should sue the defendant in the court of the defendant's place of residence or domicile. Secondly, a judgment delivered on the jurisdiction basis of domicile and/or place of residence is more likely to be enforceable in the state in which it has been delivered, since the assets of the defendant are likely to be located

[312] See above section 3.2.2.1.
[313] Ezaldeen (n 305) 681; Hassan Al Hadaw (n 305).
[314] ibid.
[315] Akasha Abdulall, Hesham Sadek and Hafitha Alhadad, *Private International Law* (Dar Al Matbaat Aljamiaa 2006); Hesham Sadek, *Conflicts of International Jurisdiction Rules* (Dar Al Matbaat Aljamiaa 2007); Husam Al Deen, *International Jurisdiction Rules and Enforcement of Foreign Judgments* (Dar Al Nahda Al Arabiya 2012) 117.
[316] Husam (n 315) 119; Akasha Abdulall, Hesham Sadek and Hafitha Alhadad (n 315).

where the defendant is domiciled or resides.[317] Thirdly, Egyptian scholars have compared domicile and place of residence with the presence principle.[318] According to this principle, if a person is physically present within the state in which a process is served, he must be subject to the jurisdiction of that state regardless of the length of his stay and the connection between the state and the dispute.[319]

The presence principle is the traditional rule of jurisdiction in common law legal systems.[320] The archetypal illustration of the presence principle in the United States was the *Pennoyer* case, in which the United States Supreme Court held that, 'every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory [and] no state can exercise direct jurisdiction and authority over persons or property outside its territory'.[321] Thus, according to the presence principle, in common law jurisdictions, the state has the power to regulate persons and things within its territory, and no state can exercise jurisdiction over persons or property outside of its territory.[322] This is the same underlying rationale as the principles of territoriality and sovereignty in public international law discussed above.

Accordingly, if Egypt and then the GCC States had sought to exercise jurisdiction based on territorial sovereignty, *a fortiori* Egypt, and therefore the GCC States, would have elected to exercise jurisdiction based on the 'presence principle' rather than on domicile and place of residence. Exercising jurisdiction based on the presence principle requires merely the transitory presence of the defendant in the territory of the state for the defendant to be subject to that state's sovereignty, while jurisdiction based on domicile and place of residence

[317] Salama (n 44) 118; Husam (n 315) 118; Hesham (n 315) 121.
[318] Husam (n 315) 117; Akasha, Hesham and Hafitha (n 315) 38.
[319] Arthur Taylor von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983, 2008) 63 Boston University Law Review 279, 56.
[320] Clarkson and Hill, *The Conflict of Laws* (4th edn, OUP 2011) 103.
[321] *Pennoyer v Neff*, 95 US 722 (1877). However, the approach of the Unites States has been moved from the territoriality restrictions and also started to recognise the derogation effect of choice of court agreements, see *M/S Bremen and Unterweser Reederei GmbH v Zapata Off-shore Co* (n 269).
[322] Gary B Born and Peter B Rutledge, *International Civil Litigation in United States Courts* (5th edn, Aspen 2011) 85.

requires the defendant to be either more than a mere transitory resident or be domiciled in the territory of the state in which he is sued.

In conclusion, the rationale for adopting domicile and place of residence in the GCC States as grounds for jurisdiction seems to be not merely based on the principle of territorial sovereignty. It also seems that the GCC States take into consideration the best outcome for the parties in private disputes. Therefore, it can be argued that the recognition of choice of court agreements by the GCC States' courts would not infringe the sovereignty of the GCC States, because those GCC States respect individuals' rights, since they exercise jurisdiction on the basis of territoriality in the GCC States and also consider the interests of the parties.

3.5.4.3 Prorogation of Jurisdiction as a Basis for Exercising Jurisdiction

All of the GCC States, except the United Arab Emirates (UAE), as outlined earlier in this chapter, recognise the prorogation effect of choice of court agreements. Furthermore, the recognition of the prorogation effect in Kuwait, Saudi Arabia, Bahrain and Oman reflects the real autonomy of the parties, as the recognition of this effect does not require any connection of either the parties or the dispute with the chosen GCC State. Therefore, the recognition of the prorogation effect in the above GCC States is free from any of the restrictions that reflect the principle of territoriality or personality under public international law. Accordingly, it can be argued that the provision in the explanatory note of the Kuwait Civil Procedure Code and also reflected in the court decisions by Kuwaiti courts and other GCC States' courts that exercising jurisdiction mainly based on territoriality and personality might not be certain. This is because these GCC States, as demonstrated above,[323] adopt an approach to the exercise of jurisdiction that is not related entirely to the principles of territoriality and personality which is the prorogation of jurisdiction.

[323] See above section 3.3.1.

This approach to recognition of the prorogation effect of choice of court agreements without restrictions is based on the principles of personality and territoriality, while rejecting the recognition of the derogation effect, because it would assault state sovereignty and state authority according to the territoriality and personality principles, clearly seems a contradictory approach towards exercising jurisdiction. Such a contradictory approach in the recognition of the two aspects of choice of court agreements is not be justifiable and presents a challenge to the state interests, which have a connection with the parties or the dispute. If these states believe that the jurisdiction rules of the state are a manifestation of state sovereignty and public authority, they should not recognise the prorogation effect without any restrictions that reflect the principle of territoriality or personality under public international law, because such recognition might present a challenge to another state's sovereignty and hence its right to assert its jurisdiction over the same dispute according to its jurisdiction rules. For example, in opting for exclusive jurisdiction, the parties choose the courts of one state and exclude the courts of other states that might otherwise have had jurisdiction. If the chosen court is one of the above GCC States, the chosen GCC State will respect party autonomy, assume jurisdiction on the basis of the prorogation of jurisdiction and deliver a judgment, even if the parties and dispute are more closely linked to the excluded state or states, without considering the sovereignty and public authority of the excluded state. In contrast, if the parties exclude any of the above GCC States and choose a foreign state, the excluded GCC State will refuse to recognise the derogation effect and will refuse to decline jurisdiction in favour of the chosen foreign court, since such recognition would assault the GCC State's sovereignty, even if the parties and dispute are more closely linked to the chosen foreign court. This has been reflected in several GCC State judgments that have been considered above.[324]

[324] See above sections 3.3.3 and 3.4.

Hence, those GCC States overlook the interests of other states in regulating the concept of party autonomy in choice of court agreements. On the one hand, the GCC States accept jurisdiction when the parties exclude any other competent states, even if the excluded court has a strong connection with the parties or the dispute, without considering the state sovereignty of the excluded forum. However, they do not accept their courts being excluded under any circumstances, because such exclusion would assault their sovereignty. Accordingly, the approach of the above GCC States in the recognition choice of court agreements is contradictory and unjustifiable and should therefore be revised. In the UAE, the approach seems to be more consistent than in the other GCC States, as the UAE Civil Procedure Code does not recognise by virtue of article 14 either the prorogation or derogation effects of choice of court agreements. Therefore, article 14 does not allow the parties to exclude the UAE courts when they have jurisdiction over a dispute, and also does not allow the parties to exclude the foreign courts by choosing the UAE courts. However, it has been outlined above that the UAE, similar to the other GCC States, has adopted bases of jurisdiction not merely based on territoriality and personality, but also taking into consideration the best outcome for the parties. Moreover, in the best interests of the parties, the UAE and the other GCC States might decline jurisdiction in the circumstances described below.

3.5.4.4 Arbitration Agreements as a Basis for Declining Jurisdiction

All of the GCC States regulate the recognition of arbitration agreements in their domestic legislation.[325] They are also all members of regional conventions, which harmonise the

[325] See Kuwait Code of Civil and Commercial Procedure, Law no 4 of 1980 arts 173–188; Saudi Arabia KSA Arbitration Law issued by Royal Order no A/90, 7/8/1412H; Bahrain Rules of Arbitration of the Bahrain Chamber for Dispute Resolution effective 1 October 2017; Omani Law of Arbitration in Civil and Commercial Disputes Royal Decree 1997 47/97; United Arab Emirates Civil Procedure Code Federal Law no 11 of 1992 arts 233–281 UAE Official Gazette no 235 3/3/1992.

recognition and enforcement of arbitral awards.[326] Furthermore, all of the GCC States, as outlined in chapter two, have signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).[327] Article II(3) of the New York Convention provides: 'The court of a contracting state ... shall, at the request of one of the parties, refer the parties to arbitration'. According to article II(3), the GCC States' courts must decline jurisdiction when there is an arbitration agreement between the parties in relation to the resolution of the particular dispute.[328] Accordingly, if parties have chosen to resolve their dispute by arbitration by selecting a tribunal that is located in a different state to the forum, all of the GCC States' courts will recognise the consent of the parties and decline jurisdiction in favour of the foreign tribunal according to their domestic laws and to article II(3) of the New York Convention. Therefore, it can be argued that if the GCC States have specifically decided to adopt rules which recognise arbitration agreements and decline jurisdiction in favour of the foreign arbitral tribunal, they should adopt a similar approach and rules if the parties have chosen a foreign court rather than an arbitral tribunal, since both will result in the same outcome with any state court required to decline jurisdiction. However, it has been argued that states are more willing to recognise arbitration agreements rather than choice of court agreements, because the recognition of arbitration agreements does not infringe the

[326] See League of Arab States Riyadh Arab Agreement for Judicial Cooperation art 37 (6 April 1983) (English) <http://www.refworld.org/docid/3ae6b38d8.html> accessed 17 December 2017; the convention has been signed and ratified by Palestine (28 November 1983), Iraq (16 March 1984), Yemen (13 April 1984), Mauritania (16 June 1985), Sudan (26 November 1984), Syria (30 September 1985), Somalia (2 October 1985), Tunisia (29 October 1985), Jordan (17 January 1986), Morocco (30 March 1987), Libya (6 January 1988), United Arab Emirates (11 May 1999), Oman (28 July 1999), Bahrain (23 January 2000), Saudi Arabia (11 May 2000), Algeria (20 May 2001), Egypt (2004); Kuwait signed the Riyadh Convention on 6 April 1985, but has not yet ratified it.; also see article 12 of the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States 1995 (English) <http://arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf. accessed 17 December 2017. The Convention has been signed and ratified by Kuwait, Saudi Arabia, Oman, Bahrain, Qatar and United Arab Emirates.

[327] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (New York Convention).

[328] See the GCC States decisions in recognition of international arbitration agreements, Kuwait Cassation Court decisions 448/2000 Commercial, 30/4/2001; 35/2002 Civilian, 17/01/2003; 58/2005 Commercial, 18/4/2006; Bahrain Cassation Court decisions 19/2007 Civilian, 23/4/2007; Abu Dhabi Cassation Court decision no 679/ 2010 Commercial 6/6/2011.

sovereignty of the state, since the parties in arbitration settle their dispute through a private institution, while, in choice of court agreements, the parties have chosen a public court of another state. The infringement of sovereignty occurs in the recognition of choice of court agreements, because a public court of a foreign state will resolve the dispute and not because the excluding court will not resolve the dispute. However, it has been argued by scholars,[329] and court decisions in developed countries[330] have demonstrated, that choice of court agreements and arbitration agreements should be treated in the same manner, since both types of agreement lead to the same conclusion, which is to decline jurisdiction. For instance, Huddart wrote in the *Sarabia* case:

> Since forum selection agreements are fundamentally similar to arbitration agreements, there is no reason for forum selection clauses not to be treated in a manner consistent with the deference shown to arbitration agreements.[331]

Accordingly, the approach of the GCC States to the recognition of arbitration agreements and declining jurisdiction in favour of the foreign arbitral tribunal seems inconsistent with their approach to the recognition of choice of court agreements, whereby their courts refuse to decline jurisdiction in favour of a chosen foreign court. Thus, it is argued that the GCC States should rethink their approach to the recognition of choice of court agreements.

The above discussion has indicated that the GCC States do not strictly apply the principles of territoriality and personality that reflect the sovereignty of the state in exercising jurisdiction as defined traditionally in public international law. It was also demonstrated that the rules regulating jurisdiction in the GCC States take into consideration to some degree the interests of the parties rather than exclusively state interests. Accordingly, the GCC States seem conscious of the developments in the definition of sovereignty and individual rights in

[329] Jeffrey Talpis, and Nick Krnjevic. 'The Hague Convention on Choice of Court Agreements of June 30 2005: The Elephant That Gave Birth to a Mouse' (2006) 13 Sw JL & Trade Am 6; Jens Dammann and Henry Hansmann, 'Globalizing commercial litigation' (2008) 94 Cornell L Rev 24.
[330] *Sarabia v Oceanic Mindoro* (1996) 26 BCLR 3d 143, 152; *GreCon Dimter Inc v JR Normand Inc* (2005) 46 SCC 31, 33 in Jeffrey Talpis, and Nick Krnjevic (n 329) fn 19; see also Egyptian Cassation Court decision no 80/ 2014 Civil and Commercial 24/3/2007, 6.
[331] ibid *Sarabia*.

public international law, as discussed above. Therefore, it can be argued that there any potential risks to the interests of the GCC States would be limited, if they were to change their approach and recognise both prorogation and derogation effects of choice of court agreements.

Before concluding the chapter, it is important to outline an important decision by the Egyptian Cassation Court. In 2014, the Egypt Cassation court recognised the derogation effect of a choice of court agreement and declined jurisdiction in favour of a chosen court,[332] after a long history of rejecting such agreements.[333] The dispute related to an investment contract between two Egyptian siblings and an American bank.[334] A disagreement occurred between the parties to the contract that led the sister to sue her brother and the American bank before the Egyptian courts in connection with the investment contract.[335] However, the American bank argued that the Egyptian court had to decline jurisdiction, as the investment contract had a choice of court agreement nominating the Jersey courts in the Channel Islands exclusively to resolve any potential dispute that arose out of the contract.[336] The Egyptian court's ruling represented a change to its traditional approach to the recognition of the derogation effect of choice of court agreements. The Egyptian court declined jurisdiction in favour of the Jersey court, although it had jurisdiction according to Egypt's jurisdiction rules. The Egyptian court held that the lack of any specific provision providing for recognition of the derogation effect in the Egyptian Civil Procedure Code did not necessarily lead to the conclusion that recognition of the derogation effect should be rejected, since the Egyptian Civil Procedure Code explicitly regulates the recognition of the prorogation effect.[337] Accordingly, the Egyptian legislator is aware of the importance of party autonomy in choice

[332] Egyptian Cassation Court decision no 80/ 2014 Civil and Commercial 24/3/2007.
[333] Hesham Khalid, 'To What Extent Might Egyptian Courts Decline Jurisdiction in International Commercial and Civil Matters' (2012) Alexandria University 1.
[334] Egyptian Cassation Court decision no 80/2014 (332) 4.
[335] ibid 4.
[336] ibid 5.
[337] Egyptian Cassation Court decision no 80/2014 (n 332) 6.

of court agreements, even if it does not explicitly regulate recognition of the derogation effect.

Secondly, the Egyptian court stressed that there are already two grounds for declining jurisdiction even where the Egyptian courts had to have jurisdiction according to Egypt's jurisdiction rules.[338] The first is where the dispute is related to immovable property outside Egypt[339] and the second is where there is an arbitration agreement, regardless of where the arbitral tribunal is located.[340] Therefore, it does not seem that there is any potential conflict with the Egyptian legal system in declining jurisdiction on the basis of the recognition of the derogation effect of choice of court agreements.[341]

The Egyptian Cassation court decision could be significant in persuading the GCC States to rethink their approach to the recognition of choice of court agreements. As has been outlined above, the Egyptian Civil Procedure Code is the key historical source for the jurisdiction rules of the GCC States, which are almost the same as the Egyptian jurisdiction rules. Accordingly, it would seem logical for the GCC States to revise their approach to the recognition of choice of court agreements, as Egypt has undertaken recently.

3.6 Conclusion

This chapter has argued that the approach to the recognition of choice of court agreements is not uniform across the GCC States. Kuwait, Saudi Arabia, Bahrain and Oman have adopted an approach in which jurisdiction is exercised solely based on the concept of party autonomy only as far as the prorogation effect of choice of court agreements is concerned, even though several factors limit the effectiveness of the recognition of choice of court agreements, which

[338] Egyptian Cassation Court decision no 80/2014 (n 332) 4-7.
[339] See arts 28 to 35 of the Egyptian Code of Civil and Commercial Procedure no 13/1968.
[340] Egyptian Arbitration Code no 27/1994, also Egypt signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 on 9 March 1959; Article II(3) of the New York Convention provides that: 'The court of a contracting state … shall, at the request of one of the parties, refer the parties to arbitration'. Accordingly, Egypt has to decline jurisdiction on the basis of article II(3) of the New York Convention when the parties conclude an arbitration agreement in their contract.
[341] Egyptian Cassation Court decision no 80/2014 (n 332).

need to be addressed. Unlike the recognition of the prorogation effect, the laws in these GCC States are silent about the recognition or non-recognition of the derogation of choice of court agreements. The Kuwaiti courts have made their position clear by refusing derogation in every case that has appeared before them, because their jurisdiction rules are compulsory for the parties, as they are based on public policy and state sovereignty. The Kuwait approach to non-recognition of the derogation effect exposes parties to international business transactions connected with Kuwait to the risks of uncertainty, unpredictability, parallel litigation between two different courts and the potential for inconsistent judgments.

It was also observed in this chapter that although the courts in Saudi Arabia, Bahrain and Oman have not yet heard a case on the recognition of the derogation effect, those courts would probably follow to the approach adopted in Kuwait and the UAE approach in rejecting the recognition of choice of court agreements, at least as far as the derogation effect is concerned, because they have also deemed the exercise of jurisdiction to be a matter of state sovereignty and authority in several decisions.[342]

The UAE Code of Civil Procedure to some extent is more radical than the other GCC States in dealing with the matter of sovereignty and public authority relating to the rules governing the exercise of jurisdiction, because the UAE rejects the recognition of both effects of choice of court agreements and considers them to be in conflict with state sovereignty. The UAE's rejection of the derogation effect has been outlined by reference to actual cases, but, to date, no cases have tested the country's position regarding the prorogation effect.

The chapter has also critically assessed the approach of the GCC States regarding recognition of choice of court agreements by a contextual debate centred on the twin principles of the sovereignty and authority of the state. It considered that the rise in recognition of an individual's rights at the beginning of the twenty-first century altered the

[342] It was considered in the previous chapter that the Cassation Court of Saudi Arabia and the High Court of Oman regard exercising jurisdiction as a matter of sovereignty and state authority.

traditional perception of sovereignty and the principles of territoriality and personality in exercising jurisdiction from one that purely reflects state interests to one that also reflects individuals' interests. Thus, if a state acknowledges that its interests do not transcend an individual's rights and interests, then it may be possible to advance an argument that justifies the recognition of choice of court agreements. In addition, it has also been argued that the GCC States are aware in some circumstances of the individual's rights and interests in exercising jurisdiction and this would again suggest that the approach of non-recognition of choice of court agreements may be inappropriate and should be revised.

Accordingly, the author concludes that the regulation of the recognition of choice of court agreements in the GCC States should be reviewed and revised. As, on the one hand, such recognition is no longer deemed to assault the sovereignty of the state, and, on the other hand, the non-recognition of choice of court agreements might negatively impact upon international trade and commerce in the GCC States. It was outlined in chapter two that parties in international business transactions tend to avoid jurisdictions that do not recognise or do not have effective rules regarding choice of court agreements. Accordingly, the GCC States should rethink their approach to the recognition of choice of court agreements, if they are to promote international trade and encourage foreign investment. The next chapter will consider the regulation of choice of court agreements by special international commercial courts that have been established in Dubai and Bahrain to encourage international trade and investment.

CHAPTER 4: SPECIAL COMMERCIAL COURTS IN BAHRAIN AND THE UNITED ARAB EMIRATES

4.1 Introduction

This thesis, as discussed in chapter one, seeks to review the legal rules in the GCC States in relation to the recognition of choice of court agreements in order to assess to what extent they need to be reconsidered and revised, and thereby minimise the risks of uncertainty and unpredictability, parallel litigation and inconsistent judgments.[1] To that end, the previous chapter[2] focused on the recognition of choice of court agreements in the traditional legislation of the GCC States together with the relevant case-law in those States. However, there are also rules regarding the recognition of choice of court agreements which are different to those in the traditional legislation of the GCC States. Such rules have been developed in relation to two special commercial courts that have been created within the GCC States. The first is the Bahrain Chamber for Dispute Resolution Court (BCDR Court)[3] established in Bahrain, and the second is the Dubai International Financial Centre Court (DIFC Court)[4] that is located in the UAE Free Zones in Dubai.

For the purposes of this thesis it is important to discuss how these two courts regulate the recognition of choice of court agreements and whether such regulation is compatible with the parties' interests in international business transactions. Accordingly, this chapter will start by discussing the regulation of the recognition of choice of court agreements in the BCDR Court, and then it will discuss the DIFC Court.

4.2 Bahrain Chamber for Dispute Resolution (BCDR)

[1] The negative impact of the risk of uncertainty and unpredictability, parallel litigation and inconsistent judgments upon international business transactions has been discussed in detail in chapter one.
[2] See chapter three.
[3] Legislative Decree no 30 of 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (BCDR) (English) <http://www.bcdr-aaa.org/en/about-us/> accessed 7 September 2017.
[4] Art 8 of the Law no 9 of 2004 In Respect Of The Dubai International Financial Center (English) <http://www.dubaicourts.gov.ae/portal/page/portal/dc/Legislation_Details?_piref292_457219_292_455214_455214.called_from=3&_piref292_457219_292_455214_455214.law_key=1221> accessed 7 September 2017.

The Bahrain Chamber for Dispute Resolution (BCDR) established by Legislative Decree no 30 of 2009,[5] as amended by Legislative Decree no 65 of 2014, came into operation in 2010.[6] The BCDR was established as a result of the Bahrain Economic Vision 2030.[7] The vision aims to diversify the country's sources of income from an economy built on oil wealth to a 'productive, globally competitive economy'.[8] It adopted the principles of sustainability, competitiveness and fairness[9] in achieving its economic aims. Furthermore, the vision stressed the importance of enhancing the private sector and encouraging international trade and investment in order to contribute to financing the economy.[10] The importance of an effective legal framework for the facilitation of international trade and investment is widely acknowledged in an increasingly economically interdependent world. Accordingly, the BCDR was established to provide the parties with a chamber of commerce that specialises in resolving economic, financial and investment disputes.[11] The BCDR aims to provide 'local, regional and international businesses and governments with fast and transparent alternative dispute resolution solutions as an alternative to potentially lengthy and costly traditional litigation'.[12] The BCDR provides three methods of commercial dispute resolution: litigation,[13] arbitration[14] and mediation.[15]

In the context of the research questions underlying this thesis, the most important of these methods is litigation before the BCDR Court, as there are rules in place to regulate the

[5] BCDR decree (n 3).
[6] Legislative Decree no 65 of 2014 with respect to amendment of the Legislative Decree No 30 of 2009 of the BCDR.
[7] The Economic Vision 2030 for Bahrain (English) <http://www.moj.gov.bh/en/pdf/Economic_Vision.pdf > accessed 7 September 2017.
[8] ibid 3.
[9] ibid.
[10] ibid 10.
[11] Art 2 BCDR decree (n 3).
[12] See the advantages of the BCDR at the official website (English) <http://www.bcdr-aaa.org/en/about-us/> accessed 7 September 2017.
[13] Section 1 BCDR decree (n 3).
[14] Art 2 BCDR-AAA Arbitration Rules (English) <http://www.bcdr-aaa.org/en/our-services/arbitration1/> accessed 7 September 2017.
[15] ibid.

operation of choice of court agreements.[16] In terms of providing local, regional and international businesses with an alternative court that can be trusted to respect the interest of the parties in international business disputes, the BCDR Court offers several advantages. First, in the BCDR Court the parties are free to choose the language of the hearing,[17] while the traditional Bahraini courts require that the language of the hearing must always be Arabic.[18] The BCDR Court has a translation department to translate the hearing proceedings for the tribunal.[19] Secondly, the parties in the BCDR Court can choose to be represented by a non-Bahraini lawyer,[20] whereas the traditional Bahraini courts require that any lawyer involved must be a Bahraini citizen.[21] Thirdly, any judgment issued by the BCDR Court is final and binding without an appeal review.[22] In contrast, judgments issued by the traditional Bahraini courts in litigation cannot be final until appellate review is completed.[23] Therefore, since litigation in the BCDR Court does not involve an appellate review, in theory this might make litigation in the BCDR Court quicker than traditional litigation in granting a final decision. As the BCDR Court process is quick and the final award is delivered without delay, costs might be also reduced in contrast to those of a lengthy court procedure. However, no empirical study has been undertaken to determine whether litigation in the BCDR Court is actually cheaper and quicker than traditional litigation in the other Bahraini courts.

Accordingly, the BCDR Court rules and processes provide local, regional and international businesses with an alternative to the Bahraini traditional courts that can be relied upon to deliver more certainty and predictability. The jurisdiction rules of the BCDR Court

[16] S 2 Ch 2 BCDR decree (n 3).
[17] ibid art 12(a).
[18] Bahraini Code of Commercial and Civil procedure no 12 of 1971 art 57.
[19] Art 12(b) BCDR decree (n 3).
[20] ibid art 30(a).
[21] Bahrain Legislative Decree no 26 of 1980, the Lawyer Act art 2(1).
[22] Art 15 BCDR decree (n 3).
[23] Art 213 Bahrain Civil Procedure Act (n 18).

and specifically how its rules in relation to choice of court agreements are applied will be considered below.

4.2.1 Jurisdiction of the BCDR Court

Before considering the jurisdiction rules in the DIFC Court in general and specifically the rules on recognition of choice of court agreements, it is important to stress at the outset that the following discussion will concentrate on a critical analysis of the BCDR Court legislation rather than its case law. The reason for that is because the judgments of the BCDR Court are not available to the public or to researchers. The author has contacted the BCDR Court regarding the possibility of collecting BCDR Court judgments but regrettably was informed that it is not possible for BCDR judgments to be consulted. Accordingly, for this reason, the approach of the BCDR Court regarding the recognition of choice of court agreements has been examined solely by reference to its legislative rules.

The jurisdiction of the BCDR Court can be divided into two categories: jurisdiction in domestic disputes[24] and jurisdiction in international disputes.[25] Since the scope of this thesis is limited to jurisdiction in international disputes, the issue of jurisdiction in domestic disputes in the BCDR Court will not be considered.

The BCDR Legislative Decree specifies two bases of international jurisdiction.

- Jurisdiction by law[26]

According to section one of the BCDR Legislative Decree, the BCDR Court has mandatory jurisdiction over every dispute that the traditional Bahrain courts have jurisdiction over,[27] if the dispute meets three specific conditions.

(1) The dispute must be for a sum of at least 500,000 Bahraini Dinars;[28]

[24] Jurisdiction in domestic disputes shall be under jurisdiction by law in art 9(1) and jurisdiction by parties' agreement under art 19 BCDR decree (n 3).
[25] Jurisdiction in international disputes shall be under jurisdiction by law in art 9(2) and jurisdiction by parties' agreement under art 19 BCDR decree (n 3).
[26] S 1 ch 2 BCDR decree (n 3).
[27] The basis of jurisdiction under traditional Bahraini Courts has been considered in detail in chapter four.
[28] Art 9 BCDR decree (n 3).

(2) The dispute must be international;

According to article 9(2), the dispute is international if the location of one of the parties or the place where the main part of the obligation of the commercial contractual relationship is to be performed, or the place that is the most closely connected with the dispute is located outside of Bahrain;[29] and

(3) The dispute must be commercial.

The dispute shall be deemed as commercial according to article 9(2) of the BCDR Decree Legislative if:

> [I]ts subject matter, contractual or non-contractual, concerns relationships of a commercial nature including any transaction of supplying goods or services or the exchange thereof, distribution agreements, commercial representation or commercial agency, managing rights before others, hiring to purchase, construction of factories, consultation services, engineering works, issuing licenses, investment and financing, banking transactions, insurance, franchising agreements, joint ventures, any other forms of industrial or commercial cooperation, and transporting commodities or passengers by air, sea or land.[30]

Accordingly, the BCDR Legislative Decree specifies the requirements for the BCDR Court to have jurisdiction to hear an international commercial dispute. If these three conditions are met, the BCDR Court rather than the traditional Bahraini courts will have jurisdiction to rule over a dispute.

Chapter three considered that[31] the prorogation of jurisdiction is contemplated under Bahraini law through the traditional jurisdiction rules of Bahrain, which recognise the prorogation of jurisdiction in article 17 of the Bahraini Code of Commercial and Civil Procedure 1971. Therefore, according to the BCDR Legislative Decree, if the parties in an international commercial dispute have chosen to litigate before the Bahraini courts and the disputed sum is 500,000 Bahraini Dinars or more, the BCDR Court will be the competent court rather than the traditional Bahraini Courts.

[29] Art 9 BCDR decree (n 3).
[30] ibid.
[31] See chapter three of this thesis.

Furthermore, the BCDR Court provides the parties with the option to choose to litigate before the BCDR Court even if the disputed sum is less than 500,000 Bahraini Dinars. This choice of the parties is contained in section two of the BCDR Legislative Decree, which is called jurisdiction by party agreement.[32]

- Jurisdiction by parties' agreement

According to section two of the BCDR Legislative Decree, the BCDR Court has jurisdiction when the parties have entered into a choice of court agreement which specifies the BCDR (prorogation of jurisdiction). The BCDR Legislative Decree does not provide any restrictions under section two in the same way as section one, as discussed above.[33] Although prorogation of jurisdiction is already contemplated in the traditional jurisdiction rules of Bahrain, section two makes prorogation of jurisdiction specific in order to provide a separate basis of jurisdiction that is free from any conditions in section one regarding the disputed monetary value.

Accordingly, the parties can choose the BCDR Court without regard to the value of the claim; no minimum value is required. Furthermore, the BCDR Legislative Decree follows the traditional Bahraini court approach in recognising the prorogation effect without any territorial and personal restrictions, as article 19 of the BCDR Legislation Decree does not require any territorial and personal restrictions for recognition of the prorogation effect. Therefore, the parties to any international business transaction throughout the world can choose to litigate before the BCDR Court. The only restriction is that the dispute must be related to commercial, financial or investment transactions, because the competence of the BCDR Court is limited to those kinds of transactions.[34]

[32] S 2 ch 2 BCDR decree (n 3).
[33] See above 'Jurisdiction by law' section 4.2.1.
[34] Art 9 BCDR decree (n 3).

It has been considered in the previous chapter[35] that the way that the prorogation of jurisdiction has been regulated before the traditional Bahraini courts might raise several problems regarding the validity of the agreement between the parties. However, the rules regarding the prorogation of jurisdiction for the BCDR Court have addressed some of the issues. First, the BCDR Legislative Decree specifies clearly when a dispute is international[36] in order to determine the jurisdiction of the BCDR Court. However, as mentioned in the previous chapter in connection with the traditional Bahraini courts the word 'international' is not defined.[37]

Secondly, article 19 of the BCDR Legislation Decree states that the agreement of the parties must be in writing.[38] Requiring a choice of court agreement to be concluded in writing will remove the uncertainty from the traditional Bahraini courts[39] in determining whether or not there is a choice of court agreement between the parties. It is also important in determining whether a choice of court agreement is exclusive or non-exclusive given as noted in chapter three the former must be sufficiently clear in order to be given effect in excluding all other competent courts.

Thirdly, article 19 of the BCDR Legislation Decree states that the BCDR Court must be competent when the 'parties' agree to litigate before the BCDR Court. The BCDR employs the term 'parties' rather than the terms 'defendant', 'opponent' or 'litigants', which are used by the traditional legislation of Bahrain, Kuwait, Saudi Arabia and Oman.[40] Accordingly, the BCDR avoids the possible misunderstanding that might suggest that a choice of court agreement is valid only if it is concluded after the start of legal proceedings.

[35] See chapter three, section 3.3.
[36] Art 9(2) BCDR decree (n 3); See above 4.
[37] The issue of the absence of the definition of the word 'international' has been considered in chapter three.
[38] Art 19 BCDR decree (n 3).
[39] The issue of the absence of the written requirement in a concluded choice of court agreement has been considered in chapter three, section 3.3.2.2.
[40] The issue of the terms 'defendant', 'opponent' or 'litigants' in regulating choice of court agreements has been considered in chapter three.

However, the issue of whether a choice of court agreement provides for exclusive and non-exclusive jurisdiction[41] still exists in the BCDR Court, as there is no specific provision clarifying when a particular jurisdiction agreement is exclusive. This may be due to the fact that the BCDR Court follows the jurisdiction rules of Bahraini traditional courts with regard to the recognition of only the prorogation effect. Therefore, the distinction between exclusive and non-exclusive agreements is not relevant.

The absence of rules on choice of law to determine the validity of the choice of court agreements and the principle of *severability*[42] also still exists in relation to the BCDR Court, because the BCDR Legislative Decree does not contain any provision regarding such matters. Chapter six of this thesis will consider the 2005 Hague Convention, which seeks to harmonise the rules in relation to choice of court agreements and addresses such issues that might improve the legal position regarding recognition of choice of court agreements.

With regard to the derogation effect of choice of court agreements, there is a risk that the BCDR Court would adopt the same stance as the traditional rules of Bahrain that were considered in the previous chapter. The reason for that is because the BCDR Legislative Decree, like the Bahrain Civil Procedure Code, does not contain any provision regarding recognition of the derogation effect. The absence of such provision in the BCDR Legislative Decree might lead to uncertainty and unpredictability in international business transactions connected with Bahrain, as the parties will not be able to predict whether or not their choice of court agreement would be recognised by the BCDR Court. Furthermore, article 13(3) of the BCDR Legislative Decree states that the Bahrain Cassation Court at the request of one party can nullify the BCDR decision if the decision issued by the BCDR Court is against the public order of Bahrain, and it was considered in the previous chapter, the traditional court in

[41] The issue of the exclusive and non-exclusive jurisdiction in regulating choice of court agreements has been considered in chapter three.
[42] The issue of the applicable law on the validity of the choice of court agreements and the principle of *severability* have been considered in chapter three.

Bahrain might follow the approach of the other GCC States and deem the exercise of jurisdiction as an affront to state sovereignty and public authority an assault on the public order of Bahrain. Accordingly, the BCDR Court might adopt similar approach and decide not to recognise the derogation effect for the same reasons discussed above.

4.2.2 Assessment of the Regulation of the Two Effects of Choice of Court Agreements in the BCDR Court

The BCDR should rethink its approach regarding the uncertainty over the recognition of the derogation effect, because this approach may not be compatible with the goals of the BCDR Court under the Bahrain Economic Vision 2030. As discussed, the aim of this vision is to facilitate international trade and investment by building an attractive legal framework for international businesses and foreign investors. The BCDR Court was created for this purpose. The objective was to create a court with expertise in international commercial disputes with various advantages for commercial litigants compared with the traditional Bahraini courts.

However, regulating the recognition of only the prorogation effect and not addressing the uncertainty and gaps regarding recognition of the derogation effect of choice of court agreements in the rules of the BCDR Court might have a negative impact on Bahrain's vision of international trade in the future. This is because international businesses that seek to avoid the risk of being sued in the BCDR Court unless they have chosen it, might not do business in Bahrain or might increase the cost of the transaction because of the risk of being sued in an unfavourable and unexpected court due the possibility of conflicts of jurisdictions and judgments. Such conflicts may exist when the parties have a choice of court agreement that favours a foreign court while there is a potential basis of BCDR jurisdiction, and one of the parties breaches the jurisdiction agreement by starting proceedings in the BCDR Court. The former is likely to take jurisdiction, because it was the chosen court, and there is a real risk that the BCDR Court will also take jurisdiction where it has jurisdiction according to its jurisdiction rules and there remains uncertainty regarding its approach to the derogation

effect of choice of court agreements. This may result in a conflict of jurisdiction and a possible conflict of judgments, because more than one forum will hear the same dispute, which could potentially result in more than one judgment in relation to effectively same dispute.

In conclusion, Bahrain is keen to improve the litigation climate for foreign businesses because of the economic benefits that this can bring. To that end, it has established a court with expertise in international commercial disputes. However, to realise the economic benefits that Bahrain seeks, the rules of the BCDR Court should clearly specify the rules regulating the recognition of the derogation effect of choice of court agreements in order to avoid the non-recognition of such agreements and ensure legal certainty and predictability for the parties. Furthermore, Bahrain should adopt the 2005 Hague Convention to allow the enforcement of choice of court agreements and to enable the recognition and enforcement of Bahraini judgments abroad where the BCDR Court has assumed jurisdiction on the basis of a choice of court agreement. The latter two issues will be discussed in detail below with regard to the Dubai special court.

4.3 Dubai International Financial Centre (DIFC)

4.3.1 The DIFC

In 2004, article 121 of the United Arab Emirates (UAE) Constitution was amended to empower the federal government of the UAE to establish financial free zones that are exempt from the application of the rules and regulations of the Union.[43] Subsequently, Federal Law no 8 of 2004, concerning financial free zones, was established and allows any emirate of the UAE, by federal decree, to establish a financial free zone within its territory.[44] Article 3 of the 2004 Federal Law exempts financial free zones from all civil and commercial federal

[43] Constitutional Amendment no 1 of 2003 (10 January 2004) (English) <https://www.loc.gov/law/help/guide/nations/uae.php#constitution> accessed 7 September 2017.

[44] Federal Law no 8 of 2004 Regarding the Financial Free Zone (English) <https://www.difc.ae/laws-regulations> accessed 7 September 2017.

laws. Accordingly, any emirate is allowed under article 7(3) to have its own legislation covering civil and commercial matters to be applied within its financial free zone, and the financial free zone of any emirate is allowed to enter into memoranda of understanding and cooperation with similar entities provided that they do not conflict with the treaties to which the UAE is a party.[45]

On 27 June 2004, a Federal Decree was enacted to establish a financial free zone in Dubai.[46] Pursuant to that Federal Decree, the ruler of Dubai established Law no 9 of 2004[47] creating a financial free zone in Dubai, namely the Dubai International Financial Centre (DIFC). It is located in the centre of Dubai, and its territory covers 110 acres.[48] The DIFC aims:

> 1. to be a financial Centre in the Emirate, based on principles of efficiency, transparency and integrity with a view to making an effective contribution to the international financial service industry;
> 2. to promote the position of the Emirate as a leading international financial centre; and
> 3. to develop the economy of the emirate [49]

To achieve these aims, the DIFC provides corporations and investors with significant advantages in order to attract them to operate in Dubai. For instance, companies established in the DIFC are permitted to have 100% foreign ownership.[50] In contrast, companies located outside of the DIFC are allowed a maximum of 49% foreign ownership, and the remaining 51% must be owned by an Emirati partner.[51] Another advantage provided by the DIFC is that the company's income and profits are not taxed for a period of 50 years from the formation of

[45] Art 6 Federal Law 8 (n 44).
[46] Federal Decree no 35 of 2004 to Establish Financial Free Zone in Dubai (English) <https://www.difc.ae/laws-regulations> accessed 7 September 2017.
[47] DIFC Law No 9 (n 4).
[48] A resolution of the Federal Cabinet established and prescribed the geographical area and the location of the DIFC which is in the heart of Dubai, see the legal framework of the DIFC Court (English) <http://difccourts.ae/legal-framework/> accessed 7 September 2017.
[49] Art 4 DIFC Law 9 (n 4).
[50] See art 11 of the DIFC Company Law no 2 of 2009, which clearly specifies the requirements for the companies in order to be registered in the DIFC, national partnership is not part of these requirements (English) <https://www.difc.ae/laws-regulations/difc-laws-regulations> accessed 7 September 2017.
[51] Art 10 of the Federal Law no 2 of 2015 on Commercial Companies.

the company in the DIFC.[52] More importantly, the DIFC creates a dispute resolution authority that is fully independent from the traditional UAE courts.[53] It is designed specifically to foster more trust among businesses and investors with regard to the resolution of commercial disputes than they might otherwise have in the UAE courts. The DIFC dispute resolution authority provides two methods of dispute resolution; namely, litigation in the DIFC Court[54] and arbitration by the DIFC Arbitration Institute.[55] The operation of the legal system of the DIFC Court and its jurisdiction rules will be considered below.

The DIFC Court is regulated by Law no 12 of 2004 Concerning the DIFC Court (which has been amended by the Law no 16 of 2011).[56] The DIFC Court contributes towards the broader aims of the DIFC Zone, which is to promote the economy of Dubai and make Dubai a leading international financial centre by attracting business and investors to Dubai.[57] The DIFC Court is regarded as exceptional for several reasons. First, the DIFC Court provides for parallel litigation along common law lines mainly influenced by the English commercial courts.[58] This is different from the traditional UAE court system that follows civil law with an Islamic background. Michael Hwang, the Chief Justice of the DIFC Court, described the DIFC Court as 'a common law island in a civil law ocean'.[59] Secondly, the main language of the DIFC Court is English,[60] rather than Arabic, which is the main language

[52] See art 14 DIFC Law 9 (n 4).
[53] ibid art 8.
[54] ibid art 8(1).
[55] ibid art 8(1)b.
[56] Law no 16 of 2011 on Amending Some Provisions of Law no 12 of 2004 Concerning the Dubai International Financial Centre Courts (English) < http://difccourts.ae/legal-framework/> accessed 7 September 2017.
[57] See DIFC Strategic Plan 2016–2021, 13 (English) < http://difccourts.ae/difc-courts-strategic-plan-2016-2021/> accessed 7 September 2017.
[58] See Michael Hwang, 'The Courts of the Dubai International Finance Centre – A Common Law Island in a Civil Law Ocean' (Lecture, Law Asia Conference, Kuala Lumpur, Malaysia, 1 November 2008 <http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/> accessed 7 September 2017; the DIFC Court official website states that 'The UAE's DIFC Courts administer a unique English-language common law system – offering swift, independent justice to settle local and international commercial or civil disputes' (English) < http://difccourts.ae/about-the-courts/faqs/> accessed 7 September 2017.
[59] Hwang (n 58).
[60] ibid.

of the UAE and UAE traditional courts.[61] Thirdly, the DIFC Court applies its own legislation that is suitable for resolving commercial and civil disputes,[62] or, when applicable, they apply the commercial laws of England and Wales[63] rather than the traditional UAE laws. Finally, decisions by the DIFC Court are not reviewed by any supreme or cassation review court, as is the case in the traditional UAE Courts. Litigation in the DIFC Court consists of a Court of First Instance and Court of Appeal. Article 5(B)2 of the Law no 16 of 2011 Concerning Dubai International Financial Centre Courts states that judgments delivered by the Court of Appeal are final and conclusive and cannot be subject to any further appeal. Accordingly, since litigation in the DIFC Court does not involve any supreme or cassation review court as under traditional UAE litigation, in theory as observed previously, this might make litigation in the DIFC Court quicker and cheaper than traditional litigation in granting a final decision. Therefore, the absence of the supreme or cassation review in relation to the DIFC Court might benefit the parties, as time and cost are important concerns for the parties in their international business transactions.

4.3.2 Jurisdiction of the DIFC Court

Before the amendment of some provisions of Law no 12 of 2004, the rules of jurisdiction in the DIFC Court were based on only two grounds of jurisdiction. The first ground is the connection between the parties and the DIFC. If one of the parties is a company that is registered in the DIFC, the DIFC Court will have jurisdiction over the dispute under article 5(a)1(a).[64] The second of the grounds set under article 5(a)1(b) depend on the connection between the dispute and the geographic area of the DIFC. The connection must consist of 'civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an

[61] UAE Federal Law of the Civil Procedure Code, art 3(2).
[62] See art 6 of the Law no 12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended (English) <http://difccourts.ae/legal-framework/> accessed 7 September 2017.
[63] Hwang (n 58).
[64] Art 5(a)1(a) of the DIFC Law no 12 of 2004 before the amendment in 2011 by the Law no 16 of 2011 (n 56).

incident that has occurred in the Centre'.[65] Accordingly, the rules appeared to follow the approach of the traditional UAE courts that do not recognise the choice of court agreements as a basis of jurisdiction.[66] However, in 2011, some provisions of the DIFC Law no 12 of 2004 were amended by the DIFC Law no 16 of 2011.[67] The main change for the purpose of this thesis was in relation to provision for the recognition of choice of court agreements. In that connection, article 5(A)2 of the Dubai Law no 16 of 2011 states:

> The Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions.[68]

The traditional UAE laws and case law, as outlined in chapter three,[69] do not recognise the prorogation effect, where the parties choose to litigate in the UAE's traditional courts. However, under the amended DIFC Court's jurisdiction rules parties are now free to choose to litigate in the DIFC Court. Furthermore, article 5(A)2 of Dubai Law no 16 2011 does not require any territorial contact between the parties or the dispute with the geographic area of the DIFC Court in order to exercise jurisdiction on the basis of choice of court agreement. There have been several cases, in the DIFC Court, in which the DIFC Court exercised jurisdiction on the basis of the prorogation effect of choice of court agreement by applying article 5(A)2 without any territorial restrictions. For instance, in 2011, in *National Bonds Corporation PJSC v (1) Taaleem PJSC and (2) Deyaar Development PJSC,*[70] the DIFC Court exercised jurisdiction on the basis that there was a choice of court agreement nominating the DIFC court in the contract. In this case, the DIFC Court stated that in exercising jurisdiction based on a choice of court agreement, the Court has to ascertain:

[65] See art 5(a)1(b) of the DIFC Law no 12 of 2004 before the amendment in 2011 by the Law no 16 of 2011 (n 56).
[66] The UAE traditional approach was considered in detail in chapter three at section 3.5.4 'Exercising jurisdiction in the GCC States'.
[67] Law no 16 (n 56).
[68] ibid art 5(A)2.
[69] See chapter 3 section 3.4.
[70] *National Bonds Corporation PJSC v (1) Taaleem PJSC and (2) Deyaar Development PJSC* [2011] DIFC CA 001, dated: 05 May 2011.

> [W]hether there has been an agreement to confer jurisdiction in respect of the dispute in question on some other Court. That involves ascertaining (i) what the parties mutually intended when at the time when they entered into the agreement they used words identifying their chosen Court and (ii) whether the dispute giving rise to the claim in question falls within the scope of the words which they have used to delineate the class of disputes in respect of which they have agreed to confer jurisdiction on their chosen Court. In relation to this threshold exercise the legal burden rests on that party who asserts that the parties have contracted out of the jurisdiction of the DIFC Courts. In respect of (i) the test to be applied is the ordinary and natural meaning of the words of the jurisdiction agreement as they would have been mutually understood by the parties when they entered into that agreement. That mutual understanding is to be ascertained from all the circumstances in which the agreement was entered into, its nature and the context in which the words were used.[71]

Therefore, in exercising jurisdiction based on choice of court agreements the DIFC Court did not require any territorial connection between the parties or the dispute with the DIFC Court in order to recognise the choice of court agreement. It stressed only whether or not the language of the parties in their choice of court agreement clearly demonstrated that the parties had chosen the DIFC Court as the court to settle any dispute arising out of their contract. Similar decisions have been also made by the DIFC Court, namely in *Injazat Capital Limited and Injazat Technology Fund BSC v Denton Wilde Sapte & Co (a firm)*[72] and *Kassab Media (FZ) LLC v Sky News Arabia FZ-LLC*[73] in which the DIFC Court recognised the prorogation effect of choice of court agreements without stressing the connection between the parties or the dispute with the DIFC Court. Accordingly, there is express provision, and also case law, making it clear that the DIFC Court recognises the prorogation effect of choice of court agreements.

However, the legislation of the DIFC Court, as with the BCDR Court, does not address the issue of exclusive and non-exclusive jurisdiction,[74] as there is nothing specified in

[71] National Bond Corporation PJSC v (1) Taaleem PJSC and (2) Deyaar Develoment PJSC (n 67) point 30.
[72] *Injazat Capital Limited and Injazat Technology Fund BSC v Denton Wilde Sapte & Co (a firm)* [2010] DIFC CFI 019, dated 6 March 2012.
[73] Kassab Media (FZ) LLC v Sky News Arabia FZ-LLC (CA-010-2016), dated 12 July 2017.
[74] The issue of the exclusive and non-exclusive jurisdiction in regulating choice of court agreements has been considered in chapter three.

the DIFC legislation as to when a jurisdiction agreement is to considered as exclusive. Moreover, the issue of the effect of lack of choice of law rules on the validity of the choice of court agreements and the principle of *severability*[75] also still exists in the DIFC Court, because the DIFC Court legislation does not contain any provision regarding such matters. Chapter six of this thesis will consider the Hague Convention, which seeks to harmonises the rules in relation to choice of court agreements and addresses such issues that might improve the legal position regarding recognition of choice of court agreements.

Unlike the recognition of the prorogation effect which the DIFC Court started to implement only after the 2011 amendment on the Law 12 of 2004, as discussed above, the DIFC Court had recognised the derogation effect in which the parties choose a foreign court before and after the 2011 amendment. However, a distinction needs to be made between the regulation of the recognition of the derogation effect before the 2011 amendment and after it, as the provision regarding the recognition of the derogation effect was changed by the 2011 amendment.

Before the 2011 amendment in Law 12 of 2004, article 5(a)2 of Law 12 of 2004 clearly provided that 'Parties may agree to submit to the jurisdiction of any other court in respect of the matters listed under paragraphs (a), (b) and (d) of this article'. Paragraphs (a) and (b) of article 5(a)1 regulate the general jurisdiction of the DIFC Court that was outlined above. Paragraph (c) is out of the scope of this thesis as it regulates the jurisdiction of the DIFC Court in administrative matters rather than civil and commercial matters. [76] Accordingly, it seems that the legislation of the DIFC Court under article 5(a)2 made it clear that the DIFC Court recognised the derogation effect and allowed the parties to choose a non-

[75] The issue of the applicable law on the validity of the choice of court agreements and the principle of *severability* have been considered in chapter three.

[76] See art 5(a)1 which provided that 'The Court of First Instance shall have exclusive jurisdiction to hear and determine ... (d) Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals.' The DIFC Law no 12 of 2004 before the amendment in 2011 by the Law no 16 of 2011 (n 56).

DIFC court even if the DIFC Court had jurisdiction under its rules. This was clearly indicated by the DIFC Court in 2010 in *Hardt v DAMAC*.[77] In this case, there was a dispute regarding a breach of contractual obligations made to the claimants in respect of transactions that related to the purchase of residential apartments and retail units in four separate property developments.[78] The claimants sued the defendants before the DIFC Court and argued that the defendants had breached their contractual obligations as they failed to deliver the properties in an appropriate timescale, which caused serious damage to them.[79] The defendants argued that the DIFC Court should decline jurisdiction as there was an exclusive choice of court agreement nominating a non-DIFC Court to settle any dispute arising out of the transactions that had been signed by the parties.[80] The DIFC Court in its decision clearly indicated that:

> [I]f, by reason of facts falling within Article 5(a) (1) (a) or (b), the DIFC Court could has jurisdiction over these proceedings, the parties have contracted out of that jurisdiction and into jurisdiction of the non-DIFC Dubai Courts. This they were perfectly entitled to do under Article 5 (a) (2) of Law No. 12 of 2004.[81]

Consequently the DIFC Court declined jurisdiction by concluding that, whatever might have been the position under Article 5(A)(1) (a) or (b), the parties had contracted out of the DIFC Court in their transactions and consequently the DIFC Court had no jurisdiction.[82] Therefore, under the DIFC Law no 12 of 2004, before the 2011 amendment and in case law, the DIFC recognised the derogation effect in which there is a choice of court agreement nominating a non-DIFC Court.

Unlike the situation in the legislation of the DIFC Court regarding the recognition of the derogation effect before the 2011 amendment, the position after the 2011 amendment is

[77] *Dr Lothar Ludwig Hardt and Hardt Trading FZE v DAMAC* (DIFC) Company Limited et al [2009] DIFC CFI 036, dated 23 February 2010.
[78] ibid point 1.
[79] ibid point 2.
[80] ibid point 40.
[81] ibid point 51.
[82] ibid.

uncertain as the text of article 5(a)(2) of Law No 12 of 2004, which used to regulate the derogation effect, was replaced[83] without any reference to the recognition of the derogation effect. The issue of whether the DIFC Court would still recognise the derogation effect where the parties choose a non-DIFC Court to settle their dispute even after the 2011 amendment was raised in 2012 in *Rafed Abdel Mohsen v Bank Sarasin-Alpen*.[84] This case involved three claimants located in Kuwait and two banks, one located in the DIFC geographic area and the other located in Switzerland.[85] The dispute related to financial advisory contracts that had been signed and partly performed within the DIFC geographic area.[86] The claimants sued the two banks before the DIFC Court and argued that as the contracts had been signed and partly performed within the DIFC geographic area therefore the DIFC Court had jurisdiction over the dispute on the basis of article 5(A)(1) (b) or (c) of the DIFC Law no 16 of 2011.[87] However, the Swiss bank argued that there was an exclusive choice of court agreement nominating the court of Basel in Switzerland to have exclusive jurisdiction over any dispute arising out of the contracts.[88] The two parties argued that the rule of the recognition of derogation effect where the parties choose a non-DIFC Court, under article 5 (a)(2) of Law No 12 of 2004, had been replaced by the 2011 amendment without any reference to the recognition of the derogation effect.[89] Therefore, this begged the question as to whether the DIFC Court would still recognise the derogation effect of choice of court agreements even after the 2011 amendment? The DIFC Court indicated in its subsequent decision in the *Rafed*

[83] The text of article 5(a)(2) of Law No 12 of 2004 has been replaced by text that regulates the recognition of the prorogation effect of choice of court agreements which has been discussed in detail at the beginning of section 4.3.2 of this chapter.
[84] *(1)Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited (2) Bank Sarasin & Co. Ltd* [2011] DIFC CA 003, dated 5 January 2012.
[85] ibid points 7–9.
[86] ibid.
[87] ibid point 31(e). Article 5(A)(1) (b) and (c) of the DIFC Law no 16 of 2011 provides jurisdiction for the DIFC Court on disputes arising out of or relating to a contract, whether partly or wholly concluded within the DIFC area, or disputes arising out of or relating to any incident or transaction which has been wholly or partly performed within the DIFC area and is related to DIFC activities.
[88] ibid point 30.
[89] ibid point 31(a).

Abdel Mohsen v Bank Sarasin-Alpen case that the DIFC Court recognises the derogation effect where there is a choice of court agreement nominating a foreign court even after the 2011 amendment.[90] The DIFC Court stressed that although the text of article 5(a)(2) of Law No. 12 of 2004 had been replaced, without any reference to the recognition of derogation effect, there were several facts in the legislation of the DIFC Court which indicated that the DIFC Court recognised the derogation effect of choice of court agreements.

First, in the 2011 amendment a new article- article 5(A)3 of the Law no 16 of 2011,[91] was introduced that did not previously exist, which indicated indirectly that the DIFC Court recognises the derogation effect. Article 5(A)3 states that the DIFC Court might still have jurisdiction and hear a particular dispute under its jurisdiction if the parties agree to submit to the jurisdiction of another court, but the other court refuses to hear the dispute due to lack of jurisdiction.[92] The DIFC Court argued that this article indicates indirectly that the DIFC Court recognises the derogation effect, because it implies that the DIFC Court will decline jurisdiction if the parties have chosen a foreign court, and the latter exercises jurisdiction.[93] The DIFC Court also stressed that article 5(A)3, in the absence of this interpretation, would be meaningless, because if the DIFC Court did not recognise the derogation effect by declining jurisdiction in favour of the chosen court, there would be no need for article 5(A)3.[94]

In addition, the DIFC Court in *Rafed Abdel Mohsen v Bank Sarasin-Alpen* decision reflected another DIFC provision that supports recognition of the derogation effect, namely

[90] *DIFC CA 003 [2011]*, dated 5 January 2012 (n 84) point 90–108.
[91] Law no 16 (n 56).
[92] Article 5(A)3 of the DIFC Law no 16 of 2011 reads 'the Court of First Instance may hear and determine any civil or commercial claims or actions falling within its jurisdiction if the parties agree in writing to submit to the jurisdiction of another court over the claim or action but such court dismisses such claim or action for lack of jurisdiction.'
[93] *(1) Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited (2) Bank Sarasin & Co. Ltd* (n 84) point 90.
[94] ibid.

article 13(1) of DIFC Law no 10 of 2005.[95] Article 13(1) provides that 'A submission to the courts of a jurisdiction in a contract shall be effective'. The DIFC Court maintained that the term 'submission to the courts' in article 13(1) refers to foreign courts rather than the DIFC Court, as submission to the DIFC Court is specifically regulated by article 5(a)2 of the DIFC Law no 16 of 2011 discussed above.[96] Therefore, the DIFC Court concluded that article 13(1) means that a submission by the parties to a foreign court where the DIFC Court has jurisdiction should be recognised by the DIFC Court by declining jurisdiction in favour of the chosen foreign court.[97]

The decision in *Rafed Abdel Mohsen v Bank Sarasin-Alpen* in which the DIFC Court recognised the derogation effect even after the 2011 amendment is due to the fact that the DIFC Court, as stressed previously, is modelled on common law jurisdiction, mainly influenced by the legal system of England and Wales.[98] The DIFC Court in *Rafed Abdel Mohsen v Bank Sarasin-Alpen*[99] stressed that it follows the English approach regarding the recognition of the derogation effect found in the *Eleftheria*.[100] In the *Eleftheria*, the court decided that discretion 'should be exercised by granting a stay, unless a strong cause for not doing so is shown'.[101] Therefore, the DIFC Court outlined that the DIFC Court would follow the *Eleftheria* case by recognising the derogation effect and declining jurisdiction in favour of the chosen court unless a strong cause for not doing so was shown. Regarding the term 'strong cause', the DIFC Court commented:

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[95] DIFC Court law no 10 of 2005 (English) < https://www.difc.ae/files/4514/5448/9185/Law_Relating_to_the_Application_of_DIFC_Laws_Amended___Restated_DIFC_Law_No._10_of_2005.pdf > accessed 7 July 2018.
[96] *(1) Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited (2) Bank Sarasin & Co. Ltd* (n 84) point 91.
[97] ibid point 93.
[98] Hwang (n 58).
[99] *(1) Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited (2) Bank Sarasin & Co. Ltd* (n 84) point 113.
[100] *The Eleftheria* [1969] 2 All ER 641.
[101] ibid.

> the "strong cause" hurdle for not enforcing a foreign jurisdiction clause had been set at a high level. The approach can be summarised by saying that the parties should be made to keep their commitments unless to do so would or might cause some serious injustice to one party or the other or both.[102]

Furthermore, the DIFC Court stressed that the strong reason that prevents the recognition of a choice of court agreement must be limited to situations in which a serious injustice would occur to one or both parties from the recognition of choice of court agreements.

Consequently, one can conclude that according to the *Rafed Abdel Mohsen v Bank Sarasin-Alpen* decision the DIFC Court recognises the derogation effect of choice of court agreements even after the 2011 amendment. However, the situation before the 2011 amendment was clearer as there was a clear rule explicitly regulating recognition of the derogation effect, which helped to avoid the risk of uncertainty and unpredictability in relation to the scope and limitations on the recognition of the derogation effect of choice of court agreements. Therefore, the DIFC Court must establish a clear basis, similar to that which existed before the 2011 amendment, for declining jurisdiction based on the consent of the parties who agree to litigate in a foreign court exclusively. This will increase the level of legal certainty and predictability for parties regarding the recognition of the derogation effect of choice of court agreements.

4.3.3 The Matter of Sovereignty in the DIFC Court

As discussed in chapter three, [103] the United Arab Emirates do not recognise either the prorogation or derogation effects of choice of court agreements, and other GCC States recognise only their prorogation effect.[104] The GCC judgments that were considered in the previous chapter[105] have demonstrated that these countries have refused to recognise the derogation effect, because they still consider that the recognition of that effect would constitute a direct assault on state sovereignty and state authority.

[102] *The Eleftheria* [1969] 2 All ER 641 point 115.
[103] See chapter 3 section 3.4.
[104] ibid.
[105] ibid.

In contrast, as discussed above, the DIFC Court, which is located in the Dubai free zone, recognises the prorogation effect of choice of court agreements and it has been argued that it also recognises the derogation effect without any reservations related to state sovereignty.

Therefore, based on the approach to the concept of choice of court agreements adopted in the DIFC Court, it appears that the Emirate of Dubai has started to relinquish the traditional meaning of sovereignty, which reflects only state interests in relation to its civil jurisdiction rules that were considered in the previous chapter,[106] in favour of a concept of sovereignty that reflects to a greater extent the interests of individuals.

The fundamental questions that remain are why and how the Emirate of Dubai has started to acknowledge the modern concept of sovereignty that does not reflect solely state interests. Chapter three of this thesis considered [107] that the developments in public international law have challenged the traditional meaning of sovereignty, which has had an effect on the regulation of jurisdiction rules under private international law. Economic considerations are one reason for these developments.

The DIFC free zone is a clear example way of the economic considerations can challenge the traditional meaning of sovereignty in the UAE. As stated above, the DIFC free zone was created to develop the economy of Dubai by attracting foreign business and investors. To make foreign businesses and investors more confident with the UAE legal system, the DIFC Court was established as an alternative dispute resolution forum separate and apart from the traditional courts.

Therefore, the DIFC Court started to apply laws that are more consistent with the modern interpretation of sovereignty, and the rules of the DIFC Court recognise choice of court agreements to attract international businesses for whom this recognition is important, as

[106] See chapter 3 section 3.5.1.
[107] ibid section 3.5.

stated in chapter one. Failure to recognise choice of court agreements would be incompatible with the desired economic benefits of increased international business, which is the aim of the DIFC free zone. Although the legal system of Dubai has implicitly acknowledged the modern meaning of sovereignty in some manner, the traditional courts of Dubai still refuse to recognise the prorogation and derogation effects of choice of court agreements, simply because the traditional courts of Dubai apply the UAE Federal Law no 11 of 1992 of the Civil Procedure Code, article 24 of which does not permit the recognition of the prorogation and derogation effects of choice of court agreements. Accordingly, it is argued that Dubai should reconsider application of those provisions prohibiting the recognition of choice of court agreements under the UAE Federal UAE Law 1992, because that approach is incompatible with the policy and interests of Dubai.

Moreover, the UAE as a whole and the other GCC States ought to reconsider their approaches on choice of court agreements under their laws and follow the position taken by the DIFC Court in moving away from the idea that the recognition of choice of court agreements assaults state sovereignty. This is especially important, because, as argued in chapter two, the UAE as a whole and the other GCC States are seeking to revitalise their economies by encouraging foreign investors and businesses to operate in their markets. Accordingly, they ought to take account of the approach of the DIFC Court to sovereignty and the recognition of choice of court agreements.

As observed in this discussion, the economic aims and interests of the Emirate of Dubai have caused it to move away from the traditional meaning of sovereignty as a representation solely of state interests to the modern meaning of sovereignty, which should also reflect the parties' interests. This development in the meaning of sovereignty has justified the adoption of the recognition of choice of court agreements in the DIFC Court.

Although it is argued that the DIFC Court recognises the prorogation and derogation

effects of choice of court agreements, it will be considered below that adoption of the 2005 Hague Convention can nevertheless be of significant value for the DIFC Court.

4.3.4 The DIFC Court and the Benefits of Ratification of the 2005 Hague Convention

It will be considered below in details that adopting of the 2005 Hague Convention can minimise, first, the issue of the recognition and enforcement of the DIFC Court's judgments abroad where the DIFC Court has assumed jurisdiction on the basis of a choice of court agreement, and secondly, it can minimise the issue of breaching an exclusive choice of court agreement that nominating the DIFC Court.

4.3.4.1 The Recognition and Enforcement of DIFC Court Judgments

The DIFC Court, as outlined above, was originally created to be a reliable judicial institution to provide businesses and investors who operate in Dubai's free zone with a court that can be trusted to respect the interests of the parties in their international business disputes. It has also been observed that in 2011 the DIFC Court adopted the important concept of party autonomy underlying choice of court agreements by expanding its grounds of jurisdiction and allowing parties to choose to litigate in the DIFC Court regardless of whether they have a connection with Dubai's free zone. The aim was that the Court would be viewed by international businesses as a global hub for settling international business transactions, rather than one that only serves the needs of businesses who operate or have a connection with Dubai's free zone. However, as will be discussed in detail in chapter five of this thesis, the aim of the parties in concluding an exclusive choice of court agreement is not merely to litigate before the chosen court exclusively, but also to have the final judgment obtained from the chosen court enforced and recognised where the assets of the defendant are located. Therefore, if this aim failed, the entire proceedings before the chosen DIFC Court might be futile and a waste of time and money. Accordingly, where the DIFC Court has assumed jurisdiction on the basis of a choice of court agreement, a consideration of how might the DIFC Court's judgments be

treated abroad is important as it might negatively impact upon the effectiveness of the choice of court agreements.

The DIFC Court, as outlined above, is a unique public court which covers Dubai's free zone area and belongs to the Emirate of Dubai. Accordingly, the aim was that the DIFC Court's judgments be treated by foreign courts in the same manner as traditional UAE court judgments at the recognition and enforcement stages.[108] The UAE, as discussed in detail in the following chapter,[109] is a member of two regional conventions on the recognition and enforcement of foreign judgments, namely the Riyadh Arab Judicial Cooperation 1983[110] and the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States 1995.[111] Both conventions apply only to countries in the Arab region. The UAE has also signed several bilateral agreements of judicial cooperation with different states around the world[112] in order to have mutual recognition and enforcement of judgments among those states. Accordingly, there does not appear to be a particular high risk that DIFC Court judgments would encounter difficulty in achieving recognition and enforcement in the states that are members of these two regional conventions and also in the states that have signed bilateral agreements with the UAE. However, there remain many states across the world that do not have an agreement on reciprocal enforcement provisions with the UAE and which might not be prepared to recognise and enforce the DIFC Court's judgments.

[108] See DIFC Court Enforcement Guide (4th edn, January 2016) 4 (English) <http://difccourts.ae/enforcing-difc-court-judgments-and-orders-outside-the-difc1/enforcement-guide-2016-aw-2/> accessed 7 September 2017; Michael Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?' (2015) 31 Arb Intl 2, 193-212, 203.

[109] See chapter five of this thesis.

[110] League of Arab States Riyadh Arab Agreement for Judicial Cooperation (1983) (English) <http://www.refworld.org/docid/3ae6b38d8.html> accessed 7 September 2017.

[111] GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1996).

[112] Agreement on Judicial Cooperation, Execution of Judgments and Extradition of Criminals (United Arab Emirates—Tunisian Republic) (1975); Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial Matters (France—the UAE) (1992) (the Paris Convention); Agreement on Judicial Cooperation in Civil and Commercial Matters with India (2000); Legal and Judicial Cooperation Agreement (UAE—Arab Republic of Egypt) (2000); Convention on Judicial Assistance in Civil and Commercial Matters (United Arab Emirates— Republic of China) (2004); Agreement on Judicial Assistance in Civil and Commercial Matters (Republic of Kazakhstan—United Arab Emirates) (2009).

To address the issue of recognition and enforcement of the DIFC Court's judgments in a state that is not a member of a regional or mutual convention with the UAE, the DIFC Court has taken two steps. In 2016, the DIFC Court established its Strategic Plan 2016–2021.[113] One of the aims of the plan is to encourage the UAE Federal Government to sign and ratify the 2005 Hague Convention.[114] The strategic plan stresses the importance of the 2005 Hague Convention in facilitating the enforcement of the DIFC Court's judgments abroad where the DIFC Court has assumed jurisdiction on the basis of a choice of court agreement.[115] Chapter six of this thesis considers in detail how the 2005 Hague Convention facilitates the recognition and enforcement of foreign judgments abroad.[116] The second step that the DIFC Court has taken in addressing the issue of recognition and enforcement of its judgments is the creation of what might be called a 'conversion'[117] mechanism. A consideration of the conversion mechanism is significant for the underlying research question of this thesis because that mechanism might be a viable solution in facilitating the recognition and enforcement of the DIFC Court's judgments abroad where the DIFC Court has assumed jurisdiction on the basis of a choice of court agreement.

- The conversion mechanism

The conversion mechanism was created by the DIFC Court to give the parties who have selected this court the option to request that the DIFC Court's final judgment be converted to

[113] DIFC Court Strategic Plan (n 57).
[114] ibid point 9 page 28.
[115] ibid.
[116] See chapter 6 of this thesis.
[117] Amended DIFC Court Practice Direction no 2 of 2015 Referral of Judgment Payment Disputes to Arbitration (English) <http://difccourts.ae/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration/> accessed 7 September 2017; see also Dalma R Demeter and Kayleigh M Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 Journal of International Arbitration 5, 441–469, 454; Sundaresh Menon, 'International Commercial Courts: Towards A Transnational System of Dispute Resolution' (Opening Lecture, DIFC Courts Lecture Series 2015) 38; Michael Hwang, 'The DIFC Courts Judgment-Arbitration Protocol Referral of Judgment Payment Disputed to Arbitration' (DIFC Courts Lecture Series 14 November 2014) < https://www.difccourts.ae/2015/02/16/difc-courts-chief-justices-explanatory-lecture-notes-referral-judgment-payment-disputes-arbitration-november-2014/> accessed 7 September 2017.

an arbitral award by the DIFC-LCIA Arbitration Centre. Such agreement needs to be in writing. This option provides as follows:

> If parties who have submitted (or have agreed to submit) to (or are bound by) the jurisdiction of the DIFC Courts wish further to agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts may, at the option of the judgment creditor (as defined below), be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, they may to that end adopt an arbitration clause in the terms of the recommended arbitration agreement.[118]

The aim of the proposal is to provide the parties with the advantage of recognition and enforcement of a court judgment by means of an arbitration award[119] under the worldwide enforcement convention that has been adopted by 156 countries around the world,[120] namely the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention),[121] which has been signed and ratified by the UAE.[122] Article III of the New York Convention ensures that 'Each Contracting State shall recognise arbitral awards as binding and enforce them'. Thus, the New York Convention seeks to harmonise the rules of recognition of arbitration agreements and awards. More importantly, the wide enforcement of the New York Convention makes parties confident that their arbitral awards will be recognised in most countries in the world.

The conversion mechanism is new in arbitration history. Chief Justice Michael Hwang has called the proposal 'an experiment without parallel in arbitration history'.[123] Also, it has been described as an unprecedented construction worldwide in arbitration mechanisms.[124] However, the conversion mechanism might not be a fool-proof solution for

[118] Amended DIFC Courts Practice Direction (n 117).
[119] Hwang, The DIFC Courts Judgment-Arbitration Protocol (n 117) 1.
[120] States table of the New York Convention <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.> accessed 7 September 2017.
[121] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (New York Convention).
[122] The UAE became a member of the New York Convention on 21 August 2016.
[123] Hwang, The DIFC Courts Judgment-Arbitration Protocol (n 117) 2.
[124] Gordon Blanke and Habib Al Mulla, 'The DIFC and Arbitration: Raising the Stakes?' (Kluwer Arbitration Blog 2014) <http://kluwerarbitrationblog.com/2014/07/20/the-difc-and-arbitration-raising-the-stakes-2/> accessed 7 September 2017; Demeter and Smith (n 117) 454.

the issue of recognition and enforcement of the DIFC Court's judgments abroad. The potential challenges facing the application of the conversion mechanism in practice are discussed below.

(A) The risk of interpretation

There is a risk that a subsequent national court that has to recognise and enforce the converted arbitral award will consider the converted arbitral award as a 'rubber stamp'[125] and not compatible with the meaning of an arbitral award for the purposes of the New York Convention. There are two main reasons why the converted arbitral award might be interpreted as not satisfying the requirements of the New York Convention and why a national court might therefore refuse to enforce it.[126]

The first issue is the definition of an arbitral award.[127] Although the New York Convention does not define an arbitral award,[128] and whether an award constitutes an arbitral award might be determined under the law of the national court that is asked to enforce it (*lex fori*),[129] there is a consensus in various jurisdictions that in order for an arbitral award to fall within the scope of the New York Convention a decision must:

> (1) be issued in a means of dispute resolution genuinely alternative to the jurisdiction of domestic courts (the so-called 'alternativity test'); and
>
> (2) finally settle one or more of the issues submitted to the jurisdiction of an arbitral tribunal (the so-called 'finality test').[130]

The requirement of the alternativity test might be challenged by the conversion mechanism, as it means that the New York Convention covers only dispute resolution processes that can be regarded as a truly definitive alternative to the jurisdiction of domestic

[125] Gordon Blanke and Habib Al Mulla, 'The DIFC and Arbitration: Raising the Stakes?' (Kluwer Arbitration Blog 2014) <http://kluwerarbitrationblog.com/2014/07/20/the-difc-and-arbitration-raising-the-stakes-2/> accessed 7 September 2017; Demeter and Smith (n 117) 454.
[126] ibid 455–457.
[127] Demeter and Smith (n 117) 455–457; Hwang (n 117) 5.
[128] Demeter and Smith (n 117) 455.
[129] ibid 455.
[130] Loukas A Mistelis and Domenico diPietro, 'New York Convention, Article I (Scope of Application)' in Mistelis L (ed), *Concise International Arbitration* (2nd edn, Kluwer Law International 2015).

courts.[131] According to the alternativity test, for an arbitration to be a true alternative to domestic litigation a dispute must be referred to arbitration instead of litigation at the outset.[132] However, by referring a dispute to the DIFC Court, the parties have opted for litigation before the DIFC Court instead of arbitration, and only after a decision by the DIFC Court can the matter be referred to arbitration through the conversion process. Therefore, it could be argued that arbitration under the conversion mechanism is not an alternative to litigation according to the New York Convention, but a subsidiary step following litigation.[133] Accordingly, the arbitral award under the conversion mechanism might not satisfy the requirement of the alternativity test for the purpose of the New York Convention.[134]

The second concern in interpretation is the meaning of dispute under the conversion mechanism.[135] Article I(1) of the New York Convention states that the Convention applies to arbitral awards 'arising out of differences [136] between persons, whether physical or legal'. Accordingly, there must be a dispute between parties that was settled by arbitration for the decision to be regarded as an arbitral award for the purposes of the New York Convention.

The conversion mechanism defines 'Judgment Payment Disputes' that the parties can refer to arbitration as:

> any dispute, difference, controversy or claim between a judgment creditor and judgment debtor with respect to any money (including interest and costs) due under an unsatisfied judgment, including:
>
> (i) a failure to pay on demand any sum of money remaining due under a judgment on or after the date on which that sum becomes due under Rule 36.34; and/or
>
> (ii) the inability or unwillingness of the judgment debtor to pay the outstanding portion of the judgment sum within the time demanded, but excluding any dispute

[131] Demeter and Smith (n 117) 457.
[132] ibid.
[133] ibid.
[134] ibid.
[135] Demeter and Smith (n 117) 457.
[136] New York Convention (n 121).

about the formal validity or substantive merits of the judgment.[137]

It has been argued that it is doubtful whether the definition of the term 'Judgment Payment Disputes' under the conversion mechanism proposal of the DIFC Court will be compatible with the meaning of dispute for the purposes of the New York Convention.[138] That is to say, that there is no certainty that failure, inability or unwillingness to pay alone constitutes a dispute as defined by the New York Convention.[139] For example, in Hong Kong and Singapore, it has been held that a cheque being dishonoured does not amount to a dispute that falls within the scope of an arbitration clause for the purpose of the New York Convention.[140] According to the conditions of the arbitral tribunal, in converting the DIFC Court's judgment into an arbitral award, the arbitral tribunal does not have the authority to verify the validity or the grounds of the judgment giving rise to the Judgment Payment Claim.[141] The arbitral tribunal only has the authority to indicate whether there is a DIFC Court judgment ordering payment.[142] Therefore, the tribunal has no choice but to rubber-stamp the DIFC Court's judgment presented to it, regardless of the validity or the grounds of the judgment.[143] Thus, it seems that whether the tribunal of the DIFC-LCIA Arbitration Centre is dealing with a genuine dispute of a 'legal nature' for the purposes of the New York Convention is a matter of controversy.[144]

Consequently, it seems that there is uncertainty surrounding the interpretation by the national courts of the meaning of the converted arbitral award and the meaning of 'dispute' under the conversion mechanism proposal, and, therefore, the proposal may not fall within

[137] Amended DIFC Court Practice Direction (n 117).
[138] Demeter and Smith (n 117) 459.
[139] ibid.
[140] *China Overseas Building Construction Ltd v Profit Nation Development Ltd. and others* (2004) HKCFI 466; *Tjong Very Sumito and others v Antig Investments Pte Ltd.* (2009) SGCA 41 [57] in Demeter and Smith (n 117) 458.
[141] Demeter and Smith (n 117) 460; Hwang 'The DIFC Courts Judgment-Arbitration Protocol' (n 117) 8 point (e).
[142] ibid.
[143] ibid.
[144] ibid 461.

the scope of the term of the arbitral award for the purposes of the New York Convention.

(B) The third party issue

Chapter two of this thesis[145] provided a detailed comparison between the advantages and disadvantages of litigation versus arbitration for international disputes and observed that the power of the arbitral tribunal stems from the consent of the parties who agreed to an arbitration agreement.[146] Therefore, the arbitral tribunal does not have jurisdiction/power over a third party who has not agreed to be subject to an arbitral tribunal.[147] In contrast, in litigation, the court might have jurisdiction based on different kinds of connecting factors, only one of which is party autonomy.[148]

This characteristic of arbitration, whereby there is no power of jurisdiction over a third party, may present a challenge to the effectiveness of the conversion mechanism created by the DIFC Court, as the conversion mechanism proposal requires the agreement of the parties to be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre.[149] Accordingly, to benefit from the conversion mechanism, both parties must agree to be referred to arbitration through the conversion mechanism. However, in some cases in international business disputes, during the proceedings the claimant might need to bring a third party (who is not a party to the conversion agreement) into the litigation proceedings. A typical example of this is where there is a contract between the claimant and a subsidiary of a major international corporation and both have agreed to the conversion mechanism. However, during the DIFC Court's proceedings, the claimant might seek to involve the international corporation in those proceedings to improve the likelihood of being paid.

[145] The issue of the third party in arbitration mechanism has been considered in details in chapter 2 section 2.4.2.2 of this thesis.
[146] Stewart Mcclendon and RE Goodwin, 'International Commercial Arbitration In New York 3' (1986) in James Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (2003-2004) 4(3) Pepperdine Dispute Resolution Law Journal 476.
[147] *AT & T Technologies Inc v Communications Workers of Am* (1986) 475 US 643, 648.
[148] Martin Hunter, *Redfern and Hunter on International Arbitration* (OUP 2009) 21.
[149] Amended DIFC Courts Practice Direction (n 117).

Consequently, the final DIFC Court judgment delivered might affect not only the subsidiary company that agreed to the conversion mechanism, but also the major international corporation, which is not a party to the conversion mechanism.

Therefore, because of the nature of arbitration agreements, whereby the arbitral tribunal does not have jurisdiction/power over a third party, several scenarios might occur in practice regarding the involvement of a third party in a conversion mechanism. It will be problematic if the arbitral tribunal converts the DIFC Court's judgment into an arbitral award without excluding the obligation of the major international corporation that is not a party to the conversion agreement. This is because the arbitral tribunal will have extended its authority to the non-party, which is contrary to the nature of arbitration agreements whereby the arbitral tribunal does not have jurisdiction/power over a third party. The second scenario might arise if the arbitral tribunal converts the final DIFC Court's judgment only for the parties who agreed to the conversion and excludes the obligation of the major international corporation. This can also be problematic, because it is likely to be contrary to the conversion mechanism, whereby the arbitral tribunal has authority to indicate only whether there is a DIFC Court's judgment ordering payment without challenging the substantive matter of the judgment. Moreover, even if there is no conflict in the last scenario, and the arbitral tribunal converts the DIFC Court's judgment only for the parties who agreed to the conversion, and excludes the third party, then including the third party in the litigation is of no value as the claimant cannot enforce the converted judgment against him or her.

As a result, in practice, the conversion mechanism might face several potential difficulties in relation to a third party that might adversely impact its effectiveness in ensuring that the rights of the judgment creditor will be recognised following conversion of a final DIFC judgment into an arbitral award.

(C) Delay

The final potentially problematic issue in relation to the conversion mechanism is the delay in the enforcement of the final decision, as the conversion mechanism will add a further step to the normal process.[150] The parties must first start proceedings through the DIFC Court, then move to arbitration to convert the judgment into an arbitral award and finally move to the enforcement proceedings abroad. To reduce any delay, the conversion proposal suggests that the parties specify in their conversion agreement clause a single arbitrator who can be appointed according to the DIFC-LCIA Arbitration Rules, rather than having each party appoint an arbitrator and those arbitrators then appointing the third arbitrator.[151] Although this solution might reduce any delay, it is still likely to take longer than the normal process, which involves only court proceedings and enforcement proceedings abroad.

This discussion illustrates that the measures taken by the DIFC Court to avoid the obstacles regarding the recognition and enforcement of its judgments abroad are a positive step in relation to international business transactions, as the DIFC Court has sought to safeguard parties' interests by increasing legal certainty and predictability in the recognition and enforcement of DIFC Court judgments abroad. However, the conversion mechanism is not without problems. In practice, it may face issues of interpretation, the treatment of third parties and delay. Therefore, the conversion mechanism might not be as effective as hoped or necessary in reducing the issues of the recognition and enforcement of judgments. Consequently, the risk to the recognition and enforcement of judgments where the DIFC Court has assumed jurisdiction on the basis of a choice of court agreement exists even with the availability of the conversion mechanism. This may make a business reconsider its selection of the DIFC Court as a forum for settling its international business disputes.

[150] Charles Lilley, Update: 'Converting' DIFC Court judgments into arbitral awards' (Report, Berwin Leighton Paisner LLP 2014) <http://www.blplaw.com/expert-legal-insights/articles/update-converting-difc-courts-judgments-arbitral-awards> accessed 7 September 2017.

[151] Hwang, The DIFC Courts Judgment-Arbitration Protocol (n 117) 8 point (d); also see the model arbitration clause that has been suggested by 'conversion' proposal at the DIFC Courts Practice Direction no 2 of 2015 (n 117).

According to the DIFC Court's Annual Review 2012,[152] 37% of companies that operate in the DIFC area of jurisdiction are from the European Union. This is the highest percentage of companies operating in DIFC territory. As outlined in chapter six of this thesis, the European Union is a member[153] of the 2005 Hague Convention, which harmonises the rules of recognition and enforcement of a judgment that is delivered by a chosen court. Therefore, the 2005 Hague Convention would appear to be a valuable instrument for the DIFC Court to be able to apply even with existence of the conversion mechanism. The 2005 Hague Convention will be discussed in detail in chapter six of this thesis. What follows will demonstrate another problem associated with the DIFC Court that the 2005 Hague Convention might also address.

4.3.4.2 Breach of an Exclusive Choice of Court Agreement

The DIFC Court, as discussed above, recognises choice of court agreements in terms of their prorogation and derogation effects. However, without international harmonisation of the rules of choice of court agreements the effectiveness of such agreements might be challenged.[154] As the nature of international business transactions necessarily involves a connection with more than one state it follows that the courts of more than one state may potentially have jurisdiction over the dispute. Therefore, without the certainty that any non-chosen state will recognise the derogation effect of a particular choice of court agreement and decline jurisdiction in favour of the chosen DIFC Court, there is a risk that one of the parties might breach the jurisdiction agreement and start the proceedings in one of these states.[155] The risk might be greater due to the fact that the DIFC Court is surrounded by states that do not recognise choice of court agreements, namely the other GCC States. Moreover, according to

[152] DIFC Authority Annual Review (2012) 46 (English) < https://www.difc.ae/newsroom/publications> accessed 7 September 2017.
[153] The European Union became a member of the Hague 2005 Convention on 11 June 2015; Status table <http://www.hcch.net/index_en.php?act=conventions.status&cid=98> accessed 7 September 2017.
[154] Menon 38 (n 117).
[155] The drawbacks of being sued in more than one forum have been considered in detail in chapter one.

the DIFC Court's Annual Review 2012, 26%[156] of the companies operating in the DIFC were from the Middle East, which made up the second highest percentage of companies operating in the DIFC. Also, in 2015, 33%[157] of the financial services companies operating in the DIFC were from the Middle East, which is the same percentage as European financial services companies, which also accounted for 33%. Accordingly, it is likely that international business transactions in the DIFC may have a connection with courts that do not recognise choice of court agreements. Therefore, if the parties agreed to litigate in the DIFC Court exclusively, and the dispute or the parties has/have a connection with one or more of the courts that do not recognise choice of court agreements, there is a risk that one of the parties might breach a jurisdiction agreement by starting proceedings before a court that does not recognise the derogation effect. That court is likely to have jurisdiction and refuse to decline jurisdiction in favour of the DIFC Court. As discussed above, the DIFC Court is surrounded by states that do not recognise the derogation effect of choice of court agreements.

In order to minimise concerns regarding potential breaches of any exclusive choice of court agreement that favours the DIFC Court, the DIFC Court can issue what is called an anti-suit injunction. A discussion of the anti-suit injunction[158] and its effectiveness in preventing the breach of an exclusive choice of court agreement nominating the DIFC Court will be discussed below.

- Anti-suit injunction

An anti-suit injunction is an order by a court to prevent a person from commencing or pursuing a claim before another court.[159] If that person does not respond to the court order,

[156] DIFC Authority Annual Review 46 (218).
[157] DIFC Authority Annual Review 2015 42 (English) < https://www.difc.ae/newsroom/publications> accessed 7 September 2017.
[158] For the historical development of the anti-suit injunction instrument see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 201; Clarkson and Hill, *The Conflict of Laws* (4th edn, OUP 2011); Cheshire, North and Fawcett, *Private International Law* (14th edn, OUP 2008); Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014).
[159] Clarkson and Hill, *The Conflict of Laws*; Cheshire, North and Fawcett *Private International Law*; Tang, *Jurisdiction and Arbitration Agreements* (n 158) 154.

they might be punished for contempt of court.[160] A court grants an anti-suit injunction when it believes that justice might not be achieved by the foreign court before which the person started the proceedings.[161]

The power of the courts to grant an anti-suit injunction might be used in order to support choice of court agreements by preventing one party from breaching the agreement and starting proceedings in a non-chosen court.[162] Sophia Tang has argued that 'a dispute resolution agreement with the derogation feature creates a prima facie case that the chosen forum is more appropriate than any other fora and gives the parties the obligation not to bring the dispute in a non-chosen forum'.[163] In *Deutsche Bank* case, the English court stated that an anti-suit injunction must be issued for a breach of jurisdiction agreement as it 'merely requires a party to honour his contract'.[164] Therefore, an anti-suit injunction must be granted for breach of jurisdiction agreements.

It has been observed above that the DIFC Court is modelled on common law jurisdiction rather than civil law. Thus, it is not surprising that the DIFC Court supports the use of anti-suit injunctions.

In the case of *Brookfield Multiplex Constructions LLC v (1) DIFC Investments*, [165] the DIFC Court of First Instance indicated that the DIFC Court has the power to grant an anti-suit injunction when a forum agreement between the parties has been breached, on the basis of article 22 of the DIFC Court Law no 10 of 2004.[166] This provides that, 'The Court of First Instance may order an injunction restraining a person from engaging in conduct or requiring a

[160] Cheshire, North and Fawcett (n 158) 455.
[161] Sophia Tang, *Jurisdiction and Arbitration Agreements* (n 158) 154.
[162] Adrian Briggs (n 158) 208; Tang, *Jurisdiction and Arbitration Agreements* (n 158) 156; Cheshire, North and Fawcett (n 158) 470.
[163] ibid Tang 156.
[164] *Deutsche Bank* [2010] 1 WLR 1023, 1036-1037 in Sophia Tang, *Jurisdiction and Arbitration Agreements* (n 158) 157; Also, a similar approach might be found in US court decisions, see the leading case *Gallo v Andina* (2006) 446 F3d 984 (CA9 (Cal).
[165] *Brookfield Multiplex Constructions LLC v (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority* (DIFC CFI 020/2016) (English) <http://difccourts.ae/cfi-0202016-brookfield-multiplex-constructions-llc-v-1-difc-investments-llc-2-dubai-international-financial-centre-authority-2/>.
[166] DIFC Court law no 10 (n 95).

person to perform an act or thing or other order the court considers appropriate.' Article 32 of the same Law also grants the DIFC Court the power to issue injunctions. Furthermore, article 36 of DIFC Law no 7 of 2005, the Law of Damages and Remedies, provides that interim injunctions and declarations may be issued and an order made for the detention, custody or preservation of relevant property and that the Courts may make other orders of a like nature. Accordingly, one may conclude that the DIFC Court can use its discretion to grant an anti-suit injunction in order to support choice of court agreements by preventing one party from breaching the agreement nominating the DIFC Court and starting proceedings in a non-chosen court.

However, although the DIFC Court can issue an anti-suit injunction in those circumstances and minimise the issue of breach of a choice of court agreement, there may nevertheless be a challenge which might need to be overcome if that injunction is to succeed. If the party who breaches the jurisdiction agreement does not have assets located in the DIFC territory, the breaching party is unlikely to comply with the injunction.[167] In that case, the other party can take the injunction to the court where the breaching party has initiated proceedings and request that court to decline jurisdiction. However, that court may not recognise and enforce the injunction in the absence a mutual convention between the state in which that court is located and the DIFC on the recognition and enforcement of judgments.[168]

Although it has been stated previously that the UAE has signed and ratified conventions on the recognition and enforcement of foreign judgments with the states that surround the DIFC Court, namely the other GCC States, the difficulties of enforcing anti-suit injunctions in those states still remain. That is because those states do not acknowledge anti-suit injunctions in their legislation or case law. There are no rules in the other GCC States which regulate the issuing of an anti-suit injunction or similar injunctions that require the

[167] Menon (n 117) 38; for the issue of the enforcement of the anti-suit injunction in general see Cheshire, North and Fawcett (n 158) 455.
[168] ibid.

respondent to revoke its proceedings before a foreign court. Those other GCC States, as considered in chapter three, follow the civil law tradition while an anti-suit injunction is an order found and developed by common law jurisdictions. Tang has argued that civil law states do not usually acknowledge anti-suit injunctions because it is considered that an anti-suit injunction is an improper assault on another country's sovereignty and an intervention in the regulation of another state's jurisdiction, and that each state should regulate its jurisdiction independently.[169] For instance, in Germany, in *Re the Enforcement of an English Anti-suit Injunction*,[170] the Regional Court of Appeal of Dusseldorf refused to enforce an anti-suit injunction issued by the English High Court in order to prevent the defendant from continuing proceedings before German courts in breach of an arbitration agreement nominating the London Court of International Arbitration.[171] The German court argued that the injunction assaulted the state sovereignty of Germany, as jurisdiction of the German court represents state sovereignty, and that the German court is the only court that has power to decide when it can exercise or decline jurisdiction, without taking any instructions from a foreign court.[172] Consequently, the German court refused to enforce the injunction and rejected the argument of the English court that the injunction was issued against the defendant instead of the German court.[173]

However, some civil law states have started to take a different approach and enforce anti-suit injunctions. For instance, traditionally the approach of the French courts was similar to German courts in refusing to enforce anti-suit injunctions, considering it as an assault on

[169] Sophia Tang, *Jurisdiction and Arbitration Agreements* (n 158) 154.
[170] (Case 3 VA 11/95) (Oberlandesgericht, Dusseldorf) [1997] ILPr 87-95. The case has been discussed in detail by scholars; see Geoffrey Fisher 'Anti-suit injunctions to restrain foreign proceedings in breach of an arbitration agreement' (2010) 22 Bond Law Review 9; Sophia Tang, *Jurisdiction and Arbitration Agreements* (n 158) 176.
[171] ibid.
[172] ibid.
[173] ibid.

French sovereignty and contrary to French public policy.[174] The position, however, changed in *Zone Brands International v Zone Brands Europe*[175] where an injunction was issued from a US court to enforce an exclusive jurisdiction clause. In this case, a contract was concluded between a French company and a US company which contained an exclusive choice of court agreement nominating Georgian courts.[176] When a dispute arose, the French party breached the agreement and sued in a French court rather than a Georgian court. The Georgian court at the request of the US party issued an anti-suit injunction preventing the French party from continuing the French proceedings. The US party applied for the injunction order to be recognised and enforced in France. The French court enforced the injunction and stayed proceedings in favour of the chosen Georgian courts.[177] The French court stated that the injunction only aimed to enforce the agreement freely entered into between the parties and that the parties should be bound by their agreement, which therefore should be respected and enforced.[178] Accordingly, from the above discussion it can be argued that it is not certain that all civil law states will refuse to enforce anti-suit injunctions.

All GCC States, as outlined above, are similar to the traditional civil law states which still do not acknowledge anti-suit injunctions either in their legislation or case law. The question remains as to whether the GCC States will recognise and enforce anti-suit injunction orders issued by the DIFC Court or consider them as an assault on their sovereignty, similar to the view of the German court discussed above. It seems that the GCC States are likely to refuse recognition and enforcement of any anti-suit injunction orders issued by the DIFC Court. The reason for this is because, as was outlined in chapter three, from the case law

[174] For instance, see the decision of Stoltzenber, 1ere civ, 30 June 2005, Rev crit DIP (204) 815 and Perreau-Saussine, 2010: 524 where the French courts refused to enforce anti-suit injunctions, in Sophia Tang, *Jurisdiction and Arbitration Agreements* (n 158) 167, footnote 131.
[175] Cass Civ 1, 14 October 2009, n 08-16369 in Sophia Tang, *Jurisdiction and Arbitration Agreements* (n 158) 167.
[176] ibid.
[177] ibid.
[178] ibid.

perspective[179] all the GCC States consider the exercise of jurisdiction rules as a manifestation of state sovereignty, which is related to public policy. Thus, if the court has jurisdiction according to its own jurisdiction bases it has to exercise jurisdiction and cannot decline jurisdiction in any circumstances, whether there is a choice of court agreement nominating a foreign court or whether there is foreign court closer to the dispute or the parties than the forum. Therefore, an injunction issued by a foreign court requiring a GCC State court to decline jurisdiction or requiring a respondent to revoke its proceedings will likely be rejected by the GCC States on the grounds that it assaults their public policy and the sovereignty of the state, similar to the view of the German court discussed above.

In conclusion, although the DIFC Court has the power to grant an anti-suit injunction, the usefulness of the availability of that type of injunction is debatable. An anti-suit injunction might not be useful when the defendant has no assets in the DIFC territory, and there is also a risk that the states which surround the DIFC Court, namely the GCC States, might not recognise any such anti-suit injunction. The 2005 Hague Convention might reduce the risk that parties may consider breaching their choice of court agreements. As will be outlined in detail in chapter six, the 2005 Hague Convention harmonises the rules in relation to exclusive choice of court agreements in terms of their prorogation effect for chosen courts and their derogation effect for non-chosen courts.[180] Article 6 of the Hague Convention provides that the court of a contracting state other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.[181] Accordingly, article 6 prevents a party from breaching an exclusive choice of court agreement. Therefore, the applicability of the 2005 Hague Convention will be important for

[179] Cass Civ 1, 14 October 2009, n 08-16369 in Sophia Tang, *Jurisdiction and Arbitration Agreements* (n 158) 167.
[180] Hague Convention on Choice of Court Agreements 2005 art 5.
[181] Hague Convention art 6.

the DIFC Court when there is a breach of a choice of court agreement in transactions that have a connection with the DIFC.

4.4 Conclusion

This chapter has considered the two special commercial courts established in Bahrain and Dubai. The conclusion is that Bahrain is keen to improve the litigation climate for foreign businesses because of the economic benefits that this can bring. To that end, it has established the BCDR Court with expertise in international commercial disputes. However, the BCDR Court follows the same approach of the traditional Bahraini jurisdiction rules that recognise the prorogation effect. There is a high probability that it would adopt an approach which would reject the recognition of the derogation effect. To realise the economic benefits of facilitating and encouraging international business, the BCDR Court should clearly consider recognising the derogation effect of choice of court agreements. Furthermore, it should also consider adopting the 2005 Hague Convention to ensure the enforcement of the choice of court agreements abroad and to facilitate the recognition and enforcement of Bahraini judgments abroad.

With regard to the DIFC Court, which is located in Dubai's free zone, this chapter has concluded that the DIFC Court has adopted a different approach to the traditional approach of the UAE in regulating jurisdiction, by recognising both the prorogation and the derogation effects of choice of court agreements. With regard to the issue of sovereignty in regulating the jurisdiction under the DIFC Court, the economic aims and interests of the Emirate of Dubai have caused it to move away from the traditional meaning of sovereignty, meaning a representation solely of state interests, to the modern meaning of sovereignty, which should reflect the parties' interests as well. This development in the meaning of sovereignty has led to the justification of the recognition of choice of court agreements by the DIFC Court. Moreover, in 2016, the DIFC Court published a report that encourages the UAE Federal

Government to sign and ratify the 2005 Hague Convention. The importance of the 2005 Hague Convention for the DIFC Court has been stressed, especially to avoid enforcement risks, as the 2005 Hague Convention might facilitate the enforcement of the DIFC Court's judgments and the enforcement of choice of court agreements abroad.

Chapter six of this thesis will consider the 2005 Hague Convention to stress the importance of the Convention in ensuring the enforcement of the choice of court agreements and the recognition of judgments where a court has exercised jurisdiction on the basis of a choice of court agreement. However, before discussion of the 2005 Hague Convention, it is important for the purposes of this thesis to consider the rules of recognition and enforcement of foreign judgments in the GCC States, as these rules have a significant impact upon the effectiveness of recognition of choice of court agreements. Therefore, the rules of recognition and enforcement of foreign judgments in the GCC States will be the subject of the following chapter.

CHAPTER 5: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE GCC STATES

5.1 Introduction

The purpose of this thesis is to argue that the recognition of choice of court agreements in the GCC States should be improved in order to minimise uncertainty and unpredictability for the parties in their international business transactions.[1] Appropriate recognition of exclusive choice of court agreements can be achieved by recognition of both prorogation and derogation effects, where the parties in an exclusive choice of court agreement choose a particular court exclusively to settle any potential dispute.[2] To that end, the previous chapters of this thesis were focused mainly on the jurisdiction rules of the GCC States in order to address how the recognition of both prorogation and derogation effects might be improved.[3] However, the rules of recognition and enforcement of foreign judgments (recognition and enforcement rules) might also impact upon the effectiveness of exclusive of choice of court agreements and, therefore, should also be considered.[4]

There are two situations in which the rules for recognition and enforcement foreign judgments might negatively impact upon the effectiveness of exclusive choice of court agreements.[5] The first situation is related to the recognition and enforcement of a judgment that is obtained from a chosen court according to an exclusive choice of court agreement. If the GCC States do not enforce and recognise a foreign judgment delivered from a chosen court the effectiveness of exclusive choice of court agreements will be limited. The aim of

[1] Chapter 2 of this thesis argued in detail the importance of the recognition of choice of court agreements on international business transactions.
[2] See chapter 2 section 2.2.
[3] See chapters 3 and 4.
[4] Trevor Hartley and M Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013) 791 <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=3> accessed 1 January 2018; sections 2.2.1–2.3.2 and 3 consider how the recognition and enforcement rules might negatively impact the effectiveness of exclusive choice of court agreements.
[5] The potential negative impact of the recognition and enforcement rules on the effectiveness of choice of court agreements has been considered in Trevor Hartley, *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention and the Hague Convention* (Oxford University Press 2013) 171, 185–187; Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 224–256.

the parties in concluding an exclusive choice of court agreement is not merely to litigate before the chosen court exclusively, but also to have the final judgment obtained from the chosen court enforced and recognised where the assets of the defendant are located.[6] Ronald Brand has argued that a judgment would be of no value to the judgment creditor without assurance that the judgment will be enforceable in the state where the assets of the judgment debtor are located.[7] Accordingly, without assurance that a judgment obtained from the chosen court will be recognised and enforced in the requested state, the entire proceedings before the chosen court might be futile and a waste of time and money.[8] In this connection, it has been suggested that the risk of non-enforceability of the foreign judgment should be considered at the outset by the parties in cross-border litigation rather than at the end.[9]

The GCC States, as considered in chapter three, do not recognise the derogation effect of choice of court agreements, because they believe that such recognition limits state sovereignty and public policy. Therefore, it is important to consider whether a judgment delivered from a foreign chosen court, where the GCC State court would otherwise have jurisdiction over the dispute, will also be regarded as contrary to public policy and, therefore, will not be enforced and recognised by the excluded GCC State.

The second situation in which the recognition and enforcement rules might limit the effectiveness of an exclusive choice of court agreement is related to the recognition and enforcement of a foreign judgment that is obtained in breach of a choice of court agreement,[10] whether the exclusive choice of court agreement was in favour of the requested

[6] Tang, *Jurisdiction and Arbitration* (n 5) 224.
[7] Ronald A Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments* (Brill 2014) 118.
[8] Tang, *Jurisdiction and Arbitration* (n 5) 224.
[9] Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) 617; Brand, *Transaction Planning* (n 7) 118.
[10] In this regard see Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, CRC Press 2015) 725; The Report of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13–17 November 2017) 53<https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission/>; Jürgen Basedow and others, *Conflict of Laws in Intellectual Property – The CLIP Principles and Commentary* (Oxford University Press 2013) Commentary 416; Pedro Alberto De

GCC State court or any particular court. If the courts of the GCC States recognise such a foreign judgment, the effectiveness of exclusive of choice of court agreements will also be limited. This is because there will be no obstacle for the party who seeks to breach the exclusive choice of court agreement, since the judgment obtained from the non-chosen court in breaching an exclusive choice of court agreement will be recognised in the GCC States.

Accordingly, there are two situations in which the recognition and enforcement rules of foreign judgments might impact upon the effectiveness of choice of court agreements, which are particularly significant for the GCC States. Therefore, it is important for the purpose of this thesis to consider the two situations under the recognition and enforcement rules of foreign judgments in the GCC States. The scope of this chapter will be limited to the recognition and enforcement rules of foreign judgments which are related to the two situations in which the effectiveness of choice of court agreements might be reduced, given the focus of this thesis on the proper recognition of choice of court agreements rather than the recognition and enforcement rules of foreign judgments per se.

There are two sources for the recognition and enforcement rules of foreign judgments in the GCC States. The first source is the domestic laws of the GCC States, as all of the GCC States have rules for recognition and enforcement of foreign judgments.[11] Secondly, there are also rules under conventions that harmonise the recognition and enforcement rules of foreign judgments. The GCC States are members of two regional conventions that harmonise the

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Miguel Asensio, 'Recognition and enforcement of judgments in intellectual property litigation: the CLIP principles' (2010) 237.

[11] Article 199 of the Kuwaiti Code for Civil and Commercial Procedure no 38/1980; article 11 of the Saudi Arabia Enforcement Act 13/8/1433 Hijri, 2/7/2013 Gregorian; article 252 of the Bahraini of the Code of Commercial and Civil procedure no 12 of 1971; article 352 of the Omani Civil and Commercial Procedure Law no 22 of 2002; article 235 of the UAE Federal Law of the Civil Procedure Code 1992; For more details on recognition and enforcement rules in the GCC States, see Husain M Al-Baharna, 'The Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain' (1989) ALQ 332–344; Jalila Sayed Ahmed, 'Enforcement of Foreign Judgments in Some Arab Countries-Legal Provisions and Court Precedents: Focus on Bahrain' (1999) 14 ALQ 2, 169–176; Samir Saleh, 'The recognition and enforcement of foreign arbitral awards in the states of the Arab Middle East' in Lew JDM (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 340–352; A El-Ahdab, *Arbitration with the Arab Countries* (2nd edn, Kluwer Law International 1999).

recognition and enforcement rules of foreign judgments. The first is the Convention of the Riyadh Arab Agreement for Judicial Cooperation in the League of Arab States 1983 (Riyadh Convention).[12] The second is the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States 1995 (EJDJN Convention).[13] First, this chapter will examine the domestic recognition and enforcement rules of foreign judgments in the GCC States to clarify the two situations in which the recognition and enforcement rules of foreign judgments might reduce the effectiveness of choice of court agreements. Secondly, the two situations will also be considered under the Riyadh and EJDJN conventions.

5.2 The Recognition and Enforcement Rules of Foreign Judgments in the Domestic Laws of the GCC States

5.2.1 General Considerations

Recognition and enforcement of foreign judgments is an issue that relates to the sovereignty of the state.[14] The concept of territorial sovereignty, as considered in chapter three, requires that each state regulate its people and things within its territory and provides that the state has no authority to regulate people or objects outside of its territory.[15] In this connection, in general, any judgment has effect only within the territory of the state in which it was

[12] League of Arab States, Riyadh Arab Agreement for Judicial Cooperation (1983) (English) <http://www.refworld.org/docid/3ae6b38d8.html> accessed 17 December 2017; the convention has been signed and ratified by Palestine (28 November 1983), Iraq (16 March 1984), Yemen (13 April 1984), Mauritania (16 June 1985), Sudan (26 November 1984), Syria (30 September 1985), Somalia (2 October 1985), Tunisia (29 October 1985), Jordan (17 January 1986), Morocco (30 March 1987), Libya (6 January 1988), United Arab Emirates (11 May 1999), Oman (28 July 1999), Bahrain (23 January 2000), Saudi Arabia (11 May 2000), Algeria (20 May 2001), Egypt (2004); Kuwait signed the Riyadh Convention on 6 April 1985, but has not yet ratified it.

[13] Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States 1995 (English) http://arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf> accessed 17 December 2017; the convention has been signed and ratified by Kuwait, Saudi Arabia, Oman, Bahrain, Qatar and United Arab Emirates.

[14] Friedrich Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 AM J Comp L 5–6; Susan L Stevens, 'Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments' (2002) 26 Hastings Intl & Comp L Rev 26, 118–120; Ralf Michaels, *Recognition and Enforcement of Foreign Judgments* (Max Planck Institute for Comparative Public Law and International Law and OUP 2009) 2; Samuel P Baumgartner, 'Understanding the Obstacles to the Recognition and Enforcement of US Judgments Abroad' (2012) 45 NYUJ Intl L & Pol 965–970.

[15] The concept of territorial sovereignty has been demonstrated in detail chapter three, section 3.5.1.

delivered.[16] However, with the increasing number of cross-border transactions, it is increasingly likely that a judgment may be required to be given effect in a different state from the one in which the original court ruling was delivered.[17] Therefore, legal systems around the world have tended to introduce rules to provide for the recognition and enforcement of foreign judgments to meet the need created by cross-border transactions.[18]

The GCC States have introduced rules for recognition and enforcement in their respective codified legal systems.[19] The recognition and enforcement rules of all of the GCC States require several conditions to be satisfied for a foreign judgment to be recognised and enforced.[20] Two conditions are required by the recognition and enforcement rules of the GCC States that might limit the effectiveness of exclusive choice of court agreements, namely the 'jurisdiction requirement'[21] and the 'reciprocity requirement'.[22] Both requirements will be considered below, and then it will demonstrated how their application to a judgment delivered from a chosen court or in breach of an exclusive choice of court agreement might limit the effectiveness of an exclusive choice of court agreement.

5.2.2 The Jurisdiction Requirement in General

The jurisdiction requirement appears in the rules of recognition and enforcement of foreign judgments in different jurisdictions around the world.[23] The jurisdiction requirement requires

[16] James Fawcett and Janeen Carruthers, *Cheshire, North & Fawcett Private International Law*, vol 14 (Oxford University Press 2008) 569–570; Asensio (n 10) 2; Ralf (n 14) 2.
[17] Baumgartner (n 14) 970.
[18] Jens Dammann and Henry Hansmann, 'Globalizing commercial litigation' (2008) 94 Cornell L Rev 24.
[19] See the domestic laws of the GCC States (n 11).
[20] The conditions of recognition and enforcement rules of foreign judgments in the GCC States (n 11) might be summarised as follows: (1) the equal treatment condition, which may also be called the condition of 'reciprocity'; (2) the foreign judgment must be delivered by a court of competent jurisdiction over the subject of the foreign judgment, the 'jurisdiction requirement'; (3) the foreign judgment must become final according to the law of the state in which it was delivered; (4) the foreign judgment must not be inconsistent with a judgment delivered from the requested court; (5) the parties must have been properly summoned and represented during the hearings before the foreign court; and (6) the foreign judgment must not contradict the public order of the state in which the requested court is located.
[21] See the domestic laws of the GCC States (n 11); article 199(a) of the Kuwaiti Code, article 11(1) of the Saudi Arabia Act, article 252(1) of the Bahraini Code, article 352(a) of the Omani Law, and article 235(a) of the UAE Federal Law.
[22] See the domestic laws of the GCC States (n 11).
[23] Juenger (n 14) 6–7; Ralf (n 14) 6.

that a foreign judgment is delivered by a foreign court (referred to as 'the court of origin') that has competent jurisdiction over the subject of the judgment.[24] There are two approaches to determining whether or not the court of origin has competent jurisdiction.[25] All the GCC States have adopted the position in which the jurisdiction rules under private international law of the court of origin are used to determine whether the court of origin had competent jurisdiction.[26] Such an approach might be less restrictive in relation to the recognition and enforcement of a foreign judgment.[27] According to such an approach, the court of the state in which enforcement is to take place (the requested court) will not challenge the basis of jurisdiction that was adopted by the court of origin which delivered the judgment. A decision by the High Court of Oman in 2006 demonstrated that adopting an approach in which the jurisdiction rules under private international law of the court of origin are used to determine whether the court of origin had competent jurisdiction supporting the needs of international business transactions by limiting restrictions on the recognition and enforcement of foreign judgments in Oman.[28]

On the other hand, there is another approach applied in some jurisdictions[29] that requires the court of origin to have had competent jurisdiction on the subject of the foreign judgment, according to the jurisdiction rules under the rules of private international law of the requested court, rather than the court of origin.[30] This approach might narrow the scope for recognition and enforcement of foreign judgments,[31] as under this approach a foreign judgment will not be recognised and enforced in the requested court, unless the requested

[24] Juenger (n 14) 13.
[25] ibid 15; Ralf (n 14) 6.
[26] For the articles in the GCC States legislation see (n 21); Sayed (n 11) 171; Husain (n 11) 338.
[27] Dieter Martiny, 'Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany' (1987) 35 Am J Comp L 721,736; Juenger, (n 14) 15.
[28] Oman Supreme Court decision no 176/ 2005 Commercial 25/1/2006.
[29] For example, in the United Kingdom see *Buchanan v Rucker* (1808) 9 East 192, in CMV Clarkson and Jonathan Hill, *The Conflict of Laws* (OUP 2011) 164; German courts also apply indirect jurisdiction, see Martiny (n 27) 736; French courts apply indirect jurisdiction as well, see Ralf (n 14) 6.
[30] Ralf (n 14) 6.
[31] Juenger (n 14) 15; Ralf (n 14) 6.

court accepts the basis of jurisdiction, according to which the court of origin delivered the judgment.[32] Since each state regulates its own private international law rules, and these rules might differ from state to state, the requested court might not recognise several bases of jurisdiction adopted in other states. Accordingly, the requested court will not recognise and enforce any judgment that is delivered on the basis of rules of jurisdiction that is not recognised by the private international law of the requested court. Therefore, the approach adopted by the GCC States in which the jurisdiction rules under private international law of the court of origin are used to determine whether the court of origin had competent jurisdiction, seems to be less restrictive in relation to the recognition and enforcement of foreign judgments than the other approach.

However, the crucial question is whether a foreign judgment meets the jurisdiction requirement of the requested GCC court, if the requested GCC State also had competent jurisdiction over the dispute, which is the subject of that foreign judgment. For instance, if an Egyptian court had jurisdiction on the basis of the place where the contract was signed and delivered a judgment on that basis, but, the judgment creditor requested that the Egyptian judgment be enforced in Kuwait rather than in Egypt, the following question arises. If Kuwait also had competent jurisdiction over the subject of the Egyptian judgment would the Egyptian judgment meet the jurisdiction requirement and be enforceable in Kuwait, as it was delivered by a court that had competent jurisdiction according to its private international law rules? Or, would the Egyptian judgment not meet the jurisdiction requirement and not be enforceable in Kuwait, because the Kuwaiti courts also had jurisdiction over the subject of the Egyptian judgment according to Kuwaiti jurisdiction rules?

The answers to these questions are controversial in the GCC States. The situation of each GCC State regarding the issue of joint jurisdiction between the court of origin and the

[32] For example, in the United Kingdom see *Buchanan v Rucker* (1808) 9 East 192, in CMV Clarkson and Jonathan Hill, *The Conflict of Laws* (OUP 2011) 164; German courts also apply such approach, see Martiny (n 27) 736; French courts apply indirect jurisdiction as well, see Ralf (n 14) 6.

requested court over disputes that are the subject of foreign judgments will be considered below.

- Kuwait and Oman

The recognition and enforcement rules in Kuwait and Oman do not explicitly consider the issue of joint jurisdiction in their rules of recognition and enforcement of foreign judgments. Hesham Khaled, in his publication in relation to the recognition and enforcement rules in the GCC States,[33] argues that the Kuwaiti and Omani courts are likely to refuse to recognise a foreign judgment when the Kuwaiti or Omani courts also have jurisdiction over a dispute that is the subject of a foreign judgment.[34] Khaled argues that the Kuwaiti and Omani courts have demonstrated in several decisions that exercising jurisdiction rules is a manifestation of state sovereignty, which is related to public policy, and that the parties cannot simply by their agreement overrule the jurisdiction rules and choose a court in which to litigate.[35] Therefore, a judgment delivered by a foreign court, where the Kuwaiti or Omani courts also have jurisdiction, might not be recognised in Kuwait or Oman on the grounds that it assaults the public policy of the state, according to which the latter courts should have heard the case and delivered the judgment instead of the chosen foreign court.[36]

Khaled's argument appears compatible with the decisions[37] of the Kuwaiti and Omani courts considered in chapter three that regard jurisdiction rules as a manifestation of state sovereignty and related to the public policy of the state. However, the explanatory memorandum in Kuwait's Code of Civil and Commercial Procedures,[38] clarifying the scope of the jurisdiction requirement, provides a counter argument to that of Khaled. The Kuwaiti

[33] Hesham Khaled, *Enforcement of the Foreign Judgment and Arbitral in the GCC States* (Monshaat Al Maaref 2009).
[34] ibid 151 and 407.
[35] ibid.
[36] ibid.
[37] See chapter 3 section 3.3.3.
[38] The explanatory notes to the Kuwaiti Civil Procedure Code in Alsamdan A, *Kuwait Private International Law* (3rd edn, 2008) 434.

explanatory memorandum clearly provides that the court of origin that delivers a foreign judgment must have jurisdiction, according to its private international law rules, 'regardless of whether Kuwaiti courts too would have jurisdiction over the same dispute'.[39] Accordingly, it appears that the jurisdiction of the Kuwaiti courts over a dispute which is the subject of a foreign judgment is not a basis for refusing to enforce the foreign judgment, as long as the court of origin had competent jurisdiction according to its private international law rules. Furthermore, that interpretation of Kuwait's explanatory memorandum has been reflected in a decision by the Kuwaiti Cassation court.[40] Accordingly, the Kuwaiti approach, demonstrated both by the legal rules and court decisions, is such that having competent jurisdiction by the Kuwaiti courts over a dispute which is the subject of a foreign judgment is not a basis for refusing to recognise and enforce the foreign judgment.

In Oman, the situation seems ambiguous, as the Omani Code of Civil and Commercial Procedures does not contain an explanatory memorandum clarifying the scope of the jurisdiction requirement as in Kuwait. However, there are several reasons to assume that the Omani courts are likely to follow the Kuwaiti courts, whereby having jurisdiction over the same dispute which is the subject of a foreign judgment is not a basis for refusing to recognise that judgment. First, the provision that regulates the jurisdiction requirement in Oman is precisely the same as the provision in Kuwait, which does not explicitly prevent Omani courts from recognising a foreign judgment, if the Omani courts also have competent jurisdiction over a dispute which is the subject of the foreign judgment. However, it will be considered below that the applicable provisions in the other GCC States explicitly prevent the requested court from recognising the foreign judgment, if the requested court would particularly have jurisdiction over a dispute which is the subject of a foreign judgment.

[39] The explanatory notes to the Kuwaiti Civil Procedure Code in Alsamdan A, *Kuwait Private International Law* (3rd edn, 2008) 434.
[40] See Kuwait Cassation Court decisions no 842/2002 Commercial 18/10/2003.

Secondly, the High Court of Oman, as demonstrated above,[41] has indicated that the approach to the jurisdiction requirement in Oman aims to limit restrictions on the recognition and enforcement rules and hence facilitate the recognition and enforcement of foreign judgments in Oman. Therefore, the Omani courts are likely to recognise a foreign judgment delivered by a chosen court, even if the Omani courts also have competent jurisdiction over the dispute, on the basis that this facilitates the recognition and enforcement of foreign judgments.

Having considered the issue of enforcement of a foreign judgment in Kuwait and Oman, where joint jurisdiction exists over a dispute between the court of origin and the requested court, the situation in Saudi Arabia, the United Arab Emirates and Bahrain will be considered next.

- Saudi Arabia, the United Arab Emirates and Bahrain

In contrast to the rules of Kuwait and Oman, the recognition and enforcement rules in Saudi Arabia, the United Arab Emirates and Bahrain explicitly prevent the recognition and enforcement of foreign judgments where the requested court also had competent jurisdiction over the dispute which was the subject of the foreign judgment.[42] The provisions regarding the jurisdiction requirement in the recognition and enforcement rules in Saudi Arabia, the United Arab Emirates and Bahrain state that 'the requested court must not have competent jurisdiction over the subject of the foreign judgment'[43] for the foreign judgment to be recognised and enforced in the required state. Similarly, the UAE courts have refused to recognise and enforce several foreign judgments, because the UAE court was deemed also to have competent jurisdiction over the dispute which was the subject of the foreign judgment.[44]

[41] See above section 5.2.2.
[42] See art 11(1) of the Saudi Arabia Act, art 252(1) of the Bahraini Code, and art 235(a) of the UAE Federal Law (n 11); see also for more detail Ahmed (n 11) 171; Husain (n 11) 338.
[43] ibid.
[44] Dubai Cassation Court decisions no 114/1993, 26/9/1993; Dubai Cassation Court decisions no 258/1999, 2/10/1999; Dubai Cassation Court decisions no 286/1997, 14/3/1998, the last two judgments are on the enforcement of the foreign arbitral award rather than a judgment, but the rules regarding the jurisdiction requirement are the same in the UAE for foreign judgments and arbitral awards. Therefore, the same consideration will apply whether it is a foreign judgment or arbitral award.

The historical source of this limitation on the recognition and enforcement of foreign judgments is found in article 22 of the Egyptian Civil and Commercial Procedures Code 1949. The explanatory memorandum of the Egyptian Civil and Commercial Procedures Code justifies the limitation by claiming that the limitation aims to protect the jurisdiction of the state to which the requested court belongs by refusing to recognise and enforce any foreign judgment, when the requested court has competent jurisdiction on the subject of the foreign judgment.[45] Accordingly, the limitation seems to be based on the traditional idea that jurisdiction is a manifestation of state sovereignty and related to public policy.[46] It seems that the laws of Saudi Arabia, the United Arab Emirates and Bahrain seek to limit the recognition and enforcement of foreign judgments, because the requested court will not recognise any judgment when it and the court of origin are both deemed to have competent jurisdiction over the dispute.[47] Given that these three GCC States have adopted many bases for exercising jurisdiction[48], it is therefore highly that the requested court in these GCC States will have joint jurisdiction with the court of origin over any international commercial dispute.[49]

In light of the criticism of the joint jurisdiction rules as a basis for limiting the recognition and enforcement of foreign judgments, as provided by the rules of Saudi Arabia, the United Arab Emirates and Bahrain, the Cassation Court of Bahrain has interpreted it in a way that allows the Bahraini courts to recognise and enforce a foreign judgment even though

[45] The explanatory note of Egypt's Procedure Code in Civil and Commercial (no 13 of 1968) 186.
[46] Chapter three of this thesis considered in detail the relationship between state sovereignty and the regulation of jurisdiction rules.
[47] Khaled (n 33) 220 and 466.
[48] Saudi Arabia, the United Arab Emirates and Bahrain have adopted various ground of exercising jurisdiction such as the domicile and place of the residence of the defendant, the nationality of the defendant, chosen domicile, place of assets, the place where an obligation is deemed to have originated or where it has been performed, where it is to be enforced and prorogation jurisdiction (except the UAE). See jurisdiction rules section in the Saudi Arabia Enforcement Act 13/8/1433 Hijri, 2/7/2013 Gregorian, the UAE Federal Law of the Civil Procedure Code 1992 and the Bahraini of the Code of Commercial and Civil procedure no 12 of 1971.
[49] ibid; Sayed (n 11) 171.

Bahraini courts may have competent jurisdiction over the dispute which is the subject of that judgment.[50]

The Cassation Court of Bahrain argued that, despite its explicit wording, article 252(1) of the Bahraini Civil and Commercial Procedures should not be taken to mean that the Bahraini court cannot recognise any foreign judgment, only because the Bahraini court is deemed also to have competent jurisdiction over the dispute which was the subject of the foreign judgment.[51] The Cassation Court has asserted that such an interpretation would limit the recognition and enforcement of foreign judgments in Bahrain, which therefore would not be compatible with the needs of international business transactions in facilitating the recognition and enforcement of foreign judgments.[52]

In summarising the scope of the jurisdiction requirement in the recognition and enforcement rules in the GCC States, all of the GCC States require that the court of origin have competent jurisdiction over the dispute according to the private international law rules of the court of origin itself, rather than private international law rules of the requested court. However, the controversial point is that the rules of Kuwait and Oman, and particularly Bahrain, do not require the absence of jurisdiction by the requested court over the dispute which is the subject of the foreign judgment to recognise and enforce that judgment. In contrast, Saudi Arabia and the United Arab Emirates require the requested court not to have jurisdiction over the dispute which is the subject of the foreign judgment; otherwise the judgment cannot be recognised and enforced in that requested court.

Before considering how the scope of the jurisdiction requirement discussed above applies to a foreign judgment obtained from a chosen court and to a judgment obtained in breach of an exclusive choice of court agreement, it is important to highlight the following. It was considered in chapter three that all of the legal systems of the GCC States regard

[50] Bahrain Cassation Court decision no 34/1990 Civil 12/5/1991.
[51] ibid; Sayed (n 11) 171.
[52] ibid.

international jurisdiction rules as a manifestation of state sovereignty, which is an aspect of the State's public policy. Therefore, the general approach is that parties cannot disregard the GCC States' jurisdiction rules and exclude the courts of one of those GCC States which has jurisdiction and simply litigate before a chosen court. However, it has been demonstrated above that the rules of Kuwait, Oman and particularly Bahrain allow for recognition and enforcement of a foreign judgment, even if the requested court also has competent jurisdiction over a dispute which is the subject of that judgment. It was also considered above that the reason for such an approach is to support international business transactions. In the light of this relinquishment of jurisdiction to a foreign court, in the case of enforcement of foreign judgments there is no justification for the current approach of the GCC States to the recognition of the derogation effect, whereby they refuse to decline jurisdiction in favour of the chosen court where there is a breach of an exclusive choice of court agreement. Hence, these states should reconsider their position and recognise the derogation effect of choice of court agreements, since this would also make the legal environment more attractive for parties to international business transactions.

Having considered the scope and the rationale of the jurisdiction requirement in the recognition and enforcement rules in the GCC States, consideration will next be given to how the jurisdiction requirement applies first, to a foreign judgment that is obtained from a chosen court and secondly, to a foreign judgment that is obtained from a foreign court in breach of an exclusive choice of court agreement, in order to consider the extent to which the scope of the jurisdiction requirements in the GCC States might challenge the effectiveness of such exclusive choice of court agreements.

5.2.3 Jurisdiction Requirements and the Effectiveness of Exclusive Choice of Court Agreements

5.2.3.1 The First Category: Judgment Obtained from a Foreign Chosen Court

It has been observed above[53] that the parties to a choice of court agreement may seek to have a judgment that is obtained from the chosen court in one state recognised and enforced in another state. This may be deemed more appropriate by the judgment creditor in order to obtain his/her remedy; otherwise the entire proceedings might be futile. Also, as has been outlined above,[54] all of the GCC States have jurisdiction requirements when considering the recognition and enforcement of foreign judgments. Therefore, a foreign judgment will be recognised and enforced in the GCC States only when the foreign judgment meets the jurisdiction requirement in the requested GCC State. It has been argued above[55] that the scope of the jurisdiction requirement is not the same in all GCC States. Accordingly, the following paragraphs will first consider the approach in Kuwait, Oman and particularly Bahrain followed by the situation in Saudi Arabia and the United Arab Emirates.

- Kuwait, Oman and Bahrain

The jurisdiction requirement as applied in Kuwait, Oman and particularly Bahrain,[56] requires that the court of origin has competent jurisdiction over the dispute which is the subject of the foreign judgment according to the private international law rules of the court of origin itself, rather than the private international law rules of the requested court, regardless of whether the requested court also has competent jurisdiction over the dispute in question. Accordingly, a judgment obtained from the chosen court on the basis of a choice of court agreement is enforceable according to the jurisdiction requirement in the rules of those three GCC States, even if the requested court of one of those three GCC States has competent jurisdiction over the same dispute which is the subject of the foreign judgment. Therefore, if the parties conclude an exclusive choice of court agreement in their international business transaction and exclude the courts of one of the those three GCC States, the judgment obtained from the

[53] See above section 5.1.
[54] See above section 5.2.
[55] See above 'Kuwait and Oman' section 5.2.2.
[56] ibid.

chosen court will satisfy the jurisdiction requirement in the excluded courts, as long as the chosen court recognises the choice of court agreement as a basis for exercising jurisdiction according to its private international law rules.

In conclusion, the jurisdiction requirement in the rules of recognition and enforcement in Kuwait, Oman and particularly Bahrain does not present an obstacle to the recognition and enforcement of a foreign judgment obtained from a court chosen in an exclusive choice of court agreement, even if the jurisdiction of the requested court was excluded by that agreement.

- Saudi Arabia and the United Arab Emirates

It has been outlined previously[57] that the jurisdiction requirement in the States of Saudi Arabia and the UAE is the same as in Kuwait, Oman and Bahrain in requiring the court of origin to have competent jurisdiction over a dispute according to the private international law rules of the court of origin itself rather than the private international law rules of the requested court. However, Saudi Arabia and the UAE have an additional restriction that requires the absence of jurisdiction by the requested court over the particular dispute; otherwise the foreign judgment cannot be recognised and enforced in that requested court.[58] Accordingly, any judgment that is obtained from a chosen court can be recognised and enforced in the courts of Saudi Arabia and the UAE, as long as the requested court does not also have competent jurisdiction over the dispute. Therefore, if the parties to an exclusive choice of court agreement exclude the courts of Saudi Arabia or the UAE, which otherwise have had competent jurisdiction over the dispute, and litigate before a chosen court, the judgment delivered by the chosen court will not be recognised and enforced in the excluded courts of Saudi Arabia or the UAE. The courts of Saudi Arabia and the UAE would also have competent jurisdiction even if they had been excluded by the parties, because the

[57] See above 'Saudi Arabia, the United Arab Emirates and Bahrain' section 5.2.2

[58] The additional restrictions that are provided in the rules of Saudi Arabia and the UAE have been considered in detail above 'Saudi Arabia, the UAE and Bahrain' section 5.2.2.

international jurisdiction rules of Saudi Arabia and the UAE do not recognise the derogation effect of choice of court agreements, as considered in chapter three of this thesis.[59] Accordingly, the rules of Saudi Arabia and the UAE, which require the absence of jurisdiction by the requested court to recognise and enforce a foreign judgment, might limit the effectiveness of exclusive choice of court agreements, as the judgment creditor will not be able to have a foreign judgment obtained from the chosen court recognised and enforced in the excluded Saudi Arabia or UAE courts.

The provisions in the rules of Saudi Arabia and the UAE, which require the absence of jurisdiction by the requested court for a foreign judgment to be recognised and enforced, are based on the traditional idea that jurisdiction is a manifestation of state sovereignty which is an aspect of a state's public policy aimed at protecting the jurisdiction of the requested court.[60] However, as demonstrated previously, such a rule might limit the effectiveness of exclusive choice of court agreements, as a judgment creditor will not be able to obtain recognition and enforcement of a foreign judgment obtained from the chosen court in the excluded Saudi Arabia or UAE courts. Therefore, it can be argued that the rules for recognition and enforcement of foreign judgments in Saudi Arabia or the UAE are not compatible with the interests of the parties and with economic considerations. As previously outlined, the Bahraini Cassation Court realised that such provisions are not compatible with the interests of the parties and with economic considerations and changed its approach by recognising and enforcing foreign judgments, even where the Bahraini courts had competent jurisdiction over a dispute judged by a foreign court. Therefore, it is argued that Saudi Arabia and the UAE ought to reconsider their traditional approach of prioritising their sovereignty and adopt an approach which recognises foreign judgments from a chosen court, even where

[59] See chapter 3 sections 3.3.3.3 and 3.4.
[60] ibid.

the requested court is excluded by the parties by an exclusive choice of court agreement. The support of international business could provide the motivation for doing this, as in Bahrain.[61]

It will be demonstrated in chapter six that the 2005 Hague Convention[62] harmonises rules for recognition and enforcement of foreign judgments [63] in order to ensure that judgments obtained from a chosen court of a Member State will be recognised in every other Member State.[64] Therefore, by adopting the 2005 Hague Convention, the issue of recognition and enforcement of a foreign judgment obtained from a chosen court might be effectively addressed.

Nevertheless, it is important to simply stress that the requirement that the requested court lacks competent jurisdiction over the dispute could also be minimised without revising the provisions for recognition and enforcement in Saudi Arabia and the UAE. Saudi Arabia and the UAE would need only to recognise the derogation effect of exclusive choice of court agreements. By accepting the derogation effect, the courts of Saudi Arabia and the UAE would not have competent jurisdiction in the event that their jurisdiction was excluded by the parties to an exclusive choice of court agreement. Accordingly, any judgment obtained from the court chosen by the parties to the exclusion of the Saudi Arabian or UAE requested court would be compatible with the additional restriction of the jurisdiction requirement in Saudi Arabia and the UAE, which requires the absence of jurisdiction by the court requested in order to enforce a foreign judgment. Hence, the approach to non-recognition of the derogation effect in Saudi Arabia and the UAE might have a negative impact, not only at the litigation level by permitting parties to breach an exclusive choice of court agreement, but also on the recognition and enforcement of any foreign judgment obtained from the chosen court, as the judgment could not be recognised and enforced in the excluded requested court.

[61] See chapter 3 sections 3.3.3.3 and 3.4.
[62] Hague Convention on Choice of Court Agreements (30 June 2005) <http://www.hcch.net/index_en.php?act=conventions.text&cid=98>accessed 7 September 2017.
[63] ibid art 8.
[64] ibid recital.

Having considered how the jurisdiction requirements of the recognition and enforcement rules in the GCC States might limit the effectiveness of choice of court agreements, as a judgment obtained from a chosen court might not be enforceable in some of the GCC States, the following sections will consider the risk that a foreign judgment obtained in breach of an exclusive choice of court agreement may be enforceable in some of the GCC States.

5.2.3.2 The Second Category: A Foreign Judgment Obtained in Breach of an Exclusive Choice of Court Agreement

- Kuwait, Oman and Bahrain

It has been considered above[65] that the jurisdiction requirements in Kuwait, Oman and particularly Bahrain in relation the recognition and enforcement of foreign judgments require only that the foreign judgment be delivered by a court that had competent jurisdiction according to its private international law rules, regardless of whether the requested court was also deemed to have competent jurisdiction or otherwise. It has been suggested above[66] that this approach appears to favour the party who obtained a judgment from a chosen court and seeks to recognise and enforce that judgment in one of the above GCC States, as he/she will be able to have his/her judgment recognised and enforced in the requested court of Kuwait, Oman or Bahrain, even though the requested court also has competent jurisdiction whether excluded by the parties' agreement or not.

However, these jurisdiction requirement rules might present a risk that a foreign judgment obtained in breach of an exclusive choice of court agreement could be recognised and enforced in Kuwait, Oman or Bahrain, as the judgment might be compatible with the jurisdiction requirement in these GCC States. Such risk might exist due to the fact that these states only require that the court of origin has competent jurisdiction, according to its private international law rules. Therefore, if the court of origin does not recognise the derogation

[65] See above 'Kuwait and Oman' section 5.2.2
[66] See above 'Kuwait, Oman and Bahrain' section 5.2.3.1

effect of exclusive choice of court agreements according to its private international law rules and delivers a judgment in breach of a choice of court agreement, that judgment will be compatible with the jurisdiction requirement in Kuwait, Oman and Bahrain, as being a judgment delivered from a court that had competent jurisdiction according to its private international law rules. Accordingly, the scope of the jurisdiction requirement in Kuwait, Oman and Bahrain might reduce the effectiveness of any exclusive choice of court agreement, as there is no basis in those legal systems for refusal of a foreign judgment in breach of a choice of court agreement.

Furthermore, the reduction in effectiveness might be greater if one of these GCC States' courts were the chosen court itself, and the party in breach sought enforcement of the judgment obtained from the non-chosen court in the chosen court. It seems that any foreign judgment obtained in breach of an exclusive choice of court agreement would be compatible with the jurisdiction requirement provided in these GCC States, even though the requested court itself is the chosen court, since these GCC States recognise and enforce foreign judgments regardless of whether the requested court also had competent jurisdiction over the dispute.

An example would be where the parties in their international business transaction made an exclusive choice of court agreement nominating the Kuwaiti courts, and one of the parties breached the exclusive agreement by starting proceedings before an Abu Dhabi court on the basis that the contract had been signed in Abu Dhabi. The latter court would probably take jurisdiction and deliver a judgment, as the private international law rules in Abu Dhabi do not recognise the derogation effect of exclusive choice of court agreements.[67] The judgment delivered by the Abu Dhabi court in breach of the exclusive agreement would appear to be compatible with the scope of the jurisdiction requirement in the Kuwaiti chosen

[67] See above section 3.3.

court, as it is delivered by a court that had competent jurisdiction according to the private international law rules of Abu Dhabi. Therefore, the Abu Dhabi judgment could be recognised and enforced in the Kuwaiti chosen court. As a result, if the other party who did not breach the agreement sought to sue the party in breach, he/she would be prohibited from litigating before the Kuwaiti chosen court, which was nominated by their exclusive choice of court agreement, as that court would already have recognised the foreign judgment in the same dispute between the same parties. Accordingly, the exclusive choice of court agreement concluded by the parties would be futile, because of the regulation of the recognition and enforcement of foreign judgments rules in Kuwait, Oman and Bahrain

To minimise the problem inherent with that approach, some jurisdictions provide a basis for refusing to recognise and enforce foreign judgments obtained in breach of exclusive choice of court agreements.[68] For instance, section 32 of the United Kingdom Civil Jurisdiction and Judgments Act 1982 provides that:

> [A] judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country[69]

According to section 32, a judgment obtained in breach of an exclusive choice of court agreement might not be enforced and recognised by the English Courts.[70] Adrian Briggs argued that the rationale behind section 32 is to prevent a party from breaching a valid and

[68] The judgment obtained in breach of a choice of court agreement cannot be recognised in Germany whether the chosen court is German or a third state, Martiny (n 27) 737; Juenger (n 14) 19; A similar provision is found in some of the bilateral conventions Germany signed, see art 2 para 3 Germany–Austria, art 8 para 3 Germany–Norway, art 7 para 2 Germany–Spain Conventions, Martiny fn 89, 737; Also, Third Preliminary Draft of the Principles on Conflict of Laws in Intellectual Property (CLIP) arts 4:201 and 4:202 in combination with art 2:401 provide that a judgment that conflicts with the exclusive jurisdiction provisions of the CLIP Principles shall not be recognised or enforced; Jürgen (n 10) 416; see also Asensio (n 10) 237.

[69] United Kingdom Civil Jurisdiction and Judgments Act 1982 art 32.

[70] In *Tracomin SA v Sudan Oil Seeds* [1983] 1WLR 662, the English court refused to enforce a judgment on the basis of article 32. The judgment was obtained from a Swiss court in breach of an arbitration agreement that favoured England as the place of the arbitration seat. Article 32(1) applies to choice of court agreements as well as the arbitration agreement, as it provides that the foreign judgment should not be obtained in breach of 'an agreement under which the dispute in question'. Accordingly, the term 'agreement' applies to a choice of court agreement as well as an arbitration agreement.

binding exclusive choice of court agreement, and the rule thereby enhances the effectiveness of any exclusive choice of court agreement.[71]

Furthermore, a basis for refusing to enforce and recognise a foreign judgment obtained in breach of an exclusive choice of court agreement has been provided in article 7(1)d of the 2018 final draft of the 'Judgment Project', which is being negotiated by the working group of the Hague Conference on Private International Law (HCCH).[72] The Judgment Project aims to create an international convention that harmonises the rules of recognition and enforcement of foreign judgments in civil and commercial matters.[73] The Preliminary Explanatory Report of the Judgment Project provides that the aim of article 7(1)d is to ensure the effectiveness of choice of court agreements and to respect party autonomy.[74]

Accordingly, it is argued that these three GCC States should consider creating a basis for refusing to recognise a foreign judgment that is obtained in breach of a choice of court agreement, as the absence of such a basis in the rules in these GCC States might limit the effectiveness of exclusive choice of court agreements.

The last chapter will observe that the 2005 Hague Convention does not cover the issue of recognition and enforcement of a judgment that is delivered in breach of an exclusive choice of court agreement, as it deals only with the rules of recognition and enforcement of a judgment obtained by the chosen contracting state court. However, the Judgment Project, as considered above, covers the issue of recognition and enforcement of a judgment that is delivered in breach of an exclusive choice of court agreement. Therefore, if the Judgment

[71] Briggs (n 10) 725; for more details the Civil Jurisdiction and Judgments Act 1982 art 32 see Fawcett and Carruthers (n 16) 569–570; Clarkson and Hill (n 32) 185–186; Richard Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) 622–623.

[72] Draft Convention (24–29 May 2018) <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1>.

[73] Judgments Project (various documents) <https://www.hcch.net/en/projects/legislative-projects/judgments>.

[74] Hague Conference on Private International Law, 'Report of Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (The Hague, the Netherlands, 13–17 November 2017) <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission/>53.

Project is successful and finalised, it may be appropriate for the GCC States to consider adoption of the instrument.

- Saudi Arabia and the United Arab Emirates

As already considered above,[75] in Kuwait, Oman, and particularly Bahrain, a foreign judgment obtained in breach of a choice of court agreement might be recognised and enforced in these GCC States even if the requested court was the chosen court. However, in Saudi Arabia and the UAE, it has to be determined whether the requested court was the chosen court itself or a third court as the argument might be different in the two situations.

The jurisdiction requirement in Saudi Arabia and the UAE requires that a foreign judgment be delivered by a court that has competent jurisdiction according to its private international law rules, and the requested court must not have competent jurisdiction.[76] Accordingly, if the chosen court was not the requested court, any judgment obtained in breach of an exclusive choice of court agreement can still be recognised and enforced in Saudi Arabia, the UAE, Kuwait, Oman and Bahrain.

However, if the chosen court itself was the requested court, one must distinguish between the rules in Saudi Arabia and in the UAE. In Saudi Arabia, any judgment obtained in breach of a choice of court agreement will not be recognised and enforced, because Saudi Arabia would have competent jurisdiction, as it recognises the prorogation effect of a choice of court agreement. Therefore, any foreign judgment obtained in breach of a choice of court agreement, in which the Saudi Court itself was the chosen court, will not be recognised and enforced in Saudi Arabia on the grounds that the requested court also had competent jurisdiction.

Although the scope of the jurisdiction requirement in the UAE, which is the same as in Saudi Arabia, requires that the requested court must not have competent jurisdiction for a

[75] See above 'Kuwait, Oman and Bahrain' section 5.2.3.2.
[76] See above 'Saudi Arabia, the UAE and Bahrain' section 5.2.2.

foreign judgment to be recognised and enforced, the UAE situation might differ from that of Saudi Arabia in the situation in which the chosen court itself was the requested court. The situation in the UAE is different from Saudi Arabia, because the UAE international jurisdiction rules do not recognise the prorogation effect of choice of court agreements as a basis for exercising jurisdiction, as considered in chapter three of this thesis. Accordingly, the UAE courts would not have competent jurisdiction solely because they were chosen by the parties. Therefore, any judgment obtained in breach of a choice of court agreement may be compatible with the scope of the UAE jurisdiction requirement even if one of the UAE courts was the court chosen by the parties in an exclusive choice of court agreement, since the UAE courts would still not have competent jurisdiction, unless UAE courts have competent jurisdiction on a basis other than the choice of court agreement.

In summary, the jurisdiction requirement under the recognition and enforcement rules of the GCC States might present a risk that a foreign judgment obtained from a chosen court will not be recognised and enforced in the GCC States, which would therefore limit the benefit of exclusive choice of court agreements. Furthermore, it has been considered above that the jurisdiction requirement might also present the risk that a judgment obtained in breach of an exclusive choice of court agreement might be enforceable in some GCC States, especially if the requested court was the court chosen by the parties' exclusive agreement. Accordingly, it is argued that these GCC States must rethink their regulation of the jurisdiction requirement under their provisions, since their approach might have a significant impact on the effectiveness of exclusive of choice of court agreements.

Having illustrated how the jurisdiction requirement might limit the effectiveness of exclusive choice of court agreements in the GCC States, it is important to consider the second requirement in the recognition and enforcement rules that might also limit the effectiveness of exclusive choice of court agreements in the GCC States: 'the reciprocity requirement'.

5.2.4 The Reciprocity Requirement

All of the domestic recognition and enforcement rules of the GCC States require reciprocity as a condition for recognising and enforcing foreign judgments.[77] The requirement of reciprocity in all of the recognition and enforcement rules in the GCC States requires that the courts in the GCC States treat or enforce any foreign judgments passed in any foreign country in the same manner as the foreign country would do to any judgment emanating from the courts of those GCC States.[78] It has been argued that the rationale for the reciprocity requirement in the recognition and enforcement rules is the consideration of state sovereignty,[79] as the requested state will not give effect to a foreign judgment within its territory unless it is confident that any of its judgments would also have the same effect in the territory of the court of origin.

All of the GCC States' recognition and enforcement rules require reciprocity only in the absence of a bilateral or multilateral agreement, as all of the GCC States' recognition and enforcement rules specify that where there is a bilateral or multilateral agreement between the state where any judgment has been delivered and the requested GCC State, the rules under the agreement must be applied rather than the domestic recognition and enforcement rules of the requested GCC State.[80]

Except for Kuwait, all of the GCC States' recognition and enforcement rules require reciprocity for all foreign judgments.[81] In Kuwait, the position may be different, because, in 2007, article 199 of the Kuwaiti Civil Procedures Code, which relates to the reciprocity

[77] Art 199 in the Kuwaiti Code; art 11 in the Saudi Arabia Enforcement Act 2/7/2013; art 252 of the Bahraini Code; art 352 of the Omani Law; art 235 of the UAE Code (n 11).
[78] ibid.
[79] Juenger (n 14) 7.
[80] Art 203 in the Kuwaiti Code; art 11 in the Saudi Arabia Enforcement Act 2/7/2013; art 255 of the Bahraini Code; art 355 of the Omani Law; art 238 of the UAE Code (n 11); also see the GCC court decisions, Abu Dhabi Cassation Court decision no 357/2014, Family 29/4/2015; Kuwait Cassation Court decision no 420/2006, Family Court 26/11/2007; Kuwait Cassation Court decision no 35/2002, Civil 17/11/2003; Kuwait Cassation Court decision no 33/2002, Commercial 19/10/2002; and Bahrain Cassation Court decision no 39/1998, 28/6/1998.
[81] Art 199 of Kuwaiti Civil Procedures Code as amended in 2007 no 38.

requirement, was amended to exclude the reciprocity requirement from foreign judgments, when the judgment creditor and the judgment debtor are Kuwaiti citizens.[82] The explanatory memorandum of article 199 as amended demonstrates that the aim of the amendment is to facilitate the recognition and enforcement of a foreign judgment when both parties are Kuwaiti citizens, as the reciprocity requirement might limit the recognition and enforcement of a foreign judgment in Kuwait, which would thereby harm the interests of the Kuwaiti parties.[83] Accordingly, the Kuwaiti legislator is aware of the interests of the parties in facilitating the recognition and enforcement of foreign judgments. However, limiting the exclusion of the reciprocity requirement only to Kuwaiti citizens might not be reasonable, because it seems that the rationale for the exclusion is only to protect the interests of Kuwaiti citizens. However, there is no proper rationale for such protection as excluding only Kuwaiti citizens from the reciprocity requirement would not benefit the parties to international business transactions, since such transactions are cross-border transactions that most often include a foreign party. Accordingly, excluding the reciprocity requirement in the recognition and enforcement of foreign judgments is a positive step forward in the liberation from traditional restrictions that are based on state sovereignty and the public interest. However, limiting the exclusion to Kuwaiti citizens seems inappropriate and will not contribute to make the legal environment sufficiently attractive to international business.

Having considered the scope of the reciprocity requirement in the GCC States, it is important to consider how it applies before the GCC States' courts and how such a requirement might limit the effectiveness of choice of court agreements.

5.2.4.1 Applying the Reciprocity Requirement

- Kuwait, Bahrain, the United Arab Emirates and Oman

[82] Art 199 of Kuwaiti Civil Procedures Code as amended in 2007 no 38.
[83] The explanatory memorandum of art 199 of the Kuwaiti Civil Procedures Code as amended in 2007 no 38 28/6/2007.

From the court decisions in Kuwait,[84] Bahrain,[85] the UAE[86] and Oman[87], it seems that in order for the requested court to honour the reciprocity requirement, the requesting party must prove to the requested court that the rules for recognition and enforcement of foreign judgments of the court which delivered the judgment impose the same or fewer restrictions than the rules of recognition and enforcement in the requested court.[88] An example of the reciprocity requirement in the above GCC States was when the Omani Court refused to recognise a German judgment by arguing that the recognition and enforcement rules in Germany imposed more restrictions than the rules of recognition and enforcement of Oman.[89] The Omani Court claimed that in Germany, the jurisdiction requirement, which determines whether the court of origin has competent jurisdiction or not, adopts the approach in which the court of origin must have had competent jurisdiction on the subject of the foreign judgment according to the jurisdiction rules under the rules of private international law of the requested court, rather than the court of origin as in Oman.[90] Accordingly, the Omani Court concluded on this basis that the rules of recognition and enforcement in Germany were more stringent than the rules in Oman.[91] Consequently, the Omani court refused to recognise the German judgment on the basis that the German judgment did not honour the reciprocity requirement in Oman.[92]

Accordingly, the requesting party in the courts of the above GCC States does not have to prove that the court of origin has previously enforced the requested court's judgments to make the requested court honour the reciprocity requirement. Nevertheless, such approach in applying the reciprocity requirement by these GCC States might present several obstacles in

[84] Kuwait Cassation Court decision no 1191/2007, Commercial 23/6/2009.
[85] Bahrain Cassation Court decision no 34/ 1990, Civil 12/5/1991.
[86] Dubai Cassation Court decisions no 269/2005, Civil 26/2/2006; Abu Dhabi Cassation Court decisions no 267/1999, Commercial 27/11/1999.
[87] Oman Supreme Court decision no 176/ 2005 Commercial 25/1/2006.
[88] ibid.
[89] ibid 9.
[90] ibid.
[91] The difference between the two approaches has been outlined above at section 6.2.2.
[92] Oman Supreme Court decision no 176/ 2005 (n 87) 10.

practice. First, not all of these GCC States have established a standard that should be applied in determining whether the restrictions of recognition and enforcement of the court of origin are equivalent to or less than the restrictions of the requested court, because the restrictions of recognition and enforcement differ from state to state, and the level of such restrictions are determined according to the interests and policies of each state. Secondly, the requested court has to examine the recognition and enforcement rules of the court of origin, with which it might not be familiar, and, therefore, it can prove difficult for the requested court to decide whether the recognition and enforcement rules of the court of origin are the same or less restrictive than its own rules.[93] Furthermore, the difficulty might be greater where the language of the court of origin differs from the language of the requested GCC State court, as may occur when the requesting party has to translate the recognition and enforcement rules into Arabic, which could result in misunderstanding.[94] Accordingly, the approach that Kuwait, Bahrain, the UAE and Oman have adopted in applying the reciprocity requirement might pose a problem for parties seeking the recognition and enforcement of a foreign judgment in these GCC States. After illustrating the approach of Saudi Arabia in applying the reciprocity requirement, consideration will be given to how the issue of reciprocity might challenge the recognition and enforcement of any foreign judgment that is delivered from a chosen court.

- Saudi Arabia

[93] The Omani High Court refused to recognise a foreign judgment delivered by a German court by claiming that the recognition and enforcement rules of Germany are more rigid than the Omani rules, see Oman Supreme Court decision no 176/ 2005 (n 87). In practice, however, it might be that German rules impose less restrictions in recognising and enforcing foreign judgment rules than the Omani rules, because there are several cases in which the German rules do not require reciprocity in recognising and enforcing foreign judgments, while in Oman there must be reciprocity for all judgments, see Martiny (n 27) 749.

[94] The Dubai Cassation Court refused to enforce a foreign judgment delivered by the High Court of England and Wales, because the translation of the England and Wales recognition and enforcement rules of foreign judgments provided as requested was not clear enough for the Dubai Court to decide whether the England and Wales rules impose the same or fewer restrictions than the rules of recognition and enforcement of the UAE, Dubai Cassation Court decisions no 269/2005 (n 86).

In Saudi Arabia, the reciprocity requirement might be more rigid than in the other GCC States, as the Saudi Arabian courts[95] require that the requesting party prove to the Saudi Arabian court that the court of origin would recognise and enforce any Saudi Arabian judgment.[96] However, it is difficult or even impossible for the requesting party to prove that the court of origin would enforce a Saudi Arabian judgment if the court of origin has never been requested to recognise or enforce a Saudi Arabian judgment before. In 2008, the Saudi Arabian courts refused to enforce a foreign judgment delivered by the courts of the US district of Columbia, until the requesting party had provided to the Saudi Arabian courts a report written by a judge from the Columbian courts attesting that they had enforced a Saudi Arabian judgment and that they would be prepared to enforce Saudi Arabian judgments in the future.[97] Accordingly, the reciprocity requirement in the recognition and enforcement rules of Saudi Arabia might present a problem for the parties in terms of the recognition and enforcement of a foreign judgment in Saudi Arabia.

Having considered the scope of the reciprocity requirement and how such a requirement might prevent a foreign judgment from being recognised and enforced in the GCC States, how that requirement might limit the effectiveness of choice of court agreements will be considered next.

5.2.4.2 The Reciprocity Requirement and the Effectiveness of Choice of Court Agreements

Since the reciprocity requirement may limit the recognition and enforcement of foreign judgments in the GCC States, any party who has obtained a foreign judgment from a court nominated in a choice of court agreement might face difficulties getting that judgment recognised and enforced in the GCC States. Therefore, if the party who seeks to enforce the judgment fails to prove the existence of reciprocity to the GCC requested court, the entire

[95] Diwan Al-Mathalem Court decision no 1_343/1424 Hegira, 27/5/1429 Hegira.
[96] ibid 2.
[97] ibid 4.

proceedings before the chosen court and its judgment will be futile, and the party seeking to enforce the foreign court judgment will have to start new proceedings before the requested GCC court to obtain his/her remedy. Accordingly, because of the reciprocity requirement, the value of choice of court agreements is significantly diminished in international business transactions.

An additional risk to the effectiveness of an exclusive choice of court agreement arising from the reciprocity requirement is the denial of justice.[98] The risk of denial of justice might occur if the GCC States change their approach and decide to recognise the derogation effect of an exclusive choice of court agreement and to decline jurisdiction in favour of the chosen court while still requiring reciprocity in the recognition and enforcement of foreign judgments. An example would be if the parties conclude an exclusive choice of court agreement nominating the English courts, and the claimant sues the defendant before the chosen English court and obtains a judgment, but the claimant seeks to have his judgment enforced in Kuwait as the assets of the defendant are located in Kuwait. However, the Kuwaiti courts would refuse to enforce the English judgment because of the absence of reciprocity. The claimant would then have to sue the defendant again before the Kuwaiti court to obtain his/her remedy. However, the Kuwaiti court could refuse jurisdiction on the premise that it recognises the derogation effect of the choice of court agreement, which would lead to a denial of justice for the claimant, who would be unable to obtain his remedy in either of the two courts. Hence, the reciprocity requirement might limit the effectiveness of the Kuwaiti court's approach to recognition of the derogation effect of exclusive choice of court agreements.

[98] Sophia Tang has considered in detail the risk of the denial of justice presented because of the reciprocity requirement on the effectiveness of the exclusive choice of court agreements, see Sophia Tang 'Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study' (2012) 61 ICLQ 2, 459–484.

It is argued that the reciprocity requirement in the recognition and enforcement rules in the GCC States has a detrimental effect on the operation of exclusive choice of court agreements. To limit the negative effect of the reciprocity requirement, the GCC States can enter into bilateral[99] or multilateral agreements, since, as demonstrated above, the reciprocity requirement comes into play only in the absence of a bilateral or multilateral agreement between the court of origin and the requested GCC court. In that connection, the GCC States are members of two regional conventions, which will be considered in detail below. Furthermore, the Judgment Project discussed above will be the first global convention harmonising the rules of recognition and enforcement of foreign judgments. If replicated it could also be a viable instrument that the GCC States might consider to settle the issue of the reciprocity requirement. More importantly, the 2005 Hague Convention also harmonises the recognition and enforcement rules of foreign judgments obtained from contracting states. Therefore, it is argued that the 2005 Hague Convention would minimise the risk of the

[99] The GCC States have already entered into several bilateral agreements with different countries around the world; for example, Kuwait: Agreement on Judicial and Legal Cooperation in Civil, Commercial Criminal and Personal Status Matters (Kuwait—Tunisia) (1977); Agreement on Judicial and Legal Cooperation in Civil, Commercial and Criminal Matters (Kuwait—Turkey) (1997); The Agreement on Judicial and legal Cooperation in Civil, Commercial, Criminal and Personal Status Matters (Kuwait—Morocco) (1998); Agreement on Judicial Cooperation and Recognition of Judgments in Civil Matters (Kuwait—Italy) (2002); Agreement on Judicial and Legal Cooperation in Civil, Commercial Criminal and Personal Status Matters (Kuwait—Arabian Syrian Republic) (2004); Agreement on Judicial and Legal Cooperation in Civil and Commercial Matters (Kuwait—Jordan) (2005); Agreement on Judicial and Legal Cooperation in Civil and Criminal Matters (Kuwait—Myanmar (2005); Agreement on Judicial and Legal Cooperation in Civil, Commercial, Criminal and Personal Status Matters (Kuwait—Yemen) (2008); Agreement on Judicial and Legal Cooperation in Civil and Commercial Matters (Kuwait—Algeria) (2014); The UAE: Agreement on Judicial Cooperation, Execution of Judgments and Extradition of Criminals (United Arab Emirates—Tunisian Republic) (1975); Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial matters signed between (United Arab Emirates—France) (the Paris Convention) (1992); Agreement on Juridical Cooperation in Civil and Commercial Matters with (United Arab Emirates—India) (2000); Agreement on Legal and Judicial Cooperation (United Arab Emirates—Egypt) (2000); Convention on Judicial Assistance in Civil and Commercial Matters (United Arab Emirates—the Republic of China) (2004); Agreement on Judicial Assistance in Civil and Commercial Matters (United Arab Emirates—Republic of Kazakhstan) (2009); Bahrain: Agreement on Judicial and Legal Cooperation (Bahrain—the Egyptian Republic) (1989); Agreement on Judicial and Legal Cooperation (Bahrain—Arabian Syrian Republic) (2001); Agreement on Judicial and Legal Cooperation in Civil and Commercial Matters (Bahrain—India) (2004).

reciprocity requirement on the effectiveness of choice of court agreement at least within the member states of the convention.[100]

5.3 The Recognition and Enforcement Rules of Foreign Judgments in Regional Conventions

The GCC States are members of the Riyadh Convention and the EJDJN Convention. Both create uniform rules aimed at promoting judicial cooperation in civil and commercial and criminal matters between the member states.[101] The two conventions provide uniform recognition and enforcement rules for foreign judgments between the member states. Since the rules of the two conventions are almost the same, the rules of both conventions will be addressed at the same time rather than separately. The rules of the two conventions will be addressed below by considering the two situations in which the recognition and enforcement of foreign judgments might limit the effectiveness of exclusive choice of court agreements.

5.3.1 A Foreign Judgment Obtained from a Chosen Court in a Member State

Both conventions[102] provide for a jurisdiction requirement by stating that a judgment delivered by a member state shall be enforced in any other member state, if the judgment is delivered from a member state that had competent jurisdiction over the subject of the judgment. The two conventions specify two different rules that the requested court can apply in determining whether the court of origin has competent jurisdiction. The requested court can rely on (1) the jurisdiction rules according to the private international law of the requested court itself,[103] or (2) the jurisdiction rules specified by each convention,[104] as the

[100] To date, the Hague Convention has entered into force in 29 countries; Status table of the Hague Convention on Choice of Court Agreements in the Hague Conference on Private International Law <http://www.hcch.net/index_en.php?act=conventions.status2&cid=98> accessed 15 October 2015.
[101] The recitals of the Riyadh Convention and the EJDJN Convention.
[102] See art 25 of the Riyadh Convention and art 1 of the EJDJN Convention.
[103] ibid.
[104] See art 28 of the Riyadh Convention and art 4 of the EJDJN Convention.

two conventions clearly specify the circumstances in which the member state has jurisdiction to deliver a judgment that shall be enforceable in any other member state.[105]

In the GCC States, it is not possible for the requested court of a GCC State to rely on the private international law rules of the requested court itself in determining whether the court of origin had competent jurisdiction, because none of the GCC States' domestic private international law rules specify a basis for determining whether a foreign judgment meets the jurisdiction condition of the requested court. No such basis exists in the domestic private international law rules of the GCC States, because, as has been considered above,[106] the GCC States have adopted a different approach for determining whether the court of origin had competent jurisdiction, which depends on the private international law rules of the court of origin itself, rather the private international law rules of the requested courts. Accordingly, the GCC States determine whether the court of origin had competent jurisdiction, according to the second option, namely the rules of jurisdiction that are specified in each convention.

The two conventions specify several bases of jurisdiction in situations in which the member state has jurisdiction to deliver a judgment that can be recognised in another member state. The notable basis of jurisdiction that is specified in the two conventions for the purpose of this chapter is where the member state exercises jurisdiction on the basis of a 'choice of court agreement'.[107] The two conventions provide that a member state has jurisdiction 'if the defendant had expressly accepted to be subject to the jurisdiction of the courts of the said member party, through agreement of such jurisdiction, provided that the law of the said member party does not prohibit such agreement'.[108] Accordingly, the two conventions acknowledge the consent of the parties as a basis upon which the member state may exercise jurisdiction and deliver a judgment that can be recognised in the other member state.

[105] See art 28 of the Riyadh Convention and art 4 of the EJDJN Convention.
[106] See section 5.2.2.
[107] See art 28(h) of the Riyadh Convention and art 4(h) of the EJDJN Convention.
[108] ibid.

However, it is important to stress that the prorogation of jurisdiction under the two conventions requires 'the acceptance of such jurisdiction by the legal system of the chosen court'.[109] Therefore, the prorogation of jurisdiction under the two conventions does not apply to the UAE traditional courts, since, as outlined in chapter four, the traditional UAE courts do not recognise the prorogation effect of choice of court agreements.

Accordingly, the two conventions support the effectiveness of choice of court agreements by regarding a choice of court agreement as a valid basis of jurisdiction for the purposes of recognising and enforcing a foreign judgment. However, the crucial question is whether a judgment from a chosen court of a member state nominated in an exclusive choice of court agreement is recognised and enforced in the member state that also has competent jurisdiction over a dispute which is the subject of that judgment, although the requested court was excluded by the exclusive parties' agreement. Neither convention prevents recognition and enforcement of a judgment if the requested court and the chosen court have competent jurisdiction over a dispute. Accordingly, in general, any judgment obtained from a chosen court of a member state can be recognised and enforced in any other member state, even if the requested court has competent jurisdiction over a dispute and was excluded by the parties' exclusive agreement.

However, a provision in the two conventions might prevent a judgment obtained from the chosen court of a contracting state from being recognised and enforced in an excluded court of a member state. Both conventions provide that any judgment shall not be recognised and enforced in the requested member state, 'If the dispute is also the subject of a case being heard by the court of the requested party and the action has been brought in the court requested on a date before which the court that delivered the judgment had started the

[109] See article 28(h) of the Riyadh Convention and article 4(h) of the EJDJN Convention.

proceedings'.[110] Accordingly, if one of the parties to an exclusive choice of court agreement breaches the agreement and starts proceedings in the non-chosen court of a member state before the other party starts proceedings in the chosen court, the judgment delivered by the chosen court may not be recognised and enforced in the state in which the party in breach started proceedings.

Such an obstacle to recognition and enforcement of a foreign judgment obtained from a chosen court in the excluded court might be significantly minimised if the GCC States accept recognition of the derogation effect of exclusive of choice of court agreements, because by recognising the derogation effect and declining jurisdiction, the party in breach cannot litigate before the non-chosen GCC States. Accordingly, the non-recognition of the derogation effect of choice of court agreements by the domestic GCC State rules might present a challenge for the parties not only at the litigation level, but also in terms of the recognition and enforcement of a foreign judgment even under the uniform system of reciprocal enforcement of foreign judgments in the Riyadh and the EJDJN conventions.

In summary, the Riyadh and the EJDJN conventions seem to support the effectiveness of choice of court agreements, as they clearly specify that a choice of court agreement is a valid basis of jurisdiction for the purpose of recognising and enforcing a foreign judgment. Therefore, any judgment that is obtained from the chosen court of a member state can be recognised in any other member state, even in the member state that also has competent jurisdiction over a dispute, even though it was excluded by the exclusive choice of court agreement. However, the fact that the GCC States do not recognise the derogation effect of a choice of court agreement by their domestic rules is an obstacle that might prevent a judgment obtained from a chosen court of a member state from being recognised and

[110] See art 30(e) of the Riyadh Convention and art 2(d) of the EJDJN Convention.

enforced in the excluded member state, as the latter might be hearing the same dispute which is the subject of the requested judgment.

In conclusion, it is argued that the GCC States should reconsider their approach to the derogation effect of choice of court agreements, as the non-recognition of the derogation effect creates risks for the parties at the litigation level and at the recognition and enforcement level, even where the Riyadh and the EJDJN conventions apply.

5.3.2 A Foreign Judgment Obtained in Breach of an Exclusive Choice of Court Agreement

It has been outlined above[111] that if the requested court recognises a foreign judgment obtained in breach of a choice of court agreement, the effectiveness of the choice of court agreement might be limited. It has been demonstrated that the issue of recognition a foreign judgment delivered in breach of choice of court agreement exists in some domestic recognition and enforcement rules in the GCC States.[112]

According to the rules of the two conventions, the issue also exists under both the Riyadh and the EJDJN conventions, as the conventions do not provide any basis for refusing to recognise and enforce a judgment that is obtained from a member state through a breach of a choice of court agreement. Therefore, the absence of a basis for refusing to recognise and enforce a judgment that is obtained through a breach of a choice of court agreement might limit the effectiveness of exclusive choice of court agreements, as the breaching party can ask for the recognition and enforcement in any other member state of the judgment obtained from a member state in breach of a choice of court agreement. Furthermore, the breaching party can benefit from the absence of the reciprocity requirement that exists in the domestic recognition and enforcement rules of the GCC States, because of the mutual recognition of foreign judgments created by the Riyadh and the EJDJN conventions. The Riyadh and the EJDJN conventions need to be revised to fill the gap regarding the issue of the recognition

[111] See above section 5.1.
[112] See above section 5.2.3.2.

and enforcement of a foreign judgment obtained in breach of an exclusive choice of court agreement.

The Judgment Project discussed earlier covers the issue of the recognition and enforcement of a judgment that is delivered in breach of an exclusive choice of court agreement. Therefore, the Judgment Project if replicated might be a viable instrument for the GCC States to adopt in order to address the shortcomings, not only in the domestic recognition and enforcement rules of the GCC States, but also in the recognition and enforcement rules of the Riyadh and the EJDJN conventions.

Nevertheless, the issue of recognition and enforcement of a foreign judgment that is obtained in breach of an exclusive choice of court agreement can be minimised in the two conventions by recognising the derogation effect of exclusive choice of court agreements. Recognition of the derogation effect by each member state, whereby it declines jurisdiction in favour of the chosen court, means that the party in breach will be forced to litigate only before the chosen court. In this way, it will not be possible for a judgment obtained from a GCC member state in breach of a valid choice of court agreement to be recognised in another GCC member state.

Accordingly, the non-recognition of the derogation effect of an exclusive of choice of court agreement creates risks for the parties at the recognition and enforcement level, even under the Riyadh and the EJDJN conventions, as the party in breach can benefit from the two conventions by requesting that a foreign judgment obtained in breach of an exclusive choice of court agreement be recognised in any member state.

In summary, the Riyadh and the EJDJN conventions might not be detrimental to the interests of the party that has obtained a judgment from a chosen court of a member state, as that judgment can be recognised in any other member state, even in a member state that also has competent jurisdiction over the dispute, even though it was excluded by an exclusive

choice of court agreement. However, there is one obstacle that might prevent a judgment obtained from a chosen court of a member state from being recognised and enforced in an excluded member state where the latter might be hearing the same dispute which is the subject of the requested judgment. The obstacle arises from the fact that the GCC States do not recognise the derogation effect of a choice of court agreement in their domestic rules. Moreover, it has been considered above that neither convention provides any basis for refusing to recognise and enforce any judgment that is obtained from a member state where jurisdiction has been exercised in a breach of a choice of court agreement. In this connection, the breaching party can benefit by seeking recognition and enforcement of any judgment obtained from a member state in breach of a choice of court agreement in any other member state. Finally, it has been suggested that the issue of the absence of a basis for refusing to recognise and enforce any judgment where there is a breach of a choice of court agreement might be addressed by revising the two conventions, on the one hand, and by recognising the derogation in the rules of private international law, on the other.

5.4 Conclusion

This chapter has considered the impact of the rules of recognition and enforcement on the effectiveness of choice of court agreements. It has been argued that the domestic recognition and enforcement rules of the GCC States present a significant risk to the effectiveness of exclusive choice of court agreements due to the jurisdiction and reciprocity requirements. The first risk that might arise is that any judgment obtained from a chosen court according to an exclusive choice of court agreement might not be enforceable in some of the GCC States. Accordingly, the entire proceedings brought before the chosen court might be futile and a waste of time and money, which might therefore have a negative impact upon the attractiveness of those States for international business transactions. The second risk posed by the recognition and enforcement rules occurs when a foreign judgment that is obtained in

breach of a choice of court agreement is enforceable in some of the GCC States, especially if the requested court itself was the chosen court under the parties' exclusive agreement. Therefore, the effectiveness of exclusive choice of court agreements in the GCC States will also be limited, as there will be no obstacle for the party who may seek to breach the exclusive choice of court agreement, since any judgment obtained from the non-chosen court in breaching an exclusive choice of court agreement will be recognised in the other GCC States.

The chapter has also highlighted that the GCC States are members of two regional conventions that aim to harmonise the recognition and enforcement of foreign judgments between the member states. As a result, the risk of non-enforcement of any judgment that is obtained from the chosen court might be minimised, as both conventions acknowledge choice of court agreements as a basis of jurisdiction for the recognition and enforcement rules. Furthermore, the absence of the reciprocity requirement in both conventions facilitates the recognition and enforcement of a foreign judgment between the member states. However, it has been argued that, in some instances, a judgment obtained from a chosen member state might not be recognised and enforced in another member state, where the latter is effectively hearing the same dispute between the same parties, which it would not do if it recognised the derogation effect of exclusive choice of court agreements. Moreover, under both conventions, any judgment obtained in breach of a choice of court agreement might be enforceable in any member state, thereby limiting the effectiveness of choice of court agreements. Such a risk exists, because neither convention has created a basis for refusing to recognise and enforce a foreign judgment delivered in breach of a choice of court agreement.

The rules for recognition and enforcement foreign judgments in the GCC States might create a negative impact on the effectiveness of choice of court agreements. Therefore, it is argued that revising the treatment of choice of court agreements in the GCC States to lend

recognition to both the prorogation and derogation effects without also revising the recognition and enforcement rules might not be effective, as the two are closely connected. It has been suggested above that the GCC States might revise their recognition and enforcement rules by harmonising them through bilateral and international conventions. The Judgment Project highlighted above if successful, might be a viable instrument for the GCC States to consider adopting when it enters into force. Finally, the following chapter of this thesis will consider the 2005 Hague Convention, which also harmonises the recognition and enforcement of foreign judgments that are obtained from a chosen member state, thus potentially minimising the risks posed by the recognition and enforcement rules.

CHAPTER 6: THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

6.1 Introduction

Effective recognition of choice of court agreements as considered in chapter two[1] of this thesis is significant for parties in their international business transactions, as it provides legal certainty and predictability for the parties in their cross-border disputes. In that connection, the previous chapters suggested that the GCC States should reconsider their domestic rules regarding the recognition of choice of court agreements. However, without uniform rules for global judicial cooperation on the recognition of choice of court agreements, legal certainty and predictability might not be greatly achievable,[2] because each state has its own jurisdiction rules, and those rules are different from state to state in the absence of applicable international treaties or conventions.[3] Therefore, without global uniform rules on the recognition of choice of court agreements, there will be uncertainty as to whether chosen courts will accept jurisdiction and non-chosen courts will decline jurisdiction[4] in favour of the chosen court.

Since the nature of international business transactions requires a connection with more than one state, this might lead to a conflict of interest between the states in the sense that more than one state will have an interest in asserting jurisdiction over the dispute.[5] In this regard Ronald Brand argued that the harmonisation of jurisdiction rules reduces the conflict between states in exercising jurisdiction and increases the level of legal certainty and

[1] See chapter 2 section 2.3.2.
[2] Jeffrey Talpis and Nick Krnjevic, 'The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to a Mouse' (2006) 13 Sw JL & Trade Am 5.
[3] Trevor C Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press 2009) 5; Clarkson and Hill, *The Conflict of Laws* (4th edn, OUP 2011) 3.
[4] Talpis and Krnjevic (n 2) 5.
[5] ibid.

predictability, as the determination of the forum will be made according to the rules that are in the international convention or treaty rather than the domestic jurisdiction rules of a state.[6]

The issues of uncertainty and unpredictability might also exist at the level of recognition and enforcement of a foreign judgment,[7] because without uniform rules on that matter, it will be risky for the parties to predict whether their judgment obtained from a chosen court will be enforced in a state in which the assets of the judgment debtor are located. This is highlighted by the current laws of the GCC States, as considered in chapter five.[8] In the absence of a convention that harmonises the recognition and enforcement rules, the enforceability of a foreign judgment is unclear, as it requires reciprocity, and such a requirement leads to a high risk of uncertainty and unpredictability in recognition and enforcement of foreign judgments in the GCC States.[9]

In 2005, the Hague Convention on Choice of Court Agreements (Hague Convention)[10] was finalised and it sought to provide a global harmonised approach to dealing with the recognition of choice of court agreements and foreign judgments in a commercial context. It aims to 'make choice of court agreements as effective as possible'[11] in international business transactions in order to promote international trade and investment.[12]

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[6] Ronald A Brand, 'Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice' (University of Pittsburgh School of Law Working Paper 25 June 2005) 11; A clear example of the importance of having uniform rules for ensuring legal certainty and predictability for the parties in international business transactions might be found under the New York Convention. As considered in chapter two section 2.4.1.5, the widespread enforceability of arbitration agreements and awards under the New York Convention provides the parties with significant certainty and predictability, and is considered, both theoretically and empirically, to be the most attractive reason for the parties in international business transactions to conclude an arbitration agreement rather than a choice of court agreement. A further discussion on the importance of having uniform rules on the recognition of choice of court agreements can be found below in section 6.2 which illustrates the background to the Hague Convention.

[7] Ronald A Brand, 'Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law' in Bhandari J and Sykes A (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press 1997) 592–641, 613.

[8] See chapter five.

[9] For more details on the risk of the reciprocity requirement in the GCC States, see chapter five.

[10] Hague Convention on Choice of Court Agreements (30 June 2005).

[11] Trevor Hartley and M Dogauchi, 'Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements' (Prelim doc 25, 2004) <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=3> accessed 1 January 2018.

[12] Hague Convention 2005 recital.

At the negotiation stage, it was hoped that the Hague Convention could achieve, in relation to choice of court agreements, what the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) [13] had achieved for arbitration agreements in international business transactions.[14] The New York Convention, as considered in chapter two [15] of this thesis, harmonises the rules of recognition and enforcement of international arbitration agreements and foreign arbitral awards. It is considered to be a successful convention,[16] because it has been adopted by 157 countries,[17] thus providing parties with a high level of legal certainty and predictability and making them confident that their arbitration agreements and subsequent arbitral awards are likely to be recognised in most countries in the world.[18]

The widespread enforceability of arbitration agreements and awards under the New York Convention is both theoretically[19] and empirically[20] the most attractive reason for the parties in international business transactions to choose arbitration rather than litigation. This is because the parties are assured, from the start of arbitration proceedings until the granting

[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (New York Convention).
[14] Hartley and Dogauchi, Explanatory Report (n 11) 791.
[15] See chapter two of this thesis.
[16] Ronald A Brand and Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under The Hague Convention on Choice Of Court Agreements*, vol 3 (Oxford University Press 2007) 204.
[17] Status table of the New York Convention <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.> accessed 9 November 2015.
[18] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 77–80.
[19] Alan Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 22; Ronald Brand, 'Arbitration or Litigation-Choice of Forum after the 2005 Hague Convention Choice of Court Agreements' (2009) 23 Annals Fac L Belgrade Intl Ed.
[20] In 2006, an empirical study was carried out on different types of international transactions in different regions of the world. One part of the study examined the advantages of selecting international arbitration as a dispute resolution method. The results demonstrate that the widespread enforceability of arbitration agreements and foreign awards, thanks to the New York Convention, is the most attractive advantage for selecting arbitration agreements in international business transactions, see G Lagerberg and L Mistelis, 'International Arbitration: Corporate Attitudes and Practices' (Report, Price Waterhouse Coopers 2006) <http://www.arbitration.qmul.ac.uk/docs/123295.pdf > accessed 1 January 2018; Also, in 2013, a survey was made of four types of transactions, industry sector, energy, construction sector and financial services, which showed that the enforceability of international arbitration agreements and awards is one of the most important attractions of selecting arbitration agreements, Queen Mary University, 'International Arbitration Survey: Corporate Choices in International Arbitration Industry Perspectives' (2013) <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> accessed 1 January 2018.

of the arbitral award, that their agreement and subsequent award will be recognised and enforced, not just in the place where they were made, but also internationally. The Hague Convention aims to make choice of court agreements as widely recognised as arbitration agreements in order to provide the parties who seek to settle their dispute by litigation rather than arbitration with legal certainty and predictability in their international disputes.[21]

Hence, the success of the Hague Convention depends on how many states adopt it, because if the full and effective recognition of choice of court agreements becomes widely accepted, the level of certainty and predictability of litigation will be enhanced. To date, the Hague Convention has entered into force in 31 countries.[22] It has been signed and ratified by the European Union (EU), and by Mexico and Singapore. The United States and Ukraine have only signed it,[23] and eleven other states around the world are considering joining.[24]

In June 2011, the first Gulf Judicial Seminar on Cross-Frontier Legal Cooperation in Civil and Commercial Matters was held in Doha, Qatar.[25] The Permanent Bureau of the Hague Conference attended the conference and invited the GCC States to adopt some of the Hague Conventions. One of the recommendations of the conference was that the GCC Council should research 'the benefits of predictability and legal certainty provided by the 2005 Convention on Choice of Court Agreements and its resulting advantages for cross-

[21] Andrea Schulz, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements' (2006) 2 Journal of Private International Law 243, 268.
[22] Hague Convention Status table (n 17).
[23] The signature of the Hague Convention only means that a state expresses, in principle, its intention to become a party to the Convention. However, signature does not make the Convention enforceable in that state and does not in any way oblige a state to take further action (towards ratification or not). However, ratification creates a legal obligation for the ratifying state to apply the rules of the Convention. See the rules of the signature and ratification < https://www.hcch.net/en/faq> accessed 1 January 2018.
[24] According to an official seminar held by the Hague Conference in Tokyo, the states of Argentina, Australia, Canada, Costa Rica, Denmark, New Zealand, People's Republic of China, Russian Federation, Serbia, and Tajikistan are considering adopting the Hague Convention; see Marta Pertegás, 'The HCCH in 2015: Some Milestones' (Tokyo seminar, 21 December 2015) <https://www.hcch.net/en/instruments/conventions/news-archive/details/?varevent=468> accessed 1 January 2018.
[25] First Gulf Judicial Seminar on Cross-Frontier Legal Cooperation in Civil and Commercial Matters (Doha, Qatar, 20-22 June 2011) <https://www.hcch.net/en/news-archive/details/?varevent=225> accessed 1 January 2018.

border trade and investment'[26] for possible adoption of the Hague Convention. However, the GCC States have to date taken no further steps to adopt the Hague Convention, nor have they conducted research on the benefits of predictability and legal certainty in international business transactions for the GCC States. The only exception is the DIFC Court[27] located in Dubai. In 2016, the DIFC Court established the Strategic Plan 2016–2021.[28] One of the aims of the DIFC's strategic plan is to encourage the UAE Federal Government to sign and ratify the Hague Convention.[29] The strategic plan stresses the importance of the Hague Convention in facilitating the enforcement of the DIFC Court's decisions abroad.[30] However, the strategic plan did not consider in detail how the Hague Convention might benefit litigants before the DIFC Court.

Accordingly, it is significant for the purpose of this thesis to consider the Hague Convention in detail to evaluate the desirability of its adoption by the GCC States. First, this chapter will outline the historical background to the Hague Convention, followed by the scope of the convention. Finally, it will consider the rules in relation to the recognition of choice of court agreements and the recognition and enforcement of foreign judgments under the Hague Convention.

6.2 Brief Historical Background to the Hague Convention

The Hague Convention was concluded after a long period of negotiation[31] in the Working Group at the Hague Conference on Private International Law (HCCH).[32] From the end of the

[26] First Gulf Judicial Seminar (n 25) 3.
[27] The DIFC Court is considered in detail in chapter four of this thesis.
[28] See DIFC Strategic Plan 2016–2021, 13 (English) < http://difccourts.ae/difc-courts-strategic-plan-2016-2021/> accessed 7 September 2017.
[29] ibid 28, pt 9.
[30] ibid.
[31] Peter H Pfund, 'The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters' (1998) 24 Brook J Intl L 7, 13; Von Mehren, 'Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?' (1994) 57 Law & Contemp 272; Ronald Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press 2008) 5-10; Paul Beaumont, 'Hague Choice of Court Agreements Convention 2005: Background, Negotiations,

1980s to the beginning of the 1990s, international business transactions and trade grew significantly due to the emergence of technology and the development of the means of communication and transportation.[33] Free market economics became more widespread between states, rather than the policy of protectionism.[34] Furthermore, the General Agreement on Tariffs and Trade (GATT)[35] and later the World Trade Organisation (WTO)[36] and the 1980 Vienna Sales Convention[37] have contributed to the increase of international business transactions.[38] The increase in the number of international business transactions has led to an increase in global disputes and claims.[39] It soon became clear that there was no worldwide instrument governing the rules of recognition and enforcement of foreign judgments,[40] except the New York Convention that governed the rules of recognition and enforcement of arbitral awards rather than foreign judgments.[41] Accordingly, there was uncertainty and unpredictability in international business transactions about the recognition and enforcement of foreign judgments, which could negatively affect global commerce and trade.[42]

In that connection, in 1992 the Legal Adviser at the US Department of State sent a letter to the Secretary General of the HCCH to consider creation of a global convention

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Analysis and Current Status' [2009] Journal of Private International Law 127–135; Hartley and Dogauchi, Explanatory Report (n 11) 861.

[32] The Hague Conference of Private International Law is an international intergovernmental organisation that aims to harmonise international multilateral conventions on private international law. It was founded in 1893 according to Article 1 of the Statute of the Hague Conference<https://www.hcch.net/> accessed 1 January 2018.

[33] Edward CY Lau, 'Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments' (2000) 6 Ann Surv Intl & Comp L 13,14; Brand and Herrup (n 31) 3.

[34] ibid 14.

[35] General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 187 (GATT).

[36] ibid.

[37] United Nations Convention on Contracts for the International Sale of Goods (CISG) Vienna (11 April 1980).

[38] Brand, *The Economics* (n 7) 593; Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press on Demand 2003) 3 Permanent Bureau, 'Annotated Checklist of Issues to be Discussed at the Meeting' (Prelim doc 1, 1994) <https://www.hcch.net/en/instruments/conventions/publications1/?cid=98&dtid=35> accessed 1 January 2018.

[39] Lau (n 33) 14; Brand and Herrup (n 31) 3.

[40] Preliminary Document (n 38) 4.

[41] Chapter two considered that although arbitration is important in international business transactions, it cannot replace the importance of litigation for the parties in their international business disputes. Accordingly, with the existence of the New York Convention, a worldwide convention was needed to harmonise the rules of jurisdiction, recognition and enforcement of foreign judgments.

[42] Preliminary Document (n 38) 4; Brand, *The Economics* (n 7) 593.

which would harmonise the rules of recognition and enforcement of foreign judgments.[43] The US was keen on such a convention, because it was not a member of any general international convention for recognition and enforcement of foreign judgments.[44] Nonetheless, foreign judgments generally were enforced in American courts either on the basis of international comity or according to state statutes.[45] However, it was considered that the US judgments faced difficulties in being recognised and enforced in foreign courts.[46]

The ambitions of the Working Group at the HCCH extended to the creation of a global convention that harmonised the rules of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters.[47] The Working Group stressed that such a convention aimed:

> [T]o create uniform rules on recognition and enforcement of foreign judgments in order to increase predictability and legal certainty of the parties in their international business transactions. Therefore, the parties would know where to bring a suit and where their judgment would be enforceable.[48]

The Working Group considered that by providing parties with predictability and legal certainty in their international business transactions it would hopefully promote more global business transactions by assuring the parties that there was a predictable legal system for resolving global disputes and enforcing judgments throughout the world.[49] Subsequently, in November 1998, the first document containing the draft of a global convention to harmonise

[43] Brand and Herrup (n 31) 6; Pfund (n 31) 13; Hartley and Dogauchi, Explanatory Report (n 11) 861.
[44] Brand and Herrup (n 31) 4.
[45] ibid.
[46] ibid.
[47] In 1994, the Special Commission of the Hague Conference concluded that 'it would be advantageous to draw up a convention on the jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters' and recommended to the Special Commission on General Affairs and Policy of the Conference that this question be included in the agenda for the next session, see the Preliminary Document no 2 of December 1995, on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, drawn by the Permanent Bureau at point 3.
[48] Preliminary Document (n 38) 4.
[49] Lau (n 33) 14; Brand, *The Economics* (n 7) 594.

the rules of jurisdiction, recognition and enforcement of foreign judgments was issued; it was called the project of the 'Primary Draft Convention'.[50]

Brand and Herrup stressed that the majority of the negotiators at the HCCH involved in creating the provisions of the Primary Draft Convention were from European Union Member States. Consequently, the Primary Draft Convention was set out in a similar way to the Brussels Convention,[51] being influenced mainly by the civil law legal system.[52] Regrettably, the US objected to the Primary Draft Convention and argued that it became difficult for the US to continue its involvement in the development of a global convention regarding jurisdiction, recognition and enforcement of foreign judgments, because of the major differences in jurisdiction rules between the US common law approach and the civil law system.[53] Consequently, the negotiators of the HCCH limited the scope of the Primary Draft Convention[54] to business-to-business (B2B) transactions.[55] On 30 June 2005, the

[50] The draft contained several provisions on jurisdiction, recognition and enforcement of judgments, such as the basis of jurisdiction, provisional and protective matters, prohibited grounds of jurisdiction, *lis pendens*, and declining jurisdiction (*forum non conveniens*). See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission on 30 October 1999 < https://www.hcch.net/en/instruments/conventions/publications1/?cid=98&dtid=35> accessed 1 January 2018; Brand and Herrup (n 31) 8.

[51] The Brussels 1968 Convention was enforced between the European Union States governing Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. It became Brussels Regulation No 44/2001 and then Brussels I Recast 2012.

[52] Brand and Herrup (n 31) 9; Trevor Hartley, *Choice-of-court Agreements Under the European and International Instruments: The Revised Brussels I Regulation, The Lugano Convention and The Hague Convention* (Oxford University Press 2013) 21.

[53] ibid; the main arguable rules between the US and EU were *forum non conveniens*, anti-suit injunctions and *lis pendens*; for more details see Guangjian Tu, *A Study on a Global Jurisdiction and Judgments Convention* (University of Macau 2009), his book considered the main controversial issues between the US and the EU at the negotiation of the Primary Draft Convention, and he also suggested how the controversial views of the US and the EU could be reconciled.

[54] It has been suggested that limiting the scope of the Primary Draft Convention to only the rules of choice of court agreements would minimise the need for *lis pendens* and *forum non conveniens*, which were the two most problematic issues between the main negotiators on the Primary Draft Convention, the EU and the US; Andrea Schulz and Paul Beaumont, 'Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters' (Prelim doc 19, 2002); Beaumont (n 31) 134.

[55] ibid Schulz 7.

twentieth session of the HCCH completed the Hague Convention, which became open for signature and ratification.[56]

According to the negotiation history of the Hague Convention, the broad aim of the Working Group embodied in the Hague Convention on Choice of Court Agreements was to provide parties with legal certainty and predictability in their international business transactions to promote international trade and investment.

Accordingly, this chapter will consider the extent to which regulating the recognition of choice of court agreements by the Hague Convention might provide parties with legal certainty and predictability in their international business transactions.

Having outlined the historical background of the Hague Convention and its objectives, it is important to consider the scope and limitations of the core rules of the Hague Convention.

6.3 The Scope and Limitations of the Core Rules of the Hague Convention

Article 1 of the Hague Convention sets out the basic scope of the convention by providing three limitations.[57] The first limitation is that any case must be 'international',[58] which means that purely domestic cases are excluded from the Convention.[59] Such a limitation is compatible with the rules in those GCC States that recognise the prorogation effect of choice of court agreements. As considered in chapter three,[60] those GCC States also require that a case must be international to recognise a choice of court agreement, at least the prorogation effect thereof.[61] However, the traditional GCC legislation[62] considered in chapter three[63] does

[56] Final Act of the Twentieth Session of the HCCH 14–30 June 2005; Brand and Herrup (n 31) 6; Hartley and Dogauchi, Explanatory Report (n 11) 861.
[57] Hague Convention 2005 art 1; Brand and Herrup (n 31) 39; Hartley and Dogauchi (n 11) 793.
[58] Hague Convention art 1(1).
[59] Hartley and Dogauchi, Explanatory Report (n 11) 793.
[60] See chapter 3 section 3.3.2.4.
[61] Chapter three considered that the GCC States recognise only the prorogation effect of choice of court agreements.
[62] The term 'traditional legislation' will be used in this chapter to refer to the legislation of the GCC States other than the legislation of the two special courts, the BCDR Court in Bahrain and the DIFC Court in Dubai.
[63] See chapter 3 section 3.3.2.4.

not define the term 'international' for the purposes of the application of their jurisdiction rules, which, therefore, might lead to uncertainty and unpredictability in the meaning of the term 'international'. In contrast, article 1(2) of the Hague Convention defines 'international cases' by stating that 'a case is not international unless the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State'.[64] Accordingly, providing a definition of what constitutes an international case in the Hague Convention might minimise the risk of uncertainty in the GCC States because of the absence of such a definition.

The second limitation provided by article 1 of the Hague Convention is that a choice of court agreement must be 'exclusive'.[65] Accordingly, non-exclusive choice of court agreements are excluded from the scope of the Hague Convention. As was considered in chapter two,[66] the choice of the parties can be exclusive or non-exclusive in nature. Adrian Briggs criticised the exclusion of non-exclusive choice of court agreements from the Hague Convention, stressing that such agreements are important in commercial contracts.[67] Non-exclusive choice of court agreements might be important for the parties in commercial contracts by providing them with the freedom to choose a forum to settle a potential dispute that otherwise would not be competent to hear the dispute. However, non-exclusive choice of court agreements do not provide parties with the same level of legal certainty and predictability as with exclusive choice of court agreements.[68] This is because, as considered in chapter two, with exclusive choice of court agreements, the parties designate a state and

[64] Hague Convention art 1(2).
[65] ibid art 1(1).
[66] See Chapter 2 section 3.2.
[67] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 529; See also Bhumika Khatri, 'The effectiveness of the Hague Convention on Choice of Court Agreements in making international commercial cross-border litigation easier-A critical analysis' (Research Paper, University of Wellington 2016) 12.
[68] Trevor Hartley, 'The Modern Approach to Private International Law: International Litigation and Transaction from a Common-Law Perspective (vol 319)' in *Collected Courses of the Hague Academy of International Law* (Brill 2006) 111.

exclude all other competent states. Therefore, such agreements, when recognised by the courts, will have two effects: a prorogation effect (seising jurisdiction by the chosen court) and a derogation effect (declining jurisdiction by the non-chosen court). Accordingly, by recognising those two effects, the risk of parallel proceedings in different states might be minimised, as only one forum will hear the dispute. In contrast, a non-exclusive jurisdiction choice of court agreement has only one effect, the prorogation effect, as the parties designate the courts of a state or states without excluding the courts of other states that may be competent to have jurisdiction over the dispute. Accordingly, in non-exclusive choice of court agreements, more than one forum may be competent to hear the dispute. Therefore, the problem of parallel proceedings in different states may exist, causing uncertainty and unpredictability for the parties.

At the negotiation stage of the Hague Convention, the Working Group considered that if the convention included regulation of non-exclusive choice of court agreements it would also be necessary to include in the convention a *lis pendens*[69] provision to avoid the issue of parallel proceedings.[70] However, the negotiators could not reach an agreement on the *lis pendens* provision because of differences of views between the US and EU members.[71] The Preliminary Document of the Hague Convention stressed that regulating the problem of *lis pendens* raised issues that 'have been difficult to resolve in an acceptable way'.[72] Therefore,

[69] The basic idea of the *lis pendens* rules is that any court other than the first seised court must decline jurisdiction in favour of the first court seised. See Council Regulation (EC) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) art 29; James J Fawcett, *Declining Jurisdiction In Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994*, vol 14 (Oxford University Press 1995) 27; Campbell McLachlan, *Lis Pendens in International Litigation* (Brill 2009).

[70] Trevor Hartley and M Dogauchi, 'Explanatory Report on the Preliminary Draft Convention on Choice of Court Agreements' (Prelim doc 25, 2004) art 1 scope and introduction; James Fawcett and Janeen Carruthers, *Cheshire, North & Fawcett Private International Law*, vol 14 (Oxford University Press 2008) 423; Brand and Herrup (n 31) 154; Hartley and Dogauchi (n 11) 801; Thalia Kruger, 'The 20th Session Of The Hague Conference: A New Choice Of Court Convention and the Issue of EC Membership' (2006) 55 ICLQ 2, 447–456, 448.

[71] This is because the rules of *lis pendens* are generally applied in civil law countries, which is the majority of the EU members, rather than common law countries; See ibid Kruger 448.

[72] Hartley and Dogauchi (n 70) 801. For the reason behind the failure to reach agreement by the Working Group on the rules of *lis pendens* see (n 71).

the *lis pendens* provision and subsequently non-exclusive choice of court agreements were both excluded from the scope of the Hague Convention.[73] Accordingly, the failure to reach agreement by the Working Group on the rules of *lis pendens* led to the exclusion of non-exclusive choice of court agreements in order to avoid the potential for parallel litigation, which might lead to uncertainty and unpredictability. Thus, excluding non-exclusive choice of court agreements from the scope of the convention is compatible with its underlying aim of ensuring legal certainty and predictability.

Nevertheless, the Hague Convention defines exclusive choice of court agreements in a wide sense by providing that the agreement of the parties 'shall be deemed to be exclusive, unless the parties have expressly provided otherwise'.[74] According to this definition, the Hague Convention creates a presumption that any choice of court agreement is exclusive, unless the parties explicitly agreed otherwise.[75] Therefore, the presumption of exclusivity should help to ensure many, if not most, choice of court agreements will fall within the scope of the Hague Convention.[76] Moreover, article 21 of the Hague Convention provides the member states the right to extend the scope of the Convention to non-exclusive choice of court agreements only in connection with the recognition and enforcement of foreign judgments. According to article 21, a member state in some manner[77] can declare that it will recognise and enforce a judgment rendered from a chosen Member court under a non-exclusive choice of court agreement.[78] The Working Group considered that there would be no risk of parallel litigation if the recognition of non-exclusive choice of court agreements were limited only to the recognition and enforcement of foreign judgments. In summary, the Hague Convention excludes from its scope non-exclusive jurisdiction agreements in order to

[73] Hartley and Dogauchi (n 70) 802.
[74] Hague Convention art 3(b).
[75] Kruger (n 70) 449.
[76] ibid.
[77] Art 21 of the Hague Convention provides that the State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
[78] Hartley and Dogauchi, Explanatory Report (n 11) 797.

avoid any potential risk of parallel proceedings in different states which might limit legal certainty and predictability. Furthermore, the definition provided by the Hague Convention for exclusive choice of court agreements is very broad. Finally, the Convention provides the member states with an option to declare that they will recognise and enforce a judgment delivered from the chosen member in a non-exclusive choice of court agreement.

The final limitation provided by article 1 of the Hague Convention is related to the subject of the transaction between the parties. Article 1 provides that the parties' exclusive choice of court agreements must be concluded in relation to 'civil and commercial matters'.[79] Therefore, criminal and family matters are excluded from the scope of the Convention.[80] Both terms 'civil' and 'commercial' are used, because in some legal systems civil and commercial are regarded separately, even though both relate to business transactions.[81] Some commercial transactions might fall under the heading of civil matters rather than commercial matters and vice versa.[82] Accordingly, use of both terms, civil and commercial, is useful for those states that regard civil and commercial separately to avoid misinterpretation of the scope of commercial transactions under the Hague Convention.[83]

In negotiating the Hague Convention, the Working Group stressed that the Convention aimed to serve only B2B transactions[84] and that, therefore, the words civil and commercial were limited to only B2B transactions. Article 2 of the Convention defines B2B transactions through exception by excluding several transactions that are not deemed to be business transactions. [85] Article 2(1) excludes consumer[86] and employment contracts from the

[79] Hague Convention art 1(1).
[80] Hartley and Dogauchi, Explanatory Report (n 11) 808; Brand and Herrup (n 31) 48.
[81] ibid.
[82] ibid.
[83] ibid.
[84] Hartley and Dogauchi, Preliminary Document 25 (n 70).
[85] Andrea Schulz, 'Report on the first meeting of the Informal Working Group on the Judgments Project' (Prelim doc 20, 2002) 10.
[86] For the purpose of the Convention 'consumer' refers to 'a natural person acting primarily for personal, family or household purposes'; Hague Convention art 2(1)(a).

scope of the Convention.[87] Therefore, business-to-consumer (B2C) transactions and consumer-to-consumer (C2C) transactions are excluded from the scope of the Hague Conventions.[88] Furthermore, article 2(2) excludes several other subject matter areas from the scope of the Hague Convention, and these can be divided into two groups.

First, disputes related to family law and succession[89] are excluded from the Convention, appropriately in this context as they are not related to business transactions.[90] Furthermore, such family and succession disputes are generally subject to special rules of procedure which might be different from those in normal contentious litigation.[91]

Secondly, some disputes which might otherwise fall within the scope of 'civil and commercial matters' are excluded,[92] because they are either regulated in specific international instruments,[93] so that the exclusion aims to avoid conflicts of conventions,[94] or they are

[87] See Hague Convention art 2(1).
[88] Schulz, The Hague Convention (n 21) 248; Dan Jerker B Svantesson, 'The Choice of Courts Convention: How Will it Work in Relation to the Internet and E-Commerce?' (2009) 5 Journal of Private International Law 3, 517–535, 521.
[89] See art 2(2) of the Hague Convention, which excludes the subject of '(a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and successions'.
[90] Schulz, Hague Convention (n 21) 249.
[91] ibid.
[92] See article 2(2) of the Hague Convention, which excludes matters of '(e) insolvency, composition and analogous matters; (f) the carriage of passengers and goods; (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; (h) anti-trust (competition) matters; (i) liability for nuclear damage; (j) claims for personal injury brought by or on behalf of natural persons; (k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship; (l) rights *in rem* in immovable property, and tenancies of immovable property; (m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; (n) the validity of intellectual property rights other than copyright and related rights; (o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract; (p) the validity of entries in public registers'.
[93] For example, the exclusion under article 2(2)(f), which pertains to matters of 'carriage of passengers and goods' have been excluded, because such matters are regulated under The Hague–Visby Rules that regulate international rules for the international carriage of goods by sea. Art I(b) of The Hague–Visby Rules. <https://www.klgeurope.com/files/1968_hague-visby_rules.pdf>; The United Nations Convention on Contracts for the International Sale of Goods (CISG), which regulates the rules of the international sale of goods art 1 < https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>; see also Brand and Herrup (n 31) 61; Hartley and Dogauchi, Explanatory Report (n 11) 803.
[94] ibid Brand and Herrup (n 31) 61; Hartley and Dogauchi, Explanatory Report (n 11) 803.

related to governmental interests[95] over which the state might want to have exclusive jurisdiction.[96] Scholars have criticised the extensive exclusion of the second group of dispute areas, on the basis that some of the exclusions are important in global trade, and do not therefore benefit from the worldwide harmonisation of the rules of choice of court agreements in the Hague Convention.[97]

Nevertheless, Andrea Schulz has stressed that, despite the various exclusions, the Hague Convention still covers important B2B transactions in global trade, such as insurance contracts, cross-border distributorships, loan contracts, guarantees and other international commercial contracts.[98] Furthermore, limiting the scope of the convention and excluding any matters that might relate to governmental interests could be considered positive for the GCC States and other states, because they may be less concerned about adopting the Convention, as any disputes which might threaten their governmental interests have been excluded.[99] For instance, the Hague Convention excludes claims that relate to 'rights in *rem* in immovable property'. This exclusion aims to protect the territorial sovereignty of the state in which the immovable property is located.[100] Accordingly, the exclusion of immovable property is compatible with the policy of the GCC States. As has been considered in chapter three, the

[95] For example, see article 2(2)(i) which excludes 'liability for nuclear damage', article 2(2)(l), which excludes 'rights in *rem* in immovable property', and article 2(2)(h), which excludes 'anti-trust (competition) matters'. Such matters are regarded as under the state interests, over which the state would normally be interested in asserting jurisdiction exclusively; Brand and Herrup (n 31) 63 and 66; Hartley and Dogauchi, Explanatory Report (n 11) 803; Matthew B Berlin, 'The Hague Convention on Choice of Court Agreements: Creating an International Framework for Recognizing Foreign Judgments' (2006) 3 Intl L & Mgmt Rev 43, 62.

[96] For instance, the exclusion of the claims in and 'liability for nuclear damage'; see Brand Herrup (n 31) 63 and 66.

[97] Excluding the claims in matters of 'the carriage of passengers and goods' by article 2(2)(f) has been critically considered by Beaumont (n 31) 143 and Craig Forrest, 'The Hague Convention on Choice of Court Agreements: The Maritime Exceptions' (2009) 5 Journal of Private International Law 3, 491–516, 494; Furthermore, the exclusion of 'maritime claims' by article 2(2)(g) has also been critically analysed by Craig Forrest, 'The Choice of Courts Convention and the Exclusion of Maritime Claims (2009) 5 Journal of Private International Law; Brand and Herrup (n 31) 61–62, and in general see Richard Garnett, 'The Hague Choice of Court Convention: magnum opus or much ado about nothing?' (2009) 5 Journal of Private International Law 1, 161–180, section 2.1 'Coverage of the Convention'; Talpis and Krnjevic (n 2) 14–15; Berlin (n 95) 66.

[98] Schulz, Hague Convention (n 21) 249.

[99] Tu (n 53) 353.

[100] Brand and Herrup (n 31) 66.

GCC States have a firm policy about their territorial sovereignty in the regulation of cross-border disputes.

From this discussion, it can be concluded that the Hague Convention applies only to exclusive choice of court agreements concluded in B2B international transactions. Therefore, it serves particular organisations, primarily international businesses, for a particular purpose, which is the minimisation of the risk of uncertainty and unpredictability in their international business transactions. Furthermore, the Hague Convention excludes several transactions, as discussed previously, in which the state may have an interest in exercising exclusive jurisdiction. Therefore, the Hague Convention does not threaten the GCC States' interests for the type of transactions outlined above. The primary and underlying conflict between the Hague Convention and the GCC States' legal systems concerns the concept of party autonomy in choice of court agreements. As discussed, Kuwait, Saudi Arabia, Bahrain and Oman recognise only the prorogation effect and not the derogation effect of choice of court agreements, while the UAE traditional laws do not recognise either prorogation or derogation effects. Nevertheless, it has been suggested in chapter three that the GCC States should reconsider their traditional approach regarding the recognition of choice of court agreements, because such an approach is no longer compatible with the development of human rights and with economic developments.

Having outlined the scope of the Convention, its core rules in regulating the recognition of exclusive of choice of court agreements and the recognition and enforcement of foreign judgments will now be considered.

6.4 The Core Rules of the Hague Convention

The Hague Convention sets out three core rules to achieve its objectives.[101] First, the court chosen by the parties to resolve disputes shall hear the case (prorogation effect).[102] Secondly,

[101] Hartley and Dogauchi, Explanatory Report (n 11) 791.

any court not chosen by the parties shall decline to hear the case (derogation effect).[103] Thirdly, any judgment of the chosen court shall be recognised and enforced in other contracting states.[104] The three core rules will be considered below to assess how the Hague Convention can benefit the parties to international business transactions by minimising the risks of uncertainty and unpredictability.

6.4.1 The Recognition of the Prorogation Effect

Article 5(1) of the Hague Convention provides that the court of a contracting state nominated by the parties in an exclusive choice of court agreement shall have jurisdiction, unless the agreement is null and void.[105]Article 5(1) does not require a connection between the parties or the dispute with the chosen court in order for the chosen court to accept jurisdiction.[106] Therefore, the Hague Convention provides the parties with real autonomy in choice of court agreements. This is because, as argued in chapter three,[107] any approach which limits party choice, only to courts that have a territorial connection with the parties or dispute, is essentially an attempt to balance effective recognition of choice of court agreements with considerations of territorial sovereignty rather than to recognise the autonomy of the parties.[108] Accordingly, the Hague Convention obliges the chosen court of a contracting state to accept jurisdiction when the choice of court agreement is valid.

However, it is important to stress that the Hague Convention provides joining states the right to declare under article 19 that their courts can refuse to accept jurisdiction where they have been chosen exclusively by the parties if 'there is no connection between that State and the parties or the dispute'.[109] Article 19 provides the court of a contracting state with a discretionary declaratory power in determining whether it will recognise the prorogation

[102] Hague Convention art 5.
[103] ibid art 6.
[104] Hague Convention art 8.
[105] ibid art 5(1).
[106] Hartley and Dogauchi, Explanatory Report (n 11) 815.
[107] See chapter 3 section 3.3.1.
[108] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BYIL 1, 187–239, 231.
[109] Hague Convention art 19.

effect or not according to the circumstances of each case, since article 19 uses the term 'may' rather than 'shall'.[110] Accordingly, it is argued that the declaration provided by article 19 might limit legal certainty and predictability for the parties, because they cannot predict whether the chosen court of a contracting state which made a declaration pursuant to article 19 will recognise the prorogation effect. Nevertheless, the declaration according to article 19 can also be considered in a positive light. It can be construed as accommodating those states that are concerned about the effect on territorial sovereignty of the recognition of the prorogation effect by not allowing parties to choose their courts, when the transaction is completely foreign to the forum.[111] Therefore, article 19 aims to avoid obstacles to the adoption of the Hague Convention for those states, and this may therefore facilitate the adoption of the Hague Convention by different legal systems.

It might not be a significant issue if only a few states joined the Hague Convention and invoked article 19. However, the more states use article 19, the more uncertainty and unpredictability will arise in relation to the recognition of the prorogation effect under the Hague Convention,[112] as the obligation of the chosen court in accepting jurisdiction under articles 5(1) and 5(2) will be limited.[113] The right of declaration under article 19 would not be significant for the GCC States, if they consider adopting the Hague Convention, since, as has been outlined in chapter three,[114] all of the GCC States except the United Arab Emirates (UAE) recognise the prorogation effect, even where there is no connection between the chosen GCC State and the parties or the dispute. Therefore, if the GCC States consider adopting the Hague Convention, it is unlikely that they will make a declaration pursuant to

[110] Brand and Herrup (n 31) 147; Khatri (n 67) 16.
[111] Hartley and Dogauchi, Explanatory Report (n 11) 841.
[112] No party to the Hague Convention has made a declaration pursuant to article 19 so far, see <https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=98> accessed 10 January 2018.
[113] Brand and Herrup (n 31) 84; Schulz, Hague Convention (n 21) 259; Christian Thiele, 'The Hague Convention on Choice of Court Agreements: Was it Worth the Effort?' in E Gottschalk and others (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press, 2007) 74; Paul Beaumont (n 31) 149; Ahmed Mukarrum, *The Nature and Enforcement of Choice of Court Agreements: a comparative study*. (Bloomsbury Publishing 2017) ch 10 s III.
[114] See chapter 3 section 3.3.1.

article 19. In the case of the UAE, article 19 might be a way in which party autonomy can be recognised as a basis of jurisdiction only where there is a territorial connection between the parties or the dispute, thus safeguarding its territorial sovereignty.

In article 5(2), the Hague Convention provides that the chosen court cannot decline jurisdiction on the basis that the dispute shall be settled in another court.[115] The explanatory report of the Hague Convention provides that the rationale for article 5(2) is to prevent the chosen court from applying the doctrines of *lis pendens* and *forum non conveniens*.[116] It will be observed below that these two doctrines are excluded from the Hague Convention because they might have a negative impact upon the effectiveness of choice of court agreements.

A. *Forum non conveniens*

Forum non conveniens is a doctrine that first appeared in Scotland[117] and was subsequently adopted by several common law jurisdictions.[118] It provides a forum with a broad discretionary power to decline jurisdiction according to the circumstances of each case on the basis that there is another forum more appropriate to settle the dispute.[119] In contrast, the objective of the Hague Convention is to provide the parties with legal certainty and predictability in their international business transactions by providing them with the freedom to choose where to litigate exclusively.[120] This provides parties with certainty and predictability about the forum for any subsequent dispute between them. If the chosen court had discretion to decline jurisdiction according to the circumstances of each case, there

[115] Hague Convention art 5(2).
[116] Hartley and Dogauchi, Explanatory Report (n 11) 817; Brand and Herrup (n 31) 82 and 83.
[117] For the history and development of *Forum Non Conveniens* see Brand and Jablonski, *Forum non conveniens* (n 16); Edward L Barrett, 'The Doctrine of Forum Non Conveniens' (1947) California Law Review 380–422, 386.
[118] James Fawcett (n 69) 10; For example, article 3135 of the Civil Code of Quebec 1994 allows the court to decline jurisdiction where the foreign court is in a better position to decide the case. One of the factors for consideration is the achievement of the parties' interests. Japanese courts would also decline jurisdiction in order to ensure justice and maintain fairness between the parties; see *Michiko Goto et al v Malaysian Airlines System Berhad* 26 Japanese Annual of International Law 122 (1983); For more details Fawcett provides a comparative overview of the recognition in *forum non conveniens* by different common law jurisdictions.
[119] Fawcett (n 69) 10.
[120] ibid 8.

would be a risk of uncertainty and unpredictability about whether the chosen court would accept jurisdiction by recognising the prorogation effect of the choice of court agreement or would apply its discretion and decline jurisdiction on the basis of *forum non conveniens*. Accordingly, providing the chosen court with the discretion to accept jurisdiction might reduce certainty and predictability for the parties and, therefore, have a negative impact upon the effectiveness of exclusive choice of court agreements.[121]

In terms of the inconsistency between the doctrine of *forum non conveniens* and principles of legal certainty and predictability, there is a notable case in the European Union known as *Owusu*[122] where a ruling was made by the European Court of Justice (ECJ).[123] The ECJ had ruled on whether the English court could apply the doctrine of *forum non conveniens* and decline jurisdiction even though it had jurisdiction according to the jurisdiction rules under the Brussels Convention.[124] Although the *Owusu* case was not related to a choice of court agreement, it considered the application of the doctrine of *forum non conveniens* in the context of the principles of legal certainty and predictability. Therefore, it is relevant to the discussion in this chapter. The case was related to Mr Owusu, who was domiciled in England and Wales, and who was seriously injured during his vacation in Jamaica.[125] He raised an action in the English courts against Mr Jackson, who was the owner of the building where he had stayed during his vacation and was injured,[126] together with five Jamaican companies,

[121] Brand and Herrup (n 31) 83.
[122] C–281/02 *Andrew Owusu v NB Jackson, trading as Villa Holidays Bal-Inn Villas and Others* [2005] ECR I-1383.
[123] The ECJ has been the authority to interpret the Brussels Convention by the Protocol signed on 3 June 1971. The Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L304/50), granted the ECJ the authority to interpret the Brussels Convention when it became a regulation by article 234 of the EC Treaty.
[124] For more consideration of the *Owusu* case, see Adrian Briggs (n 67) 291; Petr Briza, 'Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser-Owusu Disillusion' (2009) 5 J Priv Intl L 537, 542; Brand, Balancing Sovereignty (n 6) 22; Justin Cook, 'Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements' (2013) 4 Aberdeen Student L Rev 76, s 2.
[125] *Owusu* case (n 122) 1451.
[126] ibid.

which managed and supervised the building.[127] The defendants claimed that the English court had to decline jurisdiction on the basis of the doctrine of *forum non conveniens,* as, except for Mr Jackson, all other defendants were domiciled in Jamaica, and the accident had occurred in Jamaica. Therefore, they argued that the Jamaican courts would be a more appropriate forum to settle the dispute than the English courts.[128] The Brussels Convention applied to the case, because one of the defendants was domiciled in the UK, a member of the European Union. The English courts had jurisdiction according to article 2 of the Convention.[129] Nevertheless, the English Court of Appeal asked the ECJ to clarify whether the English courts could apply the doctrine of *forum non conveniens* where the court had jurisdiction on the basis of the defendant's domicile under Article 2 of the Brussels Convention. The ECJ ruled that the application of the doctrine of *forum non conveniens* by the English courts was excluded where the Brussels Convention applies, because that doctrine 'is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently would undermine the principle of legal certainty, which is the basis of the Convention'. [130]

Regardless of whether the English courts or the Jamaican courts were more appropriate to settle the dispute, the importance of the ECJ decision for the purpose of this chapter is to stress that the doctrine of *forum non conveniens* was regarded as being in conflict with the principles of legal certainty and predictability. Similarly, the provisions of article 5(2) of the Hague Convention preventing the use of *forum non conveniens* where there is an exclusive choice of court agreement minimises the risk of uncertainty and unpredictability, thus increasing the effectiveness of choice of court agreements. Nevertheless, the right of declaration under article 19 might limit the benefits of article 5(2),

[127] *Owusu* case (n 122) 1451.
[128] ibid 1452.
[129] ibid 1451.
[130] ibid 1461.

because, as discussed above, it gives a state that has made a declaration the discretion to accept the prorogation effect or not according to the circumstances of each case. Having considered the benefit of excluding the doctrine of *forum non conveniens* from the scope of the Hague Convention, it is important to consider the issues surrounding the *lis pendens* doctrine.

B. *Lis pendens*

Unlike *forum non conveniens*, the *lis pendens* doctrine is applied mainly in civil law jurisdictions.[131] It requires that any court other than the court first seised involving the same cause of action between the same parties must decline jurisdiction in favour of the first court.[132] Article 5(2) of the Hague Convention prevents the chosen court from applying the doctrine of *lis pendens* when there is an exclusive choice of court agreement, because that doctrine might negatively impact upon the effectiveness of the choice of court agreement.[133]

A clear example of this in the EU is found in the 2003 ruling by the ECJ in the *Gasser* case.[134] The *Gasser* case concerned the interplay between the respective rules in article 21 of the Brussels Convention on *lis pendens*[135] and article 17 of that Convention, on choice of court agreements.[136] The case involved the Gasser company that entered into a contract for the supply of children's clothing with an Italian distributor.[137] The contract had a choice of

[131] See Recast art 29 (n 69); Fawcett (n 69) 27.
[132] ibid.
[133] Brand and Herrup (n 31) 82.
[134] C–116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693. For more consideration on the conflict between the *lis pendens* doctrine and exclusive choice of court agreements, see Jonas Steinle and Evan Vasiliades, 'The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy' (2010) 6 Journal of Private International Law 3, 569–573; Brand, Balancing Sovereignty (n 6) 20 ; Cook (n 124) s 2; Briza (n 124) 539.
[135] Article 21 of the Brussels Convention (n 51), which provides that, 'where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court', became article 29 by the 2012 amended Brussels I Recast (n 131).
[136] Article 17 of the Brussels Convention provides: 'If the parties, one or more of whom is domiciled in a contracting state, have agreed that a court or the courts of a contracting state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction'; Article 17 became article 25 by the 2012 amended Brussels I Recast (n 131).
[137] *Gasse*r case (n 134) at I-14728.

court agreement which favoured the Austrian courts.[138] However, the Italian distributor breached the choice of court agreement by suing Gasser in a court in Rome seeking a declaration that the contract had been terminated.[139] Thereafter, Gasser sued the Italian distributor in the chosen court in Austria relying on article 17 of the Brussels Convention that obliges the chosen court to accept jurisdiction.[140] The Italian distributor argued before the Austrian chosen court that it should dismiss or decline jurisdiction in favour of the court first seised, according to article 21 of the Brussels Convention,[141] on the basis that any court other than the court first seised must stay its proceedings until such time as the jurisdiction of the court first seised is established.[142] Subsequently, the Austrian chosen court referred the matter to the ECJ to clarify whether it had to stay jurisdiction on the basis of *lis pendens* provided by article 21 of the Brussels Convention, even though it had exclusive jurisdiction according to the choice of court agreement.[143] It also asked the ECJ whether its decision depended to any extent upon whether the first-seised court may take an excessive amount of time in deciding whether it had jurisdiction.[144]

The ECJ ruled that the *lis pendens* rule is mandatory and has priority over the rule on choice of court agreements provided by article 17, in order to prevent parallel proceedings, regardless of the amount of time taken by the first-seised court in determining its jurisdiction.[145] The ECJ's decision in the *Gasser* case was heavily criticised by scholars[146] as

[138] *Gasse*r case (n 134) at I-14728.
[139] ibid.
[140] ibid.
[141] ibid.
[142] Article 21 of the Brussels Convention (n 51).
[143] *Gasse*r case (n 134) at I-14730.
[144] ibid.
[145] ibid at I-14749.
[146] R Fentiman, 'Jurisdiction Agreements and Forum Shopping in Europe' [2006] Journal of International Banking and Financial Law 304; Trevor Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813, 827; Sir Anthony Clarke, 'The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales' [2007] European Business Law Review 101; Adrian Briggs, 'The Impact of Recent Judgments of the European Court on English Procedural Law and Practice' [2005] Zeitschrift für Schweizerisches Recht 231; Adrian Briggs, 'Anti-suit Injunctions and Utopian Ideals' (2004) 120 LQR 529; Steinle and Vasiliades (n 134) 569–573; Cook (n 124) s 2; Briza (n 124) 539.

seriously harming the effectiveness of exclusive choice of court agreements. First, because it gives the breaching party a tactical advantage to delay the other party from suing the breaching party in the chosen court.[147] Secondly, if the first-seised court has a slow judicial system, it will take a considerable time to decide whether it has jurisdiction, thereby further delaying any litigation before the chosen court by the non-breaching party.[148] As a result, the non-breaching party might incur economic loss, given time is of paramount importance in business transactions and consequently commercial litigation.[149] Thirdly, the non-breaching party might be completely prevented from litigating before the chosen court, if the first-seised court decides according to its domestic law that the exclusive choice of court agreement is invalid, even where the chosen court would have decided that the agreement would be valid.

Following criticism of this ruling and the relationship between the rules on *lis pendens* and prorogation agreements, the 2012 reform of the Brussels I regime led to its replacement by the Brussels I Recast Regulation, which contains revised rules on *lis pendens*.[150] Article 31(2) of the Brussels I Recast provides that, when an agreement as referred to in article 25 confers exclusive jurisdiction on a court of a Member State, and that court seises jurisdiction, any court of another Member State shall stay the proceedings, until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.[151] Therefore, according to article 31(2), the Brussels I Recast reverses the effect of the ruling in *Gasser* and gives exclusive choice of court agreements priority over *lis pendens.*

[147] Briza (n 124) 541; Hartley (n 146) 816; Steinle and Vasiliades (n 134) 573.
[148] ibid Hartley 817 and 8118.
[149] Hartley (n 146) 816.
[150] See article 31(2) of the Brussels I Recast. For more detail on this amendment, European Commission, 'Report on the Application of Council Regulation (EC) No 44/2001' (2009) COM 174, 17; Sophia Tang, 'Conflicts of Jurisdiction and Party Autonomy in Europe' (2012) 59 Netherlands International Law Review 3, 321–359, 353.
[151] Article 31(2) Brussels I Recast (n 131).

Accordingly, the Hague Convention avoids any such risks to the effectiveness of exclusive choice of court agreements that developed under the Brussels Convention by excluding the *lis pendens* doctrine from the scope of the Hague Convention by article 5(2).

Therefore, article 5(2) prevents the contracting state from applying the doctrines of *forum non conveniens* and *lis pendens* to ensure the greater effectiveness of choice of court agreements. In that sense, even were they to adopt the Hague Convention, article 5(2) would not change the current GCC States' laws, as these States, with exception of the DIFC Court,[152] do not apply either the *forum non conveniens* or *lis pendens* doctrines. However, excluding those doctrines will benefit international businesses that operate in the GCC States, as there will be no risk that the doctrines of *forum non conveniens* or *lis pendens* will be applied, even if they choose a forum that otherwise applies those doctrines.

The Hague Convention gives the parties the right to choose where to litigate by obliging the chosen contracting state to accept jurisdiction, even if it has no connection with the parties or with the dispute. Furthermore, the Hague Convention prevents the chosen court from applying the doctrines of *forum non conveniens* or *lis pendens*, so that the parties can be certain that the chosen court will accept jurisdiction. The regulation of the recognition of the prorogation effect by article 5(1) of the Hague Convention does not threaten the public interest of the GCC States, because, as has been considered in chapter three, they recognise the prorogation effect, even if there is no territorial connection between the parties or the dispute with the chosen GCC State. The only GCC State legal system to which article 5(1) potentially poses a risk is the UAE, as the UAE does not recognise the prorogation effect entirely. However, as has been argued in chapter three, the UAE should reconsider its traditional approach regarding the recognition of choice of court agreements, as it is no longer compatible either with the development of human rights or economic development.

[152] The legal system of the DIFC Court, as considered in chapter four, is based on a common law system rather than a civil law system, which therefore applies the doctrine of *forum non conveniens*. For more detail, see chapter four of this thesis.

Nevertheless, the Hague Convention provides a right for states, in balancing the recognition of choice of court agreements and the safeguarding of territorial sovereignty, to issue a declaration under article 19 by accepting the prorogation effect only where there is a territorial connection between the parties or the dispute with the UAE. Having considered the first core rule of the Hague Convention, it is important to consider the second, concerning recognition of the derogation effect.

6.4.2 Recognition of the Derogation Effect

Article 6 of the Hague Convention provides that the court of a contracting state other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.[153] Article 6 complements article 5 to ensure the effectiveness of exclusive choice of court agreements by preventing parallel proceedings in two different courts, as it obliges every non-chosen court to refuse to hear the dispute. Nevertheless, article 6 provides several exceptions for the non-chosen court to refuse to decline jurisdiction in favour of the chosen court. These will be considered below. Some of the exceptions do not compromise the effectiveness of choice of court agreements, while others might limit the effectiveness of such agreements.

Article 6 contains an exception to the recognition of the derogation effect of exclusive of choice of court agreements where such agreement is null and void.[154] The non-chosen seised court does not have an obligation under the Hague Convention to decline jurisdiction where the agreement of the parties is invalid. This exception is justifiable, as without a valid choice of court agreement there can be no justification for the seised court to decline jurisdiction, where it has jurisdiction according to its domestic jurisdiction rules. However, it might be argued that the issue of parallel litigation between two different courts might exist under the Hague Convention, as it does not confer sole competence on the chosen court to

[153] Hague Convention art 6.
[154] ibid art 6(a).

interpret the choice of court agreement. An example of the risk of parallel litigation under the Hague Convention would be where a seised court interprets a choice of court agreement as invalid and refuses to decline jurisdiction under article 6, while the chosen court interprets the agreement as valid and accepts jurisdiction under article 5. This would result in parallel proceedings in two different courts.[155] However, to minimise the possibility of conflicting interpretations of the validity of a choice of court agreement by two courts, which might lead to parallel litigation, the Hague Convention specifies a clear choice of law rule that obliges the chosen court and the seised court to apply the same domestic law, the law of the chosen court, to determine the validity of the choice of court agreement.[156]

If the Hague Convention provided sole competence to the chosen court to determine the validity of a choice of court agreement, it would not be effective in minimising the risk of parallel litigation, as the *Gasser* problem discussed previously[157] would arise, because the chosen court might spend an excessive amount of time deciding whether the agreement of the parties was valid. Accordingly, a party who seeks to delay the other party from filing suit would have a tactical advantage by starting proceedings before any court of a contracting state and claiming that there is an exclusive choice of court agreement in favour of that court. Consequently, the other party would be prevented from filing suit in the chosen court, as the chosen court would be compelled to wait for a decision by the seised court. Accordingly, it is suggested that the solution adopted by the Hague Convention to minimise the issues of conflicting interpretations and parallel litigation, whereby the chosen court and any seised court must apply the same domestic law in determining the validity of the choice of court agreement, is a more effective solution than providing the chosen court sole competence to determine the validity of a choice of court agreement.

[155] Brand (n 6 & 7).
[156] See Hague Convention arts 5(1) and 6(a).
[157] See above section 6.4.1 point B.

The second exception which allows the seised court to refuse to decline jurisdiction when there is an exclusive choice of court agreement is when a party lacked the capacity to conclude the agreement.[158] This scenario may, in any event fall, within the first exception, when the parties' agreement is null and void, as lack of capacity in general renders an agreement null and void.[159] However, the exception for lack of capacity is specified in the convention separately to cover those legal systems that do not regard capacity matters under the heading of null and void.[160]

The third exception when the seised court can refuse to decline jurisdiction is when declining jurisdiction would lead to a 'manifest injustice' or would be manifestly contrary to the 'public policy' of the forum.[161] This exception is ambiguous,[162] as the text of the Hague Convention does not define either 'manifest injustice' or 'public policy'. The only reference to 'manifest injustice' might be found under the explanatory report of the Hague Convention, which provides examples when declining jurisdiction would lead to a manifest injustice.[163] It provides that manifest injustice might occur when, for instance, one of the parties would not get a fair trial in the chosen court because of bias or corruption, or when other reasons prevent the party from bringing or defending proceedings in the chosen court. Accordingly, the manifest injustice exception might be justified to avoid any potential risk of injustice to one of the parties caused by the non-chosen court declining jurisdiction. However, it has been argued that the exception of manifest injustice must be applied narrowly to avoid uncertainty and unpredictability for the parties.[164] The absence of a clear definition of 'manifest injustice' in the Hague Convention might lead to the risk that a contracting state gives the exception a

[158] Hague Convention art 5(b).
[159] Brand and Herrup (n 31) 90; Hartley and Dogauchi, Explanatory Report (n 11) 821.
[160] Brand and Herrup (n 31).
[161] ibid article 6(c).
[162] William J Woodward, 'Saving the Hague Choice of Court Convention' (2007) 29 U Pa J Intl L 657, 672; Talpis and Krnjevic (n 2) 24.
[163] Hartley and Dogauchi, Explanatory Report (n 11) 821.
[164] Brand and Herrup (n 31) 93.

wide scope of application and thereby undermines the obligation to decline jurisdiction under article 6, which, therefore, would limit the effectiveness of choice of court agreements.

The risk might be greater with the second term, 'public policy', as neither the text of the Hague Convention nor its explanatory report clarifies the meaning of 'public policy' for the purpose of the article 6 exception.[165] The lack of a definition of 'public policy' in the Hague Convention might allow a particular contracting state to exercise broad discretion and refuse to decline jurisdiction in order to protect its interests in exercising jurisdiction.[166] For example, a court of a contracting state might refuse to decline jurisdiction in favour of the chosen court on the basis of the public policy exception, simply because the dispute or the parties have a closer connection with the forum than with the chosen court or because the chosen court has no connection with the parties or the dispute.[167] Accordingly, the public policy exception, which provides the seised court with authority to refuse to decline jurisdiction in favour of the chosen court, is ambiguous and might undermine the obligation to decline jurisdiction under article 5. This is especially true given the strictly limited scope of the Hague Convention,[168] which excludes a range of transactions over which the state might be interested in asserting exclusive jurisdiction. Therefore, it is suggested that the public policy exception in article 6 is unnecessary and might undermine the obligation to decline jurisdiction under article 5 by providing the seised court with broad discretion to refuse to decline jurisdiction in favour of the chosen court.

Fourthly, the seised court can refuse to decline jurisdiction when the parties cannot reasonably perform their agreement for exceptional reasons beyond their control.[169] This exception allows the seised court to refuse to decline jurisdiction when it is not possible for

[165] Talpis and Krnjevic (n 2) 24.
[166] William Woodward (n 162) 672; Thiele (n 113) 77.
[167] Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: its likely impact on Australian practice' (2009) 5 Journal of Private International Law 2, 39.
[168] ibid 14.
[169] Hague Convention art 6(d).

the parties to litigate before the chosen court.[170] This would arise, for instance, when there is a war in the state where the chosen court is located[171] or when the chosen court no longer exists,[172] or it has changed entirely so that it cannot be regarded as the same court as that chosen by the parties.[173]

An example of this exception as the basis for refusing to decline jurisdiction in favour of the chosen court can be found in the case of *Carvalho v Hull Blyth Ltd.*[174] In the *Carvalho* case, an exclusive choice of court agreement nominated the District Court of Luanda, Angola.[175] However, the English court refused to decline jurisdiction in favour of the Luandan court.[176] Its decision was based on two grounds. First, it was impossible to give effect to the chosen District Court of Luanda, because it no longer existed.[177] Although there was still a court named the District Court of Luanda when the contract was signed, Angola was an overseas province and, in effect, a colony of Portugal. Thus, it was part of the Portuguese judicial system; the judges were Portuguese and Portuguese law applied. However, this changed when Angola gained independence after a period of protracted guerrilla war that occurred before the last sum of the payment was due. Thus, it was impossible to give effect to the court intended by the parties at the time of their agreement.[178] Secondly, the plaintiff would not get a fair trial in the chosen court, because, since he was Portuguese, there was a risk to his life if he were to go to Angola.[179] Accordingly, the refusal of the English court to decline jurisdiction was based on sufficient reasons to ensure justice. Therefore, the exception when the parties cannot reasonably perform their agreement in

[170] Hartley and Dogauchi, Explanatory Report (n 11) 821.
[171] ibid 822.
[172] ibid.
[173] ibid.
[174] *Carvalho v Hull Blyth Ltd* [1974] 1 WLR 1228; [1979] 3 All ER 280; [1980] 1 Lloyds's Rep 172 (CA England). For more consideration of this case, see Briggs (n 67) 230.
[175] ibid *Carvalho* at 1231.
[176] ibid at 1229.
[177] ibid.
[178] ibid.
[179] ibid.

exceptional reasons beyond their control under the Hague Convention is necessary to avoid any potential risk of injustice that might occur to one or all of the parties from declining jurisdiction.

Finally, the seised court can refuse to decline jurisdiction when the chosen court has decided not to hear the case[180] to avoid the risk of the denial of justice.[181] If the chosen court refuses to take jurisdiction, and the seised court declines jurisdiction, there will be a risk that the party who seeks to start proceedings will have no court from which to obtain relief. Nevertheless, this exception might be covered by the previous exception, when the parties cannot reasonably perform their agreement for exceptional reasons beyond their control, as both exceptions are based on avoiding any injustice for the parties arising from the declining of jurisdiction.[182]

This discussion outlines that article 6, which regulates the derogation effect of choice of court agreements, ensures the effectiveness of choice of court agreements, as it provides the parties in their international business transactions with greater legal certainty and the predictability that any court other than the chosen court will decline jurisdiction in favour of the chosen court. Although article 6 contains several exceptions to the rules on the recognition of the derogation effect, most of those exceptions aim to avoid any potential risk of injustice that might occur to the parties if jurisdiction is declined. The only exception which is arguably problematic is when the seised court can refuse to decline jurisdiction if it decides that declining jurisdiction would lead to a 'manifest injustice' or would be manifestly contrary to the 'public policy' of the forum. These exceptions to the recognition of the derogation effect might reduce the certainty and predictability for parties in their international business transactions, as neither manifest injustice nor public policy are defined, and this might therefore lead to the risk that certain contracting states may interpret such terms

[180] Hague Convention art 6(e).
[181] Hartley and Dogauchi, Explanatory Report (n 11) 823.
[182] ibid.

broadly and undermine the obligation under article 6 to decline jurisdiction in favour of the chosen court.

Nevertheless, article 6, which regulates the derogation effect under the Hague Convention, would significantly change the current legal position in the GCC States, if it were to be adopted by them. As has been considered above, the courts of the GCC States, except the DIFC Court, do not recognise the derogation effect of choice of court agreements. Therefore, by adopting the Hague Convention in the GCC States, the parties to international businesses transactions would be able to choose to litigate in a chosen court without the risk that a non-chosen court in the GCC States would take jurisdiction when the exclusive choice of court agreement is breached. Accordingly, the risk of parallel litigation between different courts would be significantly minimised in the GCC States by adopting the Hague Convention because of the regulation of the derogation effect under article 6.

Before considering the last core rule of the Hague Convention, which pertains to the recognition and enforcement of foreign judgments, it is important to outline some aspects of the validity of choice of court agreements under the Hague Convention.

6.4.3 Aspects of Validity of the Choice of Court Agreement in the Hague Convention

The Hague Convention provides rules regarding the formal validity of the choice of court agreement to avoid potential risks of conflict in interpreting a choice of court agreement by the contracting states.

First, the Hague Convention has a rule which makes provision and gives guidance in determining whether a choice of court agreement is exclusive or non-exclusive for the purposes of the Convention.[183] Article 3(b) specifies that 'the choice of court agreement shall be deemed to be exclusive unless the parties have expressly provided otherwise'. [184] Accordingly, the Hague Convention minimises the risk of conflict in interpreting whether the

[183] Hague Convention art 3(b).
[184] ibid.

agreement of the parties is exclusive by applying the national laws of each contracting state.[185] The conflict between states in interpreting whether an agreement between the parties is exclusive might cause significant risk for the parties in the recognition of their choice of court agreement. A clear example of that risk appears in *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd*,[186] a case regarding the recognition and enforcement of two inconsistent foreign judgments. The Hong Kong court[187] received two requests for recognition and enforcement from foreign jurisdictions, one judgment rendered by the Chinese courts and the other one rendered by the English courts.[188] Both judgments involved the same dispute with the same parties.[189] The inconsistent judgments occurred because the contract that was the subject of those two foreign judgments contained a choice of court agreement that nominated the English courts to settle any dispute that might arise out of the contract.[190] However, one of the parties started proceedings in a Chinese court and claimed that the choice of court agreement in the contract was non-exclusive and that the Chinese courts had jurisdiction over the dispute according to their domestic jurisdiction rules.[191] Subsequently, the Chinese courts regarded the agreement as non-exclusive and delivered a judgment on the dispute, as the Chinese courts were competent according to their domestic jurisdiction rules.[192] In contrast, the other party started proceedings in an English court and claimed that the choice of court agreement was exclusive and that the English courts should settle the dispute rather than the Chinese courts.[193] The English court accepted

[185] Talpis and Krnjevic (n 2) 9.
[186] *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2016] HKCFA 79. The case is discussed by Felix W H Chan in 'Inconsistent foreign judgments on exclusivity of jurisdiction: Comity and judicial deference' (2017) JIML.
[187] ibid Chan 2.
[188] ibid.
[189] ibid.
[190] ibid.
[191] ibid.
[192] *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* (2013) ZXZZ no 144 dated 20 December 2013 (Higher People's Court of Zhejiang) from Felix (n 186) 5.
[193] *Hin-Pro International Logistics Ltd v Compania Sud Americana de Vapores SA* [2014] EWHC 3632 (Comm).

the claimant's argument, regarded the choice of court agreement as exclusive and delivered a judgment on the dispute on the basis of party autonomy as grounds for exercising jurisdiction.[194] Accordingly, because of the conflict between the English and Chinese courts in interpreting the choice of court agreement as exclusive or non-exclusive, the parties risked losing money and time because of the parallel litigation and resulting inconsistent judgments.

Therefore, the existence of clear guidance in determining whether the choice of court agreement is exclusive or non-exclusive in the Hague Convention is significant for parties in providing certainty and predictability regarding the effectiveness of their choice of court agreement in order to avoid parallel litigation and inconsistent judgments. Furthermore, the clear provision for determining what constitutes exclusive and non-exclusive choice of court agreements under the Hague Convention would fill the gap in the GCC States' laws, because, as has been considered in chapters three[195] and four,[196] the traditional laws of the GCC States and the special courts in Bahrain and Dubai are silent on the classification of exclusive and non-exclusive choice of court agreements.

The second rule regarding the validity of choice of court agreements in the Hague Convention is that it specifies the only two methods by which the parties can conclude their choice of court agreement. The first is that the parties' agreement must be concluded in 'writing'.[197] This is compatible with the scope of the Convention, which is limited only to exclusive choice of court agreements. In exclusive choice of court agreements, as considered in the second chapter, the parties aim to choose a particular court to settle their dispute and exclude all other competent courts. Accordingly, the agreement of the parties should be sufficiently clear, as it will exclude all other competent courts. Therefore, the requirement that the parties' agreement is in writing is compatible with the scope of the Convention. The

[194] Felix (n 186) 3.
[195] See chapter 3 section 3.3.2.1.
[196] See chapter 4 section 4.2.1 and 4.3.2.
[197] Hague Convention art 3(c)(i).

second alternative is that the agreement of the parties can be concluded or documented 'by any other means of communication which renders information accessible so as to be usable for subsequent reference'.[198] This alternative aims to cover transactions that are concluded by electronic means,[199] which is therefore of benefit to parties who conclude transactions via the Internet.[200] Accordingly, adopting the second alternative in concluding choice of court agreements is positive, as it makes the Convention compatible with the development of technology and the Internet era.[201]

Thirdly, the Hague Convention provides clear choice of law rules to determine which law must be applied to determine the validity of the choice of court agreement. In relation to the recognition of the prorogation effect, the Hague Convention requires the chosen court to apply its domestic law to decide whether the agreement is valid or null and void, and consequently whether to accept jurisdiction or not. Furthermore, regarding the derogation effect, the Hague Convention requires the non-chosen court to apply the domestic law of the chosen court to decide whether the agreement is valid or null and void. In relation to capacity to contract, the Hague Convention requires the non-chosen court to apply its domestic law. Providing clear choice of law rules for determining the validity of a choice of court agreement is significant for the parties in their international business transactions, because they will be able to predict in advance which law shall apply to their choice of court agreement, so that they may draft their agreement according to that law and ensure that the clause is not null and void. The effect of the choice of law rules on the validity of the choice of court agreement will close the lacunae in the laws of the GCC States, including the

[198] Hague Convention art 3(c)(ii).
[199] Brand and Herrup (n 31) 46.
[200] Dan Jerker (n 88) 533 argued that the method that the Hague Convention provides in concluding a choice of court agreement, which is 'by any other means of communication which renders information accessible so as to be usable for subsequent reference', will make transactions concluded via the Internet fall under the scope of the Convention.
[201] ibid 519, Dan Jerker argued that the development of technology in the twenty-first century led to the increasing number of transactions concluded electronically. Therefore, the Hague Convention is significant for those who conclude their transactions electronically.

regimes for the two special courts in Bahrain and Dubai. This is because those laws are silent about the issue of the law that applies to the validity of a choice of court agreement, which leads to uncertainty and unpredictability for the parties in their international business transactions.

Article 3(d) of the Hague Convention provides another important rule that affects the validity of a choice of court agreement. Article 3(d) provides that a choice of court agreement must be treated as a separate agreement from the other terms of the contract,[202] so that the invalidity of the contract does not necessarily lead to the invalidity of the choice of court agreement.[203] The principle of '*severability*'[204] under article 3(d) reflects the principle of party autonomy and ensures the effectiveness of choice of court agreements,[205] as the court chosen by the parties will still be competent to hear the dispute, even if the contract is invalid. The laws of the GCC States, including the two special courts, do not provide any rules for the separate recognition of choice of court agreements. Consequently, the Hague Convention would complement the GCC State laws in this matter.

Finally, the Hague Convention in defining the term choice of court agreement uses the term 'parties',[206] which therefore avoids any possible misunderstanding about whether a choice of court agreement is valid only if it is concluded after the start of legal action. In contrast, as considered in chapter three,[207] the traditional laws of Bahrain, Kuwait, Saudi Arabia and Oman use the terms 'defendant', 'opponent' or 'litigants', which raised the question of whether a choice of court agreement can be recognised only if it was concluded after the legal action commenced. Therefore, the Hague Convention removes uncertainty

[202] Hague Convention art 3(d).
[203] ibid.
[204] For more detail on the role of the *severability* principle in the effectiveness of choice of court agreements, see Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 67–74.
[205] Mukarrum (n 113) Ch 10, s IV.
[206] Hague Convention art 3(a).
[207] See chapter 3 section 3.3.2.3.

because of inappropriate terminology used by the GCC States in regulating the recognition of choice of court agreements.

Accordingly, the regulation of the validity of the choice of court agreements in the Hague Convention provides greater certainty and predictability for the parties and addresses several issues in the legal rules of GCC States regarding the validity of choice of court agreements.

6.4.4 The Recognition and Enforcement of Foreign Judgments

In addition to the two obligations provided by the Hague Convention that require contracting states to recognise both prorogation and derogation effects of choice of court agreements, the Hague Convention requires contracting states to recognise and enforce a judgment obtained from a chosen contracting state.[208] Article 8(1) of the Hague Convention provides that a judgment delivered by a chosen contracting state designated in an exclusive choice of court agreement[209] must be recognised and enforced in every other contracting state in the absence of one of the bases for refusal under article 9.[210] To avoid any conflict in the interpretation of a judgment under the domestic laws of contracting states, the Hague Convention clearly defines 'judgment' in article 4(1).[211] This definition supports the main objective of the Hague Convention to minimise the risks of uncertainty and unpredictability for the parties in their international business transactions.

The rules that regulate the recognition and enforcement of a judgment obtained from a chosen court under the Hague Convention are highly likely to ensure the effectiveness of

[208] Hague Convention art 8.
[209] However, the Hague Convention provides contracting states a right of declaration under article 22 to recognise and enforce a judgment rendered by a chosen court designated in non-exclusive choice of court agreements as well. For more detail on the declaration in article 22, see Brand and Herrup (n 31) 153–158.
[210] Hague Convention art 8.
[211] ibid art 4.

choice of court agreements as considered in chapter five,[212] since, without such rules, the value of concluding choice of court agreements would be significantly diminished.

Yet, the Hague Convention specifies several bases for refusing to recognise and enforce a judgment obtained from a chosen contracting state.[213] The bases for refusing a foreign judgment obtained from a chosen contracting state may be divided into three groups: bases specified for the purpose of the scope of the Hague Convention,[214] bases that aim to protect the parties by ensuring that they had a fair trial before the chosen court,[215] and bases that aim to protect the fundamental interests of the requested state.[216]

One of these bases for refusing to recognise and enforce foreign judgments in the Hague Convention might limit the effectiveness of choice of court agreements. According to article 9(g) of the Hague Convention, a foreign judgment delivered by the chosen court might not be enforceable in the requested state,[217] because article 9(g) provides that when 'the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested state'.[218] Applying article 9(g) can lead to the result that a foreign judgment delivered by the chosen court might not be enforceable in the

[212] See chapter 5.
[213] Hague Convention art 9.
[214] Article 9(a) and (b) of the Hague Convention provide that 'a judgment might not be enforced in another contracting state if the agreement of the parties was null and void under the law of the chosen state, unless the chosen court has decided that the agreement is valid, or if either or both of the parties lacked the capacity to conclude the agreement under the law of the chosen court'.
[215] Article 9(c) and (d) of the Hague Convention provide that a judgment might not be enforced in another contracting state if the defendant, who was the subject of the foreign judgment, was not notified to prepare for the defence before the chosen court in sufficient time, or if a judgment was obtained by fraud in connection with a matter of procedure.
[216] Article 9(e), (f) and (g) of the Hague Convention provide that a judgment might not be enforced in another contracting state if a foreign judgment is manifestly incompatible with the public policy of the requested state, or the proceedings of the chosen court that led to the judgment are incompatible with the fundamental principles of procedural fairness of the requested state, or if a foreign judgment is inconsistent with a judgment given in the requested state in a dispute between the same parties, or if the judgment is inconsistent with an earlier judgment given in another state between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested state.
[217] Chapter five considered that enforcing and recognising a judgment obtained in breach of a choice of court agreement might negatively impact the effectiveness of choice of court agreements.
[218] Hague Convention art 9(g).

requested state, if, for example, the court of a contracting state is requested to recognise two different foreign judgments related to the same dispute between the same parties.[219] One judgment was obtained from the chosen court of a contracting state within the scope of the Hague Convention.[220] The second judgment was obtained from a non-chosen court in a non-contracting state, in which, for instance, one of the parties started proceedings contrary to the terms of the choice of court agreement.[221] The courts in the non-contracting state might take jurisdiction and deliver a judgment, as there is no obligation on them to decline jurisdiction under article 6 of the Hague Convention discussed above.[222] This earlier judgment might be considered by the courts of the requested state as having been delivered in breach of an exclusive choice of court agreement, because if the first judgment which was delivered by a chosen contracting state court in a dispute falls within the scope of the Hague Convention in relation to the same dispute between the same parties, it would be evident that the judgment by the non-chosen court in a non-contracting state was given in breach of the choice of court agreement under the Hague Convention.

Yet, article 9(g) grants the requested court of a contracting state the right to refuse to enforce any judgment obtained from a chosen contracting state court when another judgment, obtained in breach of the exclusive choice of court agreement, was delivered earlier than the chosen court's judgment. The application of this provision significantly limits the effectiveness of choice of court agreements, and it is not compatible with the objectives of the Hague Convention, as it gives any judgment obtained in breach of a choice of court agreement priority of enforcement over any judgment obtained from a chosen court of a contracting state, only because the former was rendered before the latter. Accordingly, article

[219] Ronald Brand argued that the basis for refusing to recognise and enforce a foreign judgment under article 9(g) applies when a contracting state has been requested to recognise two different foreign judgments related to the same dispute between the same parties; see Brand and Herrup (n 31) 121.
[220] Brand and Herrup (n 31) 121.
[221] ibid.
[222] See section 6.4.3.

9(g) provides the breaching party with a technical advantage whereby the party can prevent enforcement of a foreign judgment obtained from a chosen contracting state by starting proceedings and obtaining a judgment from a non-chosen court in a non-contracting state. Although article 9(g) requires the earlier judgment obtained from a non-chosen court in a non-contracting state to fulfil all of the conditions necessary for its recognition in the requested state, that condition will still not prevent the requested state from refusing to recognise and enforce the judgment of the chosen court, if the domestic laws of the requested state do not stipulate any basis for refusing a judgment obtained in breach of an exclusive choice of court agreement. A clear example can be found in the GCC States. As outlined in chapter five,[223] the laws of the GCC States do not provide any basis to refuse to enforce a judgment that is delivered in breach of an exclusive choice of court agreement. Therefore, in the GCC States, a judgment delivered in breach of a choice of court agreement might fulfil the conditions necessary for its recognition in the requested GCC State. Accordingly, given the basis of refusal under article 9(g) of the Hague Convention, the risk of recognition and enforcement of a foreign judgment obtained in breach of a choice of court agreement will exist under the GCC State law even with the adoption of the Hague Convention.

Nevertheless, this discussion demonstrates that the rules regarding the recognition and enforcement of a foreign judgment under the Hague Convention will significantly complement and improve the rules in the GCC States regarding the effectiveness of choice of court agreements. The Hague Convention requires contracting states to recognise a foreign judgment that is obtained from a chosen contracting state. Therefore, it will address the risk that a judgment obtained from a chosen court might not be enforceable by a requested GCC State if the latter also has competent jurisdiction over the subject of the foreign judgment. As

[223] See chapter 5 section 5.2.3.2.

considered in chapter five,[224] such a risk currently exists in the laws of the GCC States. Secondly, the Hague Convention addresses the issue of the reciprocity requirement in relation to the recognition and enforcement of a foreign judgment in the GCC States, as discussed in chapter five.[225] In the absence of any bilateral or international convention, all of the GCC States require reciprocity between the court that renders the judgment and the court asked to enforce any foreign judgment. Therefore, with the harmonisation of the rules of recognition and enforcement under the Hague Convention, there will be no such requirement for reciprocity between the GCC States and the other contracting states to the Hague Convention. Thirdly, the Hague Convention will benefit the GCC States by ensuring that their judgments will be recognised and enforced abroad. Such benefits might be greater for the special courts established in Bahrain and Dubai. As explained in chapter four,[226] those courts were created to encourage international business to choose them as a venue for litigation. Therefore, it is likely that their judgments will in many cases need to be recognised and enforced abroad, as the parties might not have any connection with state in which the special court is located. The DIFC Court has [227] officially requested the Federal Government of the United Arab Emirates to consider adopting the Hague Convention to facilitate the recognition and enforcement of the DIFC Court's judgments abroad.

Accordingly, even though the Hague Convention does not address the risk that a foreign judgment that is obtained in breach of a choice of court agreement is enforceable in the GCC States, which might limit the effectiveness of choice of court agreements, the Convention rules would complement the rules of recognition and enforcement of a foreign judgment in the GCC States in several respects regarding the effectiveness of choice of court agreements.

[224] See chapter 5 section 5.2.3.2
[225] ibid section 5.2.4.2.
[226] See chapter 4 sections 4.2 and 4.3.
[227] ibid section 4.3.4.

6.5 Conclusion

This chapter has argued that regulating the recognition of choice of court agreements according to the Hague Convention provides parties with a high degree of legal certainty and predictability in their international business transactions that might not be achievable under the current laws of the GCC States.

First, this chapter outlined that the scope of the Hague Convention is clearly defined. It is applicable only to exclusive choice of court agreements concluded in B2B international transactions. An exclusive choice of court agreement has been defined in article 3 as has the term 'international B2B transaction'. In contrast, according to the laws of the GCC States, as considered in chapter three, no definition is provided for the terms 'exclusive choice of court agreement' and 'international'.

Secondly, this chapter has argued that regulating the prorogation effect in the Hague Convention ensures that party autonomy is respected in relation to choice of court agreements. The Convention seeks to ensure a high level of certainty, by obliging the chosen contracting state court to accept jurisdiction, even if the chosen court has no connection with the parties or with the dispute. Furthermore, the Hague Convention prevents the chosen court from applying the doctrines of *forum non conveniens* or *lis pendens*, thereby further enhancing legal certainty and predictability that the chosen court will accept jurisdiction. However, the Hague Convention provides a right of declaration under article 19 whereby a state may refuse to accept jurisdiction, even if it has been chosen exclusively by the parties, if there is no connection between the forum and the parties or the dispute. It has been argued that this provision may limit certainty and predictability in the recognition of the prorogation effect, as it provides a chosen court with broad discretionary power to determine whether or not to recognise the choice of court agreement. Nevertheless, it is argued that, except for the UAE, the GCC States would be unlikely to make any declaration under article 19, since, as

discussed in chapter three, the GCC States recognise the prorogation effect even if there is no connection between the parties or the dispute with the chosen state. The only GCC State that might make a declaration under article 19 is the UAE, because the UAE's traditional laws, as considered in chapter three, do not recognise the prorogation effect. Therefore, an article 19 declaration may permit the UAE to strike a balance between recognition of the prorogation effect and protection of its sovereignty, as the provision in article 19 aims to avoid the problems for those states that are concerned about territorial sovereignty in regulating the prorogation effect.

Thirdly, this chapter has argued that the Hague Convention provides parties with greater legal certainty and ensures the effectiveness of choice of court agreements in regulating the derogation effect by obliging the court of the non-chosen contracting state to decline jurisdiction in favour of the chosen court. This regulation would be important for the GCC States, because it would allow the GCC States to amend their traditional approach. As considered in chapter three, the GCC States still do not recognise the derogation effect of choice of court agreements. Although article 6 provides various exceptions to the requirement to recognise the derogation effect, it has been argued that most of those exceptions aim to avoid any potential risk of injustice that might occur to the parties if a court declines to assert jurisdiction. The only exception which could arguably be problematic is when the seised court has the power to refuse to decline jurisdiction, when it decides that declining jurisdiction would lead to a manifest injustice or would be manifestly contrary to the public policy of the forum. This exception to the recognition of the derogation effect might reduce the certainty and predictability for the parties in their international business transactions, since, as outlined above, the terms manifest injustice and public policy have not been defined. Therefore, there is a risk that the contracting states will interpret such terms broadly and,

thereby, undermine the obligation under article 6 to recognise the derogation and to decline jurisdiction in favour of the chosen court.

Fourthly, this chapter has argued that the Hague Convention deals with several aspects of validity of the choice of court agreements that might minimise any potential uncertainty and unpredictability that may arise from the interpretation of those agreements by the contracting states. It stipulates clear choice of law rules to ascertain the applicable law in order to determine the validity of any choice of court agreement, and it also applies the doctrine of *severability*, which renders the court chosen by the parties still competent to hear the dispute, even if the contract is invalid. Since neither choice of law rules nor the doctrine of *severability* exist in the GCC States, the Convention will improve the laws of the GCC States in this context as well.

Finally, the Hague Convention's provisions for regulating the recognition and enforcement of foreign judgments have been considered. It has been argued that the Convention's provisions might avoid the risk that a judgment obtained from a chosen court might not be enforced by the requested GCC State, if the latter also had competent jurisdiction. Also, the issue of the reciprocity requirement in relation to the recognition and enforcement of a foreign judgment in the GCC States has been addressed. Furthermore, it has been argued that the Hague Convention would benefit the GCC States by ensuring that their judgments would be recognised and enforced abroad.

Accordingly, this chapter concludes that the GCC States should adopt the Hague Convention, as it would significantly increase the level of legal certainty and predictability for parties in their international business transactions. The only concern is that the GCC States might believe that the impact and value of the Convention may be limited in light of the disappointingly low number of contracting states which have adopted the Convention to date. It has been observed above that, to date, only 31 countries, including the EU, have

signed and ratified the Convention, which is not a high take-up rate compared, for example, with the New York Convention, which has been adopted by 157 states, as stated above.[228] Nevertheless, the existence of the EU Member States as signatories to the Hague Convention should provide sufficient motivation for the GCC States to consider adopting the Convention, given the considerable economic cooperation between the EU Member States and the GCC States.[229] In 1989, the EU and the GCC States signed a Cooperation Agreement that aims to 'broaden and consolidate their economic and technical cooperation relations and also cooperation in energy, industry, trade and services, agriculture, fisheries, investment, science, technology and environment, on mutually advantageous terms, taking into account the differences in levels of development of the Parties'.[230] In addition, there are significant negotiations in progress between the EU and the GCC States for a Free Trade Agreement (FTA) to provide for a progressive and reciprocal liberalisation of trade in goods and services.[231] Finally, a report published by the European Commission demonstrates that a significant number of goods were imported and exported between the GCC States and the EU between 2006 and 2016. The total value of the export transactions during that period reached 472,436 million Euros, and the export transactions to the GCC States from the EU Member States reached 869,866 million Euros.[232] Accordingly, there is significant mutual trade and economic cooperation between the GCC States and the EU Member States, which is a sufficient reason for the GCC States to consider adoption of the Hague Convention, even

[228] See above section 6.1.
[229] See European Commission, 'European Union, Trade in Goods with GCC 6' Directorate-General for Trade (2017) <http://ec.europa.eu/trade/policy/countries-and-regions/regions/gulf-region/index_en.htm> last accessed 1 January 2018.
[230] See EU-GCC Cooperation Agreement (1989) OJ L 054 <http://ec.europa.eu/trade/policy/countries-and-regions/regions/gulf-region/index_en.htm> last accessed 1 January 2018.
[231] The EU-Gulf Cooperation Council trade negotiations to create a FTA have been ongoing since 1990 and the last official report on the negotiation was in 2006; (all documents) <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm#study-2> last accessed 1 January 2018.
[232] European Commission Report (n 229) 3.

though the states that are signatories to the Hague Convention are limited mostly to the EU Member States.

CHAPTER 7: SUMMARY AND RECOMMENDATIONS

7.1 Overview of the Research and Contribution to Knowledge

The underlying research question of this study was to consider the extent to which the current legal regimes for recognition of choice of court agreements in the GCC States is conducive to facilitating and encouraging international business in those States, by enabling the parties to avoid litigation risks in their international business transactions, and how the legal situation can be improved by ratifying the 2005 Hague Convention and by modernising their rules as they apply to choice of court agreements. This thesis fills a gap in the literature regarding the recognition of choice of court agreements in the GCC States, since, to the best of the author's knowledge, this thesis is the first study to have considered this important subject in GCC jurisdictions.

The thesis has been divided into several chapters to answer the primary research question. The first chapter was introductory, providing a background discussion of the topic in the prologue and highlighting the importance, scope, methodology and structure of the thesis. In chapter two, consideration has been given to the importance of recognising and regulating choice of court agreements in international business transactions. The chapter considered how effective recognition of choice of court agreements would help to minimise the problems of parallel litigation and inconsistent judgments and increase the level of legal certainty and predictability for parties in international business transactions. It also cited empirical study demonstrates that international businesses might avoid doing business in jurisdictions in which there is uncertainty over the recognition of choice of court agreements, and this might negatively impact the economies of GCC States and their engagement with international trade. Finally, the chapter critically compared litigation with arbitration as an alternative means of dispute resolution. That comparison was necessary to fill a gap in the literature. Although there are several academic papers on the importance of the effective

recognition of choice of court agreements in international business transactions,[1] there has been very little study[2] of why the regulation and recognition of choice of court agreements is important if the parties can avoid the problems of parallel litigation, inconsistent judgments and uncertainty and unpredictability simply by concluding an arbitration agreement in their contract. The comparison of litigation and arbitration concluded that each has unique advantages that might be crucial for parties in international business transactions. Arbitration provides parties with commercial competence and expertise, confidentiality and privacy of dispute resolution, finality of decisions and procedural flexibility, all of which might not result from litigation. On the other hand, arbitration has disadvantages or limitations that might not be present in litigation, such as the absence of provisional measures and power over third party. As a result, in some circumstances litigation is more desirable than arbitration as a dispute resolution method. In conclusion, agreements to arbitrate or to litigate before a selected court may provide parties with different advantages in international business transactions. Therefore, the existing arbitration agreement rules in the GCC States do not necessarily reduce the need for and the importance of examining how the rules in relation to choice of court agreements might be improved.

After illustrating the importance and significance for international trade of the effective recognition choice of choice agreements, the thesis critically considered, in chapter three, the position of the GCC States regarding recognition of choice of court agreements. The approach to the recognition of choice of court agreements is not uniform across the GCC States. Kuwait, Saudi Arabia, Bahrain and Oman have adopted an approach in which jurisdiction is exercised solely based on the concept of party autonomy only as far as the

[1] The academic discussions on the importance of recognition of choice of court agreements in international business transactions are outlined in chapter 2 section 2.3.2.
[2] See Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer Law International 2013).

prorogation effect of choice of court agreements is concerned, even though several issues limit the effectiveness of the recognition of choice of court agreements, which need to be addressed.

Unlike the recognition of the prorogation effect, the codes that govern jurisdiction rules in Kuwait, Saudi Arabia, Bahrain and Oman are silent about recognition of the derogation of choice of court agreements. Kuwaiti courts have made their position clear by refusing derogation in all cases to date, on the basis that jurisdiction rules are compulsory for the parties, as they are based on public policy and state sovereignty.

It was also observed in this chapter that although no cases involving the recognition of the derogation effect have appeared before the courts in Saudi Arabia, Bahrain and Oman in all likelihood those GCC States' courts would probably follow Kuwait's approach in rejecting the recognition of choice of court agreements, at least as far as the derogation effect is concerned, because there have been various decisions which have considered the exercise of jurisdiction to be a matter of state sovereignty and authority. Chapter three noted that the UAE Code of Civil Procedure is more radical than the comparable codes in the other GCC States in addressing the matter of sovereignty and public authority related to the rules governing the exercise of jurisdiction, because article 24 of the UAE Code of Civil Procedure rejects the recognition of both effects of choice of court agreements. By considering some case law from the Kuwaiti and the UAE courts, it has been illustrated that the tendency not to recognise the derogation effect by those States' courts exposes parties to international business transactions connected with these countries to the risks of uncertainty, unpredictability, parallel litigation and inconsistent judgments. The chapter also critically assessed the approach of the GCC States regarding recognition of choice of court agreements in the context of the sovereignty and authority of the state. It considered that the rise in recognition of an individual's rights at the beginning of the twenty-first century changed the

traditional perception of sovereignty and the principles of territoriality and personality in exercising jurisdiction from one that purely reflects state interests to one that also reflects individuals' interests. Thus, if a state acknowledges that its interests do not transcend an individual's rights and interests, then effective recognition of choice of court agreements may be justified. In addition, the GCC States' courts have acknowledged individual rights and interests in exercising jurisdiction in some circumstances, which therefore makes the non-recognition of choice of court agreements inappropriate and in need of reconsideration. Accordingly, the chapter concluded that the regulation of the recognition of choice of court agreements in the GCC States should be reviewed and revised, as such recognition should no longer be deemed as an assault on the sovereignty of the state, and furthermore, the non-recognition of choice of court agreements might negatively impact upon international trade and commerce in the GCC States.

Chapter four stressed that two special commercial courts have been established in Bahrain and Dubai, which have specific rules regarding choice of court agreements that are different from the traditional laws of Bahrain and the UAE. Therefore, it was important for the underlying research question of the thesis to consider and reflect upon the rules of choice of court agreements of these two courts in the thesis. Chapter four observed that Bahrain is keen to improve the litigation climate for foreign businesses because of the economic benefits that this can bring. To that end, it has established the BCDR Court with expertise in international commercial disputes. However, the chapter observed that the BCDR Court follows the same approach as the traditional Bahraini jurisdiction rules that recognise the prorogation effect, but is likely to refuse to recognise the derogation effect of choice of court agreements. To fully realise the potential economic benefits, the BCDR Court should clearly consider recognising the derogation effect. Furthermore, it should also consider adopting the

Hague Convention to ensure the recognition of choice of court agreements abroad and to facilitate the recognition and enforcement of Bahrain judgments abroad where there is a choice of court agreement in favour of the Bahraini courts.

Chapter four also concluded that the DIFC Court, which is located in Dubai's free zone, has adopted a different approach to the traditional approach of the UAE in regulating jurisdiction by recognising both the prorogation and the derogation effects of choice of court agreements. With regard to the issue of sovereignty in regulating jurisdiction under the DIFC Court, the economic aims and interests of the Emirate of Dubai have caused it to move away from the traditional meaning of sovereignty as a representation solely of state interests to the modern meaning of sovereignty, which should also reflect the parties' interests. This development in the meaning of sovereignty has facilitated the recognition of choice of court agreements in the DIFC Court. Moreover, in 2016, the DIFC Court published a report that encourages the UAE Federal Government to sign and ratify the 2005 Hague Convention. The importance of the 2005 Hague Convention for the DIFC Court has been stressed, especially to avoid the enforcement risk, as the 2005 Hague Convention might facilitate the enforcement of the DIFC Court's decisions and the recognition of choice of court agreements abroad.

Before discussing the importance of the 2005 Hague Convention and how its adoption might improve the rules in relation to choice of court agreement in the GCC States, chapter five considered the rules of recognition and enforcement of foreign judgments in the GCC States from the perspective of the effectiveness of the recognition of choice of court agreements. The chapter also fills a gap in the literature by discussing how regulation of the rules of recognition and enforcement of foreign judgments might significantly impact upon

the effectiveness of the recognition of choice of court agreements.[3] This chapter argued that the domestic recognition and enforcement rules of the GCC States present a significant risk to the effectiveness of exclusive choice of court agreements due to the existence of jurisdiction and reciprocity requirements. The first risk that might arise is that any judgment obtained from a chosen court according to an exclusive choice of court agreement might not be enforceable in some of the GCC States. Accordingly, the entire proceedings brought before the chosen court might be futile and a waste of time and money, and this may therefore have a negative impact upon international business transactions. The second risk posed by the recognition and enforcement rules arises when a foreign judgment obtained in breach of a choice of court agreement is enforceable in some of the GCC States, especially if the requested court itself was the chosen court under the parties' agreement. Therefore, the effectiveness of exclusive choice of court agreements in the GCC States is affected, as any party is free to breach an exclusive choice of court agreement. The chapter also highlighted that the GCC States are members of two regional conventions which aim to harmonise the recognition and enforcement of foreign judgments between the member states, namely the Riyadh Convention[4] and the EJDJN Convention.[5] As a result, the risk of non-enforcement of any judgment that is obtained from the chosen court might be minimised, as both conventions acknowledge choice of court agreements as a basis of jurisdiction for the recognition and enforcement rules. Furthermore, the absence of a reciprocity requirement in both Conventions facilitates the recognition and enforcement of a foreign judgment between the member states. However, it has been argued that, in some instances, a judgment obtained

[3] To best of the author's knowledge, only Adrian Briggs and Sofia Tang discusses the effectiveness of choice of court agreements from the perspective of regulating the recognition and enforcement of foreign judgments rules. See their publication on that matter, Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 339-380; Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial law* (Routledge 2014); Sophia Tang, 'Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study' (2012) 61 ICLQ 2, 224–239.

[4] League of Arab States, Riyadh Arab Agreement for Judicial Cooperation (1983).

[5] Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States 1995.

from a chosen member state might not be recognised and enforced in another member state, where the latter is hearing the same dispute between the same parties, which it would not do if it recognised the derogation effect of exclusive choice of court agreements. Moreover, under both conventions, any judgment obtained in breach of a choice of court agreement might be enforceable in any member state, again limiting the effectiveness of choice of court agreements. That risk exists because neither convention created a basis for refusing to recognise and enforce a foreign judgment rendered in breach of a choice of court agreement. Accordingly, chapter five concluded that the rules for recognition and enforcement of a foreign judgment in the GCC States might adversely impact upon the effectiveness of choice of court agreements. Therefore, revising the treatment of choice of court agreements in the GCC States to lend recognition to both the prorogation and derogation effects without also revising the recognition and enforcement rules might not be effective, as the two are closely connected.

In chapter six, the thesis discussed the 2005 Hague Convention on Choice of Court Agreements, which could provide the GCC States with an acceptable mechanism to secure predictability and legal certainty for parties in international business transactions. At the 2011 Doha Conference,[6] it was stressed to the GCC States that they should research the benefits of predictability and legal certainty provided by the 2005 Hague Convention and its resulting advantages for cross-border trade and investment with a view to adopting the Convention. This thesis is the first study on the feasibility and desirability of enhancing the rules for the recognition of choice of court agreements in the legal systems of the GCC States by becoming signatories to the 2005 Hague Convention. Chapter six concluded that regulating the recognition of choice of court agreements according to the 2005 Hague Convention rules

[6] First Gulf Judicial Seminar on Cross-Frontier Legal Cooperation in Civil and Commercial Matters (Doha, Qatar, 20–22 June 2011) <https://www.hcch.net/en/news-archive/details/?varevent=225> accessed 1 January 2018.

would provide parties with a high degree of legal certainty and predictability in their international business transactions that might not be achievable under the current laws of the GCC States.

First, the chapter outlined that the scope of the 2005 Hague Convention is clearly defined. It is applicable only to exclusive choice of court agreements concluded in B2B international transactions. An exclusive choice of court agreement is defined in article 3 as the term 'international B2B transaction'. In contrast, according to the laws of the GCC States as considered in chapter three, the terms 'exclusive choice of court agreement' and 'international' are not defined.

Secondly, this chapter has argued that regulating the prorogation effect in the 2005 Hague Convention ensures that party autonomy is respected in relation to choice of court agreements. The Convention seeks to ensure a high level of certainty, by obliging the chosen contracting state court to accept jurisdiction, even if the chosen court has no connection with the parties or with the dispute.

Thirdly, this chapter has argued that the 2005 Hague Convention provides parties with greater legal certainty and ensures the effectiveness of choice of court agreements in regulating the derogation effect by obliging the court of the non-chosen contracting state to decline jurisdiction in favour of the chosen court. This regulation would be important for the GCC States, because it would allow the GCC States to amend their traditional approach. As was considered in chapter three, the GCC States still do not recognise the derogation effect of choice of court agreements. Although article 6 provides various exceptions to the requirement to recognise the derogation effect, it has been argued that most of those exceptions aim to avoid any potential risk of injustice that might occur to the parties if a court declines to assert jurisdiction. The only exception which is arguably problematic is when the seised court has the power to refuse to decline jurisdiction, because it decides that declining jurisdiction

would lead to a 'manifest injustice' or would be manifestly contrary to the 'public policy' of the forum. This exception to the recognition of the derogation effect might reduce the certainty and predictability for the parties in their international business transactions, since, as has been outlined above, the terms 'manifest injustice' and 'public policy' have not been defined. Therefore, there is the risk that the contracting states will interpret such terms broadly and, thereby, undermine the obligation under article 6 to recognise the derogation and to decline jurisdiction in favour of the chosen court.

Fourthly, this chapter has argued that the 2005 Hague Convention deals with several aspects of validity of the choice of court agreements that might minimise any potential uncertainty and unpredictability that may arise from the interpretation of those agreements by the contracting states. It stipulates clear choice of law rules to ascertain the applicable law in order to determine the validity of any choice of court agreement and it also applies the doctrine of *severability*, which renders the court chosen by the parties still competent to hear the dispute, even if the contract is invalid. Since neither choice of law rules nor the doctrine of *severability* exists in the GCC States, the Convention will improve the laws of the GCC States in this context as well.

Finally, the 2005 Hague Convention's provisions for regulating the recognition and enforcement of foreign judgments have been considered. It has been argued that the Convention provision might avoid the risk that a judgment obtained from a chosen court might not be enforced by the requested GCC State, if the latter also had competent jurisdiction. Also, the issue of the reciprocity requirement in relation to the recognition and enforcement of a foreign judgment in the GCC States has been addressed. Furthermore, it has been argued that the 2005 Hague Convention would benefit the GCC States by ensuring that their judgments would be recognised and enforced abroad where the court of origin has assumed jurisdiction on the basis of a choice of court agreement. Accordingly, chapter six

concluded that the GCC States should adopt the 2005 Hague Convention, as it would significantly increase the level of legal certainty and predictability for parties in their international business transactions.

Following this summary of the thesis and its significant, independent contribution to knowledge, the thesis will conclude with the key recommendations for the GCC States to consider in reviewing and revising their rules on the recognition of choice of court agreements to benefit contracting parties by enabling them to avoid litigation risks in their international business transactions, which may render the legal systems in those countries more attractive to parties wishing to do business there.

7.2 Recommendations for Reform in the GCC States

It is important for the GCC States to update their current laws regulating choice of court agreements. The author recommends that GCC laws be reformed as follows:

(1) Kuwait, Saudi Arabia, Bahrain and Oman require new separate provisions to govern the prorogation of jurisdiction in their civil procedure codes and to replace the current provisions designed to govern the prorogation of jurisdiction. As set out in chapter three, there are several issues regarding the current provisions which need to be addressed.

   (i) The new provisions governing the prorogation of jurisdiction should clearly determine whether the agreement of the parties is exclusive or non-exclusive.[7] This can be achieved by creating a presumption in the new provisions that the agreement of the parties is exclusive unless they specify otherwise.

   (ii) The new provisions should replace the availability of an implied agreement by a requirement that any agreement be in 'writing' to minimise any risk that the parties' agreement will be misinterpreted by the GCC courts.[8]

   (iii) The terms 'defendant', 'opponent' and 'litigants' in current provisions governing prorogation of jurisdiction should be replaced with the word 'parties' to avoid the erroneous conclusion that the agreement of the parties can be recognised only if it was concluded after legal action was commenced.[9]

[7] See chapter 3 section 3.3.2.1.
[8] ibid section 3.3.2.2.
[9] ibid 3.3.2.3.

(iv) The new provisions governing the prorogation of jurisdiction should clearly define the word 'international' to avoid any misinterpretation of whether a dispute is international in the context that the party can choose to litigate before a foreign court or whether a dispute is purely a domestic one where the parties cannot conclude a choice of court agreement favouring a foreign court.[10]

(v) The new provisions governing the prorogation of jurisdiction should contain clear choice of law rules for determining the validity of choice of court agreements to minimise the uncertainty and unpredictability about the applicable law governing such choice of court agreements.[11]

(vi) The new provisions governing the prorogation of jurisdiction should also include the principle of *severability* to avoid any potential risk that the invalidity of the contract leads to the invalidity of the choice of court agreement.[12]

(2) Kuwait, Saudi Arabia, Bahrain (including the BCDR Court located in Bahrain) and Oman require a clear basis for declining jurisdiction in their civil procedure codes based on the consent of the parties, when parties agree to litigate in a foreign court exclusively (derogation effect). It was considered in chapter three that the absence of such a basis led the Kuwait Cassation Court to reject the recognition of the derogation effect, because it deemed that such recognition assaulted the sovereignty and public policy of the state.[13] There is also a high risk that the courts of Saudi Arabia, Bahrain and Oman would probably follow Kuwaiti courts in rejecting the recognition of the derogation effect, because their courts have also deemed the exercise of jurisdiction to be a matter of state sovereignty and authority in several decisions.[14] Accordingly, it is necessary to have a clear basis for declining jurisdiction in the civil procedure codes of these GCC States to prevent the courts of these States from refusing to recognise the derogation effect.

(3) In the UAE, the necessary reform might be different to that suggested for other GCC States. As outlined in chapter three, article 24 of the UAE Code of Civil Procedure explicitly rejects the recognition of both prorogation and derogation effects of choice of court agreements.[15] Therefore, the UAE needs first to repeal article 24, and then it needs to regulate the prorogation of jurisdiction as a basis of exercising jurisdiction taking into consideration the suggestions for reform outlined above for the other GCC States regarding the prorogation of jurisdiction. The UAE must also establish a clear basis for declining jurisdiction in its Civil Procedure Code based on the consent of the parties, when they agree to litigate in a foreign court exclusively (derogation effect) to prevent the UAE courts from refusing to recognise the derogation effect.

(4) The DIFC Court located in Dubai must also establish a clear basis for declining jurisdiction on the consent of the parties, when they agree to litigate in a foreign court exclusively (derogation effect) in order to increase the level of legal certainty and

[10] See Chapter 3 section 3.3.2.4.
[11] ibid section 3.3.2.5.
[12] ibid section 3.3.2.6.
[13] ibid section 3.3.3.1.
[14] ibid section 3.3.3.2, 3.3.3.3, 3.3.3.3 and chapter 4 section 4.2.1.
[15] See chapter 3 section 3.4.

predictability for the parties regarding the recognition of derogation effect of choice of court agreements.

(5) Regarding the recognition and enforcement of foreign judgment rules, the GCC States need to address the following issues:

(i) Saudi Arabia, the UAE and Bahrain should abolish the restriction in their recognition and enforcement provisions that requires the absence of jurisdiction by the requested court over the dispute to recognise and enforce a foreign judgment. It was stressed in chapter five that the value of choice of court agreements is significantly diminished, because such a restriction leads to the refusal of recognition and enforcement of a foreign judgment obtained from a chosen court, if the requested court also had competent jurisdiction.[16]

(ii) All of the GCC States should establish a basis for refusing to recognise and enforce a foreign judgment that was rendered in breach of an exclusive choice of court agreement.[17] The rationale is to prevent the parties from breaching their exclusive choice of court agreement, thus ensuring the effectiveness of choice of court agreements.

(iii) All of the GCC States should enter into bilateral or multilateral agreements to limit the negative effect of the reciprocity requirement in the absence of such agreements. It was considered in chapter five that the reciprocity requirement negatively impacts upon the effectiveness of choice of court agreements, as it might lead to a refusal to recognise and enforce a foreign judgment obtained from a chosen court.[18] Furthermore, the GCC States need to consider the 'Judgment Project', which may become the first global convention that harmonises the rules of recognition and enforcement of foreign judgments.

(6) Based on the 2011 Doha Conference,[19] during which it was stressed to the GCC States that they should research 'the benefits of predictability and legal certainty provided by the 2005 Convention on Choice of Court Agreements and its resulting advantages for cross-border trade and investment'[20] for possible adoption of the Hague Convention, the author highly recommends that all of the GCC States adopt the 2005 Hague Convention. As discussed in chapter six, the 2005 Hague Convention would significantly improve the provisions governing choice of court agreements in the GCC States and the recognition and enforcement rules that might impact upon the effectiveness of choice of court agreements. Moreover, the adoption of the 2005 Hague Convention by the GCC States would significantly benefit the BCDR Court and the DIFC Courts that have been established by Bahrain and Dubai to provide international business with a unique international commercial court to settle their disputes. It has been considered in chapter four and six that the 2005 Hague Convention, on the one hand, would minimise the uncertainty and unpredictability regarding the recognition of choice of court agreements in these two courts; on the other hand, it would facilitate the recognition and enforcement abroad of judgments

[16] See chapter 5 sections 5.2.2 and 5.2.3.1.
[17] Chapter 5 section 5.2.3.2.
[18] ibid section 5.2.4.
[19] First Gulf Judicial Seminar (n 6).
[20] ibid 3.

by these two courts where the court of origin has assumed jurisdiction on the basis of a choice of court agreement.

Accordingly, this thesis has answered the underlying research question about the regulation of recognition of choice of court agreements in the GCC States and has concluded that there are considerable problems in the legal treatment of choice of court agreements in the GCC States which need to be addressed, inter alia by becoming signatories to the 2005 Hague Convention. The suggested solutions would provide business parties with rules on choice of court agreements which would prove effective in avoiding litigation risks in their international business transactions connected with the GCC States. Finally, this thesis will be concluded with the limitations of the underlying research study and recommendations for future research.

7.3 Limitations of the Research Study and Recommendations for Future Research

This research has mainly focused on how it is in the best interests of the parties in a dispute for choice of court agreements to be recognised. However, there might be instances where the interest of the parties would be better served by non-recognition of choice of court agreements; for example, where one of the parties is a weaker party such as a consumer, an employee, an insurance policy holder or another beneficiary under an insurance contract.[21] This research did not consider these limitations of recognition of choice of court agreements, because the underlying research question was mainly focused on international B2B transactions, where both parties have the same level of bargaining power, rather than international B2C transactions. However, studying these limitations of recognition of choice

[21] Vesna Lazic, 'Procedural justice for weaker parties in cross-border litigation under the EU regulatory scheme' (2014) 10 Utrecht L Rev 100.

of court agreements in the GCC States which recognise at least the prorogation effect of choice of court agreements might be an important topic for a future research study.[22]

In addition, the 'Judgment Project'[23] has been mentioned in more than one place in this research. The aims of the project are to create an international convention that harmonises the rules of recognition and enforcement of foreign judgments in civil and commercial matters,[24] and it is being negotiated by the working group of the Hague Conference.[25] From 24 to 29 May 2018 the Special Commission on the Judgments Project met and produced the 2018 final draft Convention. It has been recommended to the Council that the project proceed to a diplomatic session to be convened in mid-2019. The 2018 draft Convention will form the basis for discussion at the Diplomatic Session.[26]

It has been stressed in several places in this thesis that the GCC States should consider adopting the Judgment Project when it becomes successful and is finalised, as it will indirectly ensure the effectiveness of recognition of choice of court agreements in the GCC States.[27] However, this research has not considered the rules of the Judgments Project in detail and whether they would be compatible with the policy of the GCC States, because the main aim of this research was to explore the recognition of choice of court agreements, rather than the recognition and enforcement foreign judgments. Nevertheless, investigating the feasibility and desirability of adoption, by the GCC States, of the Judgment Project by comparing its main rules with the GCC States' rules on recognition and enforcement foreign judgments might be an important area for future research, as the Judgment Project will be the

[22] The European Union both under the Brussels Regulation (Recast) and the Hague 2005 Convention provides provisions that aim to protect the weaker party in recognition of choice of court agreements; Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast 2012) art 24(4); Hague Convention on Choice of Court Agreements 2005 art 2(1).
[23] See chapter 5 sections, 5.2.3.2, 5.3.2 and 5.4.
[24] The Judgments Project (various documents)<https://www.hcch.net/en/projects/legislative-projects/judgments> accessed 1 July 2018.
[25] Draft Convention (24–29 May 2018) <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1> accessed 1 July 2018.
[26] See the official website of the Hague Conference about the Judgment Project <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed 1 Jly 2018.
[27] See chapter 5 sections, 5.2.3.2, 5.3.2 and 5.4.

first Global Convention to harmonise the rules of recognition and enforcement of foreign judgments in civil and commercial matters.[28]

[28] There are several publications on the importance and significance of the Judgment Project, as it will be the first worldwide convention that harmonises the rules of recognition and enforcement foreign judgments; see Arthur Taylor von Mehren, 'Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful?' (1993) 57 The Rabel Journal of Comparative and International Private Law 3, 449–459; Von Mehren, 'Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?' (1994) 57 Law and Contemporary Problems 3, 271–28; Ronald A Brand, 'Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law' in Bhandari J and Sykes A (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press 1997) 592–641; William E O'Brian, 'The Hague Convention on Jurisdiction and Judgments: The Way Forward' (2003) 66 MLR 4, 491–509; Ronald Brand, 'Jurisdictional Developments and the New Hague Judgments Project' (2013); Yuko Nishitani, 'International Jurisdiction of Japanese Courts in a Comparative Perspective' (2013) 60 Netherlands International Law Review 2, 251–277; Audrey Feldman, 'Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations' (2014) 89 NYUL Rev 2190; Paul Beaumont and Lara Walker, 'Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project' (2015) 11 Journal of Private International Law 1 31–63.

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LIST OF APPENDICES

Appendix A: Kuwait's Jurisdiction Provisions in Civil and Commercial Matters

- Code for Civil and Commercial Procedure No. 38/1980

- Jurisdiction Provisions in Civil and Commercial Matters

Article 23

The Kuwaiti courts shall have jurisdiction over lawsuits filed against a Kuwaiti citizen, and lawsuits filed against a non-Kuwaiti citizen who has a place of residence or domicile in Kuwait, except in the case of real estate lawsuits related to real estate located outside Kuwait.

Article 24

The Kuwaiti courts shall have jurisdiction over lawsuits filed against a non-Kuwaiti citizen who has no place of residence or is not domiciled in Kuwait in the following circumstances:

(A) If the non-Kuwaiti citizen has a chosen domicile in Kuwait.

(B) If the lawsuit involves movable or immovable property located in Kuwait, or if Kuwait is the place where an obligation is deemed to have originated or where it has been performed or where it is to be enforced, or if the lawsuit involves bankruptcy declared in Kuwait.

(H) If the lawsuit is against more than one person and one of them is a Kuwaiti citizen or has a place of residence or domicile or a chosen domicile in Kuwait.

Article 26

The Kuwaiti courts shall have jurisdiction to adjudicate lawsuits, even if the matter does not fall under the previous provisions, when the opponent agree explicitly or impliedly to the jurisdiction of these courts.

- Recognition and Enforcement Foreign Judgments

Article 199

An order may be issued by the Kuwaiti courts for the execution of an order or judgment that has been delivered in a foreign country, in accordance with the same conditions as those provided for in the laws of that country in respect of the execution of judgments and orders delivered in Kuwait, except where enforcement favours a Kuwaiti citizen or a Kuwaiti legal entity and the execution of the order or judgment involves seizing of the assets that belong to a Kuwaiti citizen or Kuwaiti legal entity.

An order of execution will be filed in the Court, in accordance with the established rules laid down for the initiation of a suit; an order of execution may not be issued unless the following matters have been verified:

(A) Judgment or order was delivered by a competent court, pursuant to the law of the country in which it was delivered;

(B) That the parties to the lawsuit on which the foreign judgment was passed were summoned and duly represented;

(C) That the judgment or order has become a *res judicata* pursuant to the law of the court which delivered it;

(D) That the judgment or order does not conflict or contradict with a judgment or order previously delivered by a court in Kuwait and does not include any violation of moral code or public order in Kuwait.

Appendix B: Saudi Arabia's Jurisdiction Provisions in Civil and Commercial Matters

- The Law of Before Shari'ah Courts, Royal Decree No. (M/21) 20 JumadaI 1421 [19August 2000] Umm al Qura No. 3811 – 17 Jumada II 1421 [15 September 2000]

- Jurisdiction Provisions in Civil and Commercial Matters

Article 24

The Kingdom's courts shall have jurisdiction over lawsuits filed against a Saudi citizen, even if there is no record of his general or designated place of residence in the Kingdom. Excepted are cases in *rem* involving real estate located outside the Kingdom**.**

Article 25

The Kingdom's courts shall have jurisdiction over lawsuits filed against a non-Saudi citizen who has a place of residence or a chosen domicile in the Kingdom. Excepted are cases in *rem* involving real estate outside the Kingdom.

Article 26

The Kingdom's courts shall have jurisdiction over lawsuits filed against a non-Saudi citizen who has no place of residence or a chosen domicile in the Kingdom in the following circumstances:

(A) If the lawsuit involves property located in the Kingdom, or if the Kingdom is the place where an obligation is deemed to have originated or where it has been performed.

(B) If the lawsuit involves bankruptcy declared in the Kingdom.

(C) If the lawsuit is against more than one person and one of them has a place of residence in the Kingdom.

Article 28

Except for cases in *rem* involving real estate outside the Kingdom, the Kingdom's courts shall have jurisdiction to adjudicate cases when the litigants accept these courts' jurisdiction, even if the matter does not fall within their jurisdiction.

- Saudi Arabia Enforcement Act 13/8/1433 Hijri, 2/7/2013 Gregorian

- Recognition and Enforcement Foreign Judgments

Article 11

Having regard for the provisions of treaties and conventions, which the Kingdom is a member of, the enforcement judge cannot enforce a foreign order or judgment, except on the basis of reciprocity and only after verifying what follows:

(1) The Kingdom's courts have no jurisdiction over the dispute on which the judgment or the order was delivered, and that judgment or order was delivered by a competent court, pursuant to the law of the country in which it was delivered.

(2) That the issuing foreign courts have such jurisdiction in accordance with the international judicial jurisdiction rules decided in its legal system;

(3) That the parties to the lawsuit on which the foreign judgment was passed were summoned and duly represented;

(4) That the judgment or order has become a *res judicata* pursuant to the law of the court which delivered it;

(5) That the judgment or order does not conflict or contradict with a judgment or order previously delivered by a court in the Kingdom;

(6) That the judgment or order does not include any violation of moral code or public order in the Kingdom.

Appendix C: Bahrain's Jurisdiction Provisions in Civil and Commercial Matters

- Code for Civil and Commercial Procedure No. 12/1971

- Jurisdiction Provisions in Civil and Commercial Matters

Article 14

The Bahraini courts shall have jurisdiction over lawsuits filed a non-Bahraini citizen who has a place of residence or domicile in Bahrain, except in the case of real estate lawsuits related to real estate located outside Bahrain.

Article 15

The Bahraini courts shall have jurisdiction over lawsuits filed against a non-Bahraini citizen who has no place of residence or is not domiciled in Bahrain in the following circumstances:

(1) If the non-Bahraini citizen has a chosen domicile in Bahrain.

(2) If the lawsuit involves assets located in Bahrain, or if Bahrain is the place where an obligation is deemed to have originated or where it has been performed or where it is to be enforced, or if the lawsuit involves bankruptcy declared in Bahrain.

(9) If the lawsuit is against more than one person and one of them has a place of residence or domicile or a chosen domicile in Bahrain.

Article 17

The Bahraini courts shall have jurisdiction to adjudicate lawsuits, even if the matter does not fall under the previous provisions, when the opponent agree explicitly or impliedly to the jurisdiction of these courts.

- Recognition and Enforcement Foreign Judgments

Article 252

An order may be issued by the Bahraini courts for the execution of an order or judgment that has been delivered in a foreign country, in accordance with the same conditions as those provided for in the laws of that country in respect of the execution of judgments and orders delivered in Bahrain.

An order of execution will be filed in the Court, in accordance with the established rules laid down for the initiation of a suit; an order of execution may not be issued unless the following matters have been verified:

(1) The Bahraini courts have no jurisdiction over the dispute on which the judgment or the order was delivered, and that judgment or order was delivered by a competent court, pursuant to the law of the country in which it was delivered;

(2) That the parties to the lawsuit on which the foreign judgment was passed were summoned and duly represented;

(3) That the judgment or order has become a *res judicata* pursuant to the law of the court which delivered it;

(4) That the judgment or order does not conflict or contradict with a judgment or order previously delivered by a court in Bahrain and does not include any violation of moral code or public order in Bahrain.

Appendix D: Oman's Jurisdiction Provisions in Civil and Commercial Matters

- Code for Civil and Commercial Procedure No. 29/2002

- Jurisdiction Provisions in Civil and Commercial Matters

Article 29

The Omani courts shall have jurisdiction over lawsuits filed against an Omani citizen, and lawsuits filed against a non-Omani citizen who has a place of residence or domicile in Oman, except in the case of real estate lawsuits related to real estate located outside Oman.

Article 30

The Omani courts shall have jurisdiction over lawsuits filed against a non-Omani citizen who has no place of residence or is not domiciled in Oman in the following circumstances:

(A) If the non-Omani citizen has a chosen domicile in Oman

(B) If the lawsuit involves assets located in Oman, or if Oman is the place where an obligation is deemed to have originated or where it has been performed or where it is to be enforced, or if the lawsuit involves bankruptcy declared in Oman.

Article 32

The Omani courts shall have jurisdiction to adjudicate lawsuits, even if the matter does not fall under the previous provisions, when the defendant agree explicitly or impliedly to the jurisdiction of these courts.

- Recognition and Enforcement Foreign Judgments

Article 352

An order may be issued by the Omani courts for the execution of an order or judgment that has been delivered in a foreign country, in accordance with the same conditions as those provided for in the laws of that country in respect of the execution of judgments and orders delivered in Oman.
An order of execution will be filed before the First Instance Court that consists of three judges, in accordance with the established rules laid down for the initiation of a suit; an order of execution may not be issued unless the following matters have been verified:

(E) Judgment or order was delivered by a competent court, pursuant to the law of the country in which it was delivered, and that the judgment or order has become a *res judicata* pursuant to the law of the court which delivered it, and that judgment or order has not delivered in according to a fraud;

(F) That the parties to the lawsuit on which the foreign judgment was passed were summoned and duly represented;

(G) That the judgment or order does not involve a request that conflict or contradict with Omani laws;

(H) That the judgment or order does not conflict or contradict with a judgment or order previously delivered by a court in Oman and does not include any violation of moral code or public order in Oman;

(I) That the country, which delivered the judgment or order, accepts to enforce Omani judgments or orders.

Appendix E: The UAE's Jurisdiction Provisions in Civil and Commercial Matters

- Federal Law No. 11 of 1992 of the Civil Procedure Code

- Jurisdiction Provisions in Civil and Commercial Matters

Article 20

Except cases in *rem* involving real estate that located abroad, the Emirates courts shall have jurisdiction over lawsuits filed against an Emirati citizen, and lawsuits filed against a non-Emirati citizen who has a place of residence or domicile in the UAE.

Article 21

The Emirates courts shall have jurisdiction over lawsuits filed against a non-Emirati citizen who has no place of residence or is not domiciled in the UAE in the following circumstances:

(3) If the non-Emirati citizen has a chosen domicile in the UAE

(4) If the lawsuit involves assets located in the UAE...

(5) If the UAE is the place where an obligation is deemed to have originated or where it has been performed or where it is to be enforced, or if the lawsuit in connection with a contract which was notarised in the UAE, or if the lawsuit involves bankruptcy declared in the UAE.

(9) If the lawsuit is against more than one person and one of them has a place of residence or domicile or a chosen domicile in the UAE.

Article 24

Any agreement of the parties contrary to the jurisdiction rules set out in the previous provisions shall be considered null and void.

- Recognition and Enforcement Foreign Judgments

Article 235

An order may be issued by the Emirates courts for the execution of an order or judgment that has been delivered in a foreign country, in accordance with the same conditions as those provided for in the laws of that country in respect of the execution of judgments and orders delivered in the UAE.

An order of execution will be filed in the Court, in accordance with the established rules laid down for the initiation of a suit; an order of execution may not be issued unless the following matters have been verified:

(A) The Emirates courts have no jurisdiction over the dispute on which the judgment or the order was delivered, and that judgment or order was delivered by a competent court, pursuant to the law of the country in which it was delivered;

(B) That judgment or order was delivered by a competent court, pursuant to the law of the country in which it was delivered;

(C) That the parties to the lawsuit on which the foreign judgment was passed were summoned and duly represented;

(D) That the judgment or order has become a *res judicata* pursuant to the law of the court which delivered it;

(E) That the judgment or order does not conflict or contradict with a judgment or order previously delivered by a court in the UAE and does not include any violation of moral code or public order in the UAE.

Appendix F: Legislative Decree No. (30) for the year 2009 with Respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution

Preliminary Chapter

Article (1)

In applying the provisions of this law the following words and expressions shall have the meanings assigned to them unless the context requires otherwise:

Chamber: Bahrain Chamber for Dispute Resolution.

Minister: The Minister concerned with Justice affairs.

Regulation: The regulation of dispute resolution procedures stipulated in Section (1) of Chapter (2) of this law which shall be issued by an order of the Minister after the approval of the Supreme Judicial Council.

Procedural Rules: The procedural rules for the resolution of disputes stipulated in Section (2) of Chapter (2) of this law which shall be issued by resolution of Board of Trustees.

Dispute Resolution Tribunal: One or more natural person(s) designated to settle the disputes. In all disputes conducted under the provisions of Section 1 of Chapter 2 of this law, the Tribunal shall include one or more Judges deputized by the Supreme Judicial Council upon a request from the Minister. A majority of the Tribunal shall consist of deputized Judges.

Chief Executive: The Chamber Chief Executive designated pursuant to article (6) of this law.

Board of Trustees: The Chamber Board of Trustees.

Chapter (1) Establishment and Organization of the Bahrain Chamber for Dispute Resolution

Article (2)

An independent Chamber shall be established for the settlement of economic, financial and investment disputes and shall be called the "Bahrain Chamber for Dispute Resolution" it shall have legal entity, and be subject to the administrative supervision and oversight of the Minister.

Article (3)

The Chamber shall be composed of: a - The Board of Trustees. b - The Administrative and Technical apparatus.

Article (4)

a - The Board of Trustees shall be composed of not less than seven members including the chair person. Their appointment and duration of their membership shall be determined by a decree.

b - The remuneration of the chairperson and members of the Board of Trustees shall be determined by a decree.

Article (5)

A - The Board of Trustees shall be the supreme authority that deals with the Chamber's affairs devising the policies to be implemented and supervising their implementation. The Board of Trustees shall undertake what it deems necessary to conduct its duties and authorities, especially the following:

Devising and approving the Chambers financial and administrative bylaws, issuing regulations and resolutions, and undertaking the necessary measures to implement the provisions of this law.

Approving the organizational structure of the chamber and issuing a regulation regulating Chamber employees' affairs; including procedures and rules of appointment, promotion, transfer and determination of salaries, indemnities and disciplinary procedures and work ethics and values in the Chamber and all other such matters subject to the provisions of the Civil Service Law.

Issuing the procedural rules.

Approving the Chamber's annual budget draft, and approve its final audited account.

Studying the periodic reports submitted by the Chief Executive about the conduct of work in the Chamber, and responding by taking the measures it deems necessary.

Appointing the Chamber Chief Executive.

Appointing one or more Chief Registrar(s) for the Chamber upon the Chief Executive's suggestion.

Approving the annual report of the Chamber's work and activities.

Devising the Chamber's work plan at the beginning of each year.

Determining the authorities and duties of the Chief Executive and the Chief Registrar(s) and evaluating their performance.

Appointing an External Auditor to audit the Chamber's Accounts and determining the fee of the External Auditor.

Communicating with local, regional and international institutions working in the same field for exchanging experiences and visits, concluding cooperation agreements and training in a manner that will enable the Chamber to achieve the objectives it was established for, and to acquire global reputation in the field of its mandate.

B - The Board of Trustees may delegate specific tasks to one or more committees composed

of Board members, or to the Chairman, or to any Board members, or to the Chief Executive.

Article (6)

a. The Board of Trustees shall convene at least four times a year.The Chairperson of the Board shall call an extraordinary meeting when deemed necessary,or upon a reasoned written request from the Minister, at least two members of the Board of Trustees, the Chief Executive, or the external Auditor of the Chamber. This call for an extraordinary meeting shall be made within thirty days of the date of receiving the written request.

b. The invitation to the meeting shall contain a statement of the purpose thereof and an attached agenda.

c. The Chief Executive shall attend all meetings of the Board of Trustees except in the instances specified in the internal bylaws. The Board may invite to its meetings experts and others concerned to discuss or hear their opinions as non- voting participants.

d. The Board of Trustees shall appoint a Board Secretary who prepares Board agendas, writes down minutes of meetings, retains all documents and records pertaining to the Board of Trustees, and undertakes any other tasks assigned by the Board within the scope of work of the Chamber.

e. Within a period not exceeding six months from the issuance of the law, the Board of Trustees shall draft its internal bylaws. The bylaws must include provisions to organize its work and to conduct its meetings through appropriate modern technical methods as well as the mechanisms and means to make resolutions in urgent matters that arise between the meetings of Board of Trustees.

Article (7)

The Chief Executive shall be the head of the Administrative and Technical Apparatus of the Chamber, and shall represent the Chamber before the courts and in dealings with others.

Article (8)

a) The Chamber shall have an independent budget based on commercial pattern. The Budget revenues shall consist of the following:

Fees and revenues levied by the Chamber in lieu of its services.

Sums allocated to the Chamber by the Government in the general budget of the State.

Any other revenues approved by the Board of Trustees, which are not contrary to the provisions of the law.

b) The surplus of the Chamber's budget shall be forwarded from one year to the next.

c) An annual statement of the Chamber shall be published after its endorsement by the external auditor and the Board of Trustees.

Chapter (2) Chamber Jurisdiction Section (1) Chamber Jurisdiction by law

Article (9)

The Chamber shall have jurisdiction to settle the following disputes originally within the jurisdiction of Bahrain courts or other entities having judicial jurisdiction, for cases in which the value of the claim exceeds Five Hundred Thousand Dinars:

Dispute among financial institutions licensed according to the provisions of the Law of Central Bank of Bahrain or between these institutions and other institutions, companies, and individuals.

International Commercial Disputes. The dispute shall be deemed international if the location of one of the disputant parties or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the location most closely connected with the dispute is outside the Kingdom.

A dispute shall be deemed commercial if its subject matter, contractual or non-contractual, concerns relationships of a commercial nature including any transaction of supplying goods or services or the exchange thereof, distribution agreements, commercial representation or commercial agency, managing rights before others, hiring to purchase, construction of factories, consultation services, engineering works, issuing licenses, investment and financing, banking transactions, insurance, franchising agreements, joint ventures, any other forms of industrial or commercial cooperation, and transporting commodities or passengers by air, sea or land.

Article (10)

Subject to the restraints stipulated in the Legislative Decree No. (3) for the year 1972, with respect to Judicial Fees, if the dispute before the Chamber is to be conducted in accordance with the provisions of this section, no procedures shall be conducted before the Chamber unless the due fees are obtained in advance. Fee categories shall be determined and modified by a resolution from the Minister after the approval of the Cabinet of Ministers, not exceeding 5% (five per-cent) of the value of the claim. A resolution by the minister may postpone the payment of fees or exempt all or part of the fees.

Article (11)

a) Parties to the dispute before the Chamber, in accordance with the provisions of this section, may agree upon the applicable law relevant to the subject matter of the dispute provided that the provisions of the agreed law do not contradict the public order in the Kingdom. If the parties did not agree upon the applicable law, the Law of Bahrain shall be the applicable law to the subject matter of the dispute.

b) If the parties have agreed to choose a law other than the Law of Bahrain in accordance with the provisions of Paragraph (a) of this Article, parties are obliged to submit that law to the Dispute Resolution Tribunal in accordance with the regulations and procedures cited in the regulation.

Article (12)

a) If the parties did not agree upon a chosen language(s) to be used in the dispute resolution procedures, conducted before the Chamber in accordance with the provisions of this section, the Arabic language shall be the language to be used.

b) The regulation shall stipulate the provisions regulating the translation of documents and papers to the language(s) used in the dispute resolution procedures.

Article (13)

The parties to the dispute before the Chamber, in accordance with the provisions of this section, may challenge before the Cassation Court requesting nullification of the award issued by the Dispute Resolution Tribunal in any of the following cases:

The Challenging party was not properly served a notice of the appointment of a member of the Dispute Resolution Tribunal or the dispute resolution procedures, or was not enabled to present his defense.

The composition of the Dispute Resolution Tribunal or the dispute resolution procedures is contrary to what is stipulated in the regulation.

The award of the Dispute Resolution Tribunal contradicts the public order in the Kingdom of Bahrain.

If an act of deception or fraud that influenced the Dispute Resolution Tribunal award was committed by a party or his representative.

If after the Dispute Resolution Tribunal award, an admission that papers upon which the award was based were forged or were adjudicated forged, or if the award was based upon testimony of a witness which was adjudged false.

If after the Dispute Resolution Tribunal award, a party obtained decisive papers of the case, the submission of which was obstructed by his opponent.

If the Dispute Resolution Tribunal award ruled in a matter not claimed by the opponents or by more than what had been claimed. However, if it was possible to isolate the orders related to the claims of the opponents from the other orders, then it is not permissible to annul from the dispute resolution tribunal award other than that part which contains the orders related to the matters which the award had adjudicated in matters not claimed by the opponents or by more than they claimed.

If the dispute resolution tribunal award contradicts another award having res judicata status provided that all the opponents in the both cases are the same persons and status and the subject matter of the case is the same subject matter in the previous case.

Article (14)

The challenge stipulated in Article (13) of this law shall be filed in the ordinary manner for filing the case within thirty days of the date of the award, or its notification as the case may be, such period shall be calculated in regard to the instances stipulated in paragraphs (4) to (6) of Article (13) of this law, from the first day the fraud appeared or the admission of the forger or the judgment evidencing the forgery or the judgment against the committer of the

false testimony or the day the withheld paper appeared.

The plaint of challenge must include the challenge reasons, otherwise it shall be void. The challenger must deposit upon filing the plaint a sum equivalent to 2% of the awarded sum or ten thousand Bahrain Dinars whichever is more. The plaint of challenge shall not be accepted unless accompanied by proof of deposit. It is sufficient to provide a single deposit when multiple challengers file their challenge in a single plaint; even if the challenge reasons were different, the court shall confiscate the deposit or a part thereof if the court adjudged denying the challenge or non acceptance or its lapse.

Article (15)

Without prejudice to provision of Articles (14) of this law, the award issued by the Dispute Resolution Tribunal in accordance with the provisions of this section, shall be deemed a final judgment issued by the courts of Bahrain, and the regulation shall stipulate the provisions attesting the enforcement of the award.

The Dispute Resolution Tribunal's award issued in accordance with the provisions of this section shall be enforceable unless the Cassation Court suspends its enforcement upon the request of the Challenger in a Challenge plaint.

Article (16)

Until the Chamber commences its jurisdictions stipulated in Chapter (2) of this Law, the courts and the entities that have judicial jurisdiction shall continue to adjudicate the cases that fall in the jurisdiction of the Chamber in accordance with the provisions of this law until a final judgment is reached therein.

Article (17)

The Cassation Court alone shall have the jurisdiction to determine whether the Chamber or one of the courts has the jurisdiction to settle a dispute if the case concerning the same subject was filed before both of them and neither of them waived its jurisdiction or both of them waived their jurisdictions. The Cassation Court shall have the jurisdiction to settle the dispute concerning execution of two contradictory judgments, one issued by the Chamber and the other issued by one of the courts.

The request shall be filed in a plaint submitted to the court's clerk section and the disputants shall be notified in accordance with the rules related to notification stipulated in the Civil and Commercial Procedures law. The disputants are entitled to submit a memorandum of response thereon within eight days following the date of their notification. After the opinion of the Technical Bureau of the court in the request, the Bureau shall submit it to the Chief of the Court to determine a session to examine the matter before the court and notify the disputants at least three days before the session. Unless the Cassation Court decides otherwise, the filed request shall not suspend the conduct of the concerned case. If the request is submitted after the judgment in the case the Cassation Court may suspend any or both of the contradictory judgments.

Article (18)

The Supreme Judicial Counsel shall oversee the conduct of the work in the Chamber in

connection with the disputes under its jurisdiction, as an entity with a judicial jurisdiction in accordance with the provisions of this section and pursuant to the provision stipulated in the regulation.

Section (2) Chamber Jurisdiction by Parties Agreement

Article (19)

The Chamber shall be competent in disputes that the parties agree in writing to settle by the Chamber.

Article (20)

If the dispute before the Chamber has been conducted in accordance with the provisions of this section, then determination of cost and remuneration shall be in accordance with provisions mentioned in the Procedural Rules.

Article (21)

If the parties did not agree upon the applicable law on the subject matter of the dispute and the dispute before the Chamber has been conducted in accordance with the provisions of this section, the Dispute Resolution Tribunal shall determine the law specified by the rules of conflict of laws that the Tribunal deems applicable to the subject matter of the dispute.

Article (22)

a) If the parties did not agree upon the language(s) to be used in the disputes resolution procedures and the dispute is conducted before the Chamber in accordance with the provisions of this section, the dispute resolution tribunal shall specify the language(s) to be used in these procedures.

b) The Procedural Rules shall stipulate the provisions regulating translation of documents and papers to the language(s) used in the dispute resolution procedures.

Article (23)

a) The award of the Dispute Resolution Tribunal issued in accordance with the provisions of this section shall be enforceable by an order issued by a High Court of Appeal Judge upon a request petition submitted by the enforcement order applicant accompanied with the original

Dispute Resolution Tribunal award and a copy of the dispute resolution agreement, and after seeing the award and the agreement, and assuring that it does not contravene with Public Order in the Kingdom.

b) The order of the High Court of Appeal Judge concerning the request of the enforcement of the Dispute Resolution Tribunal award shall be reasoned, the dispute parties may petition thereof, before the High Court of Appeal within thirty days from its issuance or its notification, as the case may be, for any reasons stipulated in paragraph (a) in article (24) of this law.

c) The Judge who issued the order concerning the enforcement request, shall not be included in the composition of the court selected to adjudicate the petition.

Article (24)

a) The parties before the Chamber, in accordance with the provisions of this section, may challenge before the Cassation Court the award issued by the Dispute Resolution Tribunal. They may also submit before the same court a petition against the order issued by the High Court of Appeal concerning the enforcement request, within the period stipulated in article (23) of this law, for any of the following reasons:

Nullity of the Agreement to settle the dispute before the Chamber due to incapacity of one of the parties or due to this agreement contravening provisions of the applicable law chosen by the parties.

The challenger or the petitioner was not served a notice in a proper manner regarding the appointment of a member of the Dispute Resolution Tribunal or the dispute resolution procedures or was not enabled to present his defense.

Composition of the Dispute Resolution Tribunal or the dispute resolution procedures are contrary to what was stipulated in the parties' agreement.

The Dispute Resolution Tribunal award dealt with an unintended dispute or one not contained in the submitted agreement or contains orders in matters outside the scope of the agreement. However, if it was possible to isolate the orders related to the submitted matters to the Tribunal from the other orders not submitted thereto, then it is not permissible to set-aside the Dispute Resolution Tribunal award except that part which contains the orders related to the matters which were not to be submitted to the tribunal.

The award of the Dispute Resolution Tribunal contradicts the public order in the Kingdom of Bahrain.

b) The challenge or petition stipulated in paragraph (a) of this article shall be filed in the ordinary manner for filing the case, and its plaint must include the reasons upon which it was based, otherwise it shall be void.

The challenger or the petitioner must provide upon filing the plaint the deposit stipulated in the law of Cassation Court. The plaint of challenge or petition shall not be accepted if it was not accompanied by proof of the deposit. It is sufficient to provide a single deposit when multiple challengers or petitioners file their challenge or petition in a single plaint; even if the reasons were different the court shall confiscate the deposit or a part thereof if the court adjudged denying the challenge or the petition or non acceptance or its lapse.

c) Filing the Challenge or the petition stipulated in this article, shall not suspend the enforcement of the award of the Dispute Resolution Tribunal Unless the Cassation Court decides to suspend the enforcement upon the challenger or the petitioner requests in the challenge or petition plaint.

Article (25)

Without prejudice to the procedures stipulated in Articles (23) and (24) of this law concerning enforcement of the Dispute Resolution Tribunal award, parties to the dispute shall not be entitled to challenge on nullity base against the award issued by the Dispute Resolution Tribunal in accordance with Article (24) of this law, if the parties have agreed in writing to choose a foreign law concerning the dispute, and they shall not be entitled to challenge the award before Bahrain's Courts, and that the challenge against the award shall be before the competent authority in another state.

Appendix G: Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Courts

Article (5)
Jurisdiction

A. Court of First Instance:

1. The Court of First Instance shall have exclusive jurisdiction to hear and determine:

(a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
(b) Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;
(c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities.
(d) Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals.
(e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.

2. The Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions.

3. The Court of First Instance may hear and determine any civil or commercial claims or actions falling within its jurisdiction if the parties agree in writing to submit to the jurisdiction of another court over the claim or action but such court dismisses such claim or action for lack of jurisdiction.

4. Notwithstanding Clause (2) of Paragraph (A) of this Article, the Court of First Instance may not hear or determine any civil or commercial claim or action in respect of which a final judgment is rendered by another court.

B. Court of Appeal:

1. The Court of Appeal shall have exclusive jurisdiction to hear and determine:

(a) appeals filed against judgments and decisions made by the Court of First Instance;

(b) request of interpretation by the Chief Justice of the Courts of any article of the DIFC Laws and DIFC Regulations upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment; such interpretation shall have the same authority as the interpreted legislation.

2. Judgments rendered by the Court of Appeal shall be final and conclusive, and shall not be subject to appeal by any means of appeal.

C. The procedure prescribed in the Rules of the Courts shall apply to all civil and commercial claims and actions heard by DIFC Courts.

C. DIFC Execution Judge

The Chief Justice of the Courts shall assign one or more of the Courts' judges as execution judge(s).

Appendix H: Convention of the Riyadh Arab Agreement for Judicial Cooperation in the League of Arab States 1983

PART V - RECOGNITION OF JUDGEMENTS PRONOUNCED IN CIVIL, COMMERCIAL, ADMINISTRATIVE AND PERSONAL STATUTE ACTIONS

Article 25 Power or res adjudicata.

(a) In the application of this Part, judgement means every decision - regardless of nomenclature - made in pursuance of judicial or jurisdictional procedures of the courts or any competent authority of any party.
(b) Subject to the provisions of Article 30 of this Agreement, each contracting party shall recognize the judgements made by the courts of any other contracting party in civil cases including judgements related to civil rights made by penal courts and in commercial, administrative and personal statute judgements having the force of res adjudicata and shall implement them in its territory in accordance with the procedures stipulated in this Part, if the courts of the contracting party which made the said judgements are competent under the provisions of the rules of jurisdiction in force in the requested party, and if the legal system of the requested party does not retain for its courts or the courts of another party the exclusive competence to make such judgements.
(c) The present Article shall not apply to:

•Judgements made against the government of the requested party or against any of its employees in respect of acts undertaken in the course of duty or exclusively on account thereof.

•Judgements the recognition or implementation of which would be inconsistent with international treaties and agreements applied by the requested party.

•Provisional and precautionary measures and judgements made in cases of bankruptcy, taxes and fees.

Article 26 Jurisdiction in disputes over the competence of the person requesting implementation of his personal status.

The courts of the contracting party of which the person concerned is a national at the time of submitting the request are deemed competent in cases of legal capacity and personal status if the dispute concerns the capacity of such person or his personal status.

Article 27 Jurisdiction in cases of real estate.

The courts of the contracting party in whose territory the property is situated shall have jurisdiction.

Article 28 Jurisdiction of the courts of the contracting party where the judgement is made.

Except in the cases provided for in Articles 16 and 27 of this Agreement, the courts of the contracting party where the judgement was made shall be considered to have jurisdiction in the following cases:

(a) If the domicile or place of residence of the defendant at the time of hearing (opening the case) was in the territory of the said contracting party.
(b) If the defendant had at the time of hearing (opening the case) a place or branch of business or industry or any other such activity in the territory of the said contracting party, and the action instituted against him pertained to a dispute concerning the activities undertaken in such place or branch.
(c) If the contractual obligation subject of the dispute has been executed, or be mandatory in the contracting party under an express or implied agreement between the plaintiff and the defendant.
(d) In cases of non-contractual liability, if the act incurring such liability had occurred in the territory of the said contracting party.
(e) If the defendant had expressly accepted to be subject to the jurisdiction of the courts of the said contracting party, be it through the designation of an elected domicile or through agreement of such jurisdiction, provided that the law of the said contracting party does not prohibit such agreement.
(f) If the defendant made a defence in the substance of the case without raising a plea of non-jurisdiction of the court before which the dispute was brought.
(g) If the matter pertained to incidental requests when such courts had been deemed competent to examine the initial request under the text of the present Agreement.

Article 29 Scope of jurisdiction of the courts of the contracting party requested to recognise or implement the judgement.

The courts of the contracting party requested to recognize or implement a judgement, when considering the basis of the jurisdiction of the courts of the other contracting party, shall have regard to the facts included in the judgement, unless the judgement is made in absentia.

Article 30 Refusal to recognize judgements.

Recognition of judgements shall be refused in the following cases:

(a) If recognition would be in contradiction with the stipulations of the Islamic Shari'a, the provisions of the constitution, public order, or the rules of conduct of the requested party.
(b) If the judgement was passed in absentia without notifying the convicted party of the proceedings in an appropriate fashion that would enable him to defend himself.
(c) If the law of the requested party applicable to legal representation of ineligible persons or persons of diminished eligibility were not taken into consideration.
(d) If the dispute has given rise to another final judgement in the requested state, or in a third state and if the requested party has already recognized such a final judgement.

(e) If the dispute is also the subject of a case being heard by the courts of the requested party and the action has been brought before the courts of the requested party on a date preceding the presentation of the dispute to the court of the requesting party.

The judicial body examining the request for recognition in accordance with the text of this Article may observe the rule of law in its own country.

Article 31 Execution of the judgement.

(a) Judgements made by the courts of any contracting party and duly recognized by the other contracting parties in accordance with the provisions of this Agreement shall be executed in the territory of that contracting party so long as they are so in the territory of the contracting party whose courts had made the said judgements.
(b) Procedures pertaining to the recognition of a judgement or the execution thereof shall be subject to the laws of the requested party if not otherwise governed by the provisions of this Agreement.

Article 32 Duties of the competent judicial body of the contracting party requested to recognize or execute the judgement.

The duties of the competent judicial body of the contracting party requested to recognize or to execute the judgement concerned shall be confined to establishing that the judgement complies with the provisions of this Agreement without examining the subject matter thereof; the said body shall do this automatically and confirm the outcome in its relevant decision.

The competent judicial body of the contracting party requested to recognize the judgement shall order - as soon as it deems necessary - that appropriate measures be taken to give the judgement the same enforceable status as it would have had if it had been made by the requested party.

The request for the order to enforce may concentrate on the operative text of the judgement or parts thereof if it is divisible.

Article 33 Consequences of the execution order.

The execution order shall be binding on all parties to an action who domiciled in the territory of the contracting party where the judgement was made.

Article 34 Documents pertaining to the request to recognize or execute a judgement.

Any authority recognizing a judgement by any other contracting party must submit the following:

(a) A full and official copy of the judgement the signatures on which must be authenticated by the competent authority.
(b) A certificate attesting that the judgement is final and has the power of res adjudicata, unless this be specified in the text of the judgement itself.
(c) A copy of the document whereby notice of the judgement was served attested to as a true copy or any other document demonstrating that the defendant had been duly and

expressly notified of the action on which the judgement was pronounced when this was pronounced in absentia.

In the case of a request that the judgement be executed, a certified copy of the order to enforce such judgement must accompany the aforementioned documents. The documents enumerated in this Article shall carry the necessary official signatures and the seal of the competent court without any further attestation by any other authority, except for the document mentioned in provision (a) of this Article.

Article 35 Conciliation before competent authorities.

Conciliation proved before the competent judicial authorities in accordance with the provisions of this Agreement in the territory of any of the contracting parties shall be recognized and effective in the territories of all other contracting parties after ascertaining that it has the force of an executive document with the contracting party in whose territory it was concluded, and that it does not contain any texts in contradiction of the provisions of Islamic Shari'a or the constitution or public order or rules of conduct of the contracting party required to recognize such conciliation or put it into force.

The party requesting recognition of such conciliation or the execution thereof shall provide a certified copy of it and an official certificate attesting that it has the force of an executive document issued by the judicial authority before which it had been so proved.

In this case the third paragraph of Article 34 of this Agreement shall apply.

Article 36 Writs of execution.

Writs of execution of a contracting party in whose territory they were issued shall be put into force by the other contracting parties in accordance with the procedures followed in the case of judicial judgements if such writs be subject to the said procedures, provided that the application thereof does not conflict with the provisions of Islamic Shari'a, or the constitution, public order or the rules of conduct of the contracting party required to give effect to such writs. The authority requesting recognition and execution of a documented writ by the other contracting party shall submit an official copy thereof carrying the seal of the authenticating officer or office duly certified, or a certificate issued by the latter stating that the writ has the force of an executive document. In this case, the third paragraph of Article 34 of this Agreement shall apply.

Article 37 Adjudications or arbitrators.

Without prejudice to the provisions of Articles 28 and 30 of this Agreement adjudications of arbitrators shall be recognized and executed by any contracting party in the manner stipulated in this Part subject to the legal norms of the requested party, and the competent judicial authority of the requested party may not discuss the subject of such arbitration nor refuse to execute the judgement except in the following cases:

(a) If the law of the requested party does not permit the settlement of the subject of the dispute by arbitration.
(b) If the adjudication of the arbitrators is made in execution of a condition or arbitration contract that is void or has not become final.

(c) If the arbitrators are non-competent under the contract or condition of arbitration or under the law on the basis of which the adjudication was made.
(d) If the litigants have not been served subpoenas in the proper manner.
(e) If any part of the adjudication be in contradiction with the provisions of Islamic Shari'a, the public order or the rules of conduct of the requested party.

The authority requesting recognition of the adjudication of arbitrators and the execution thereof shall submit a certified copy of the adjudication accompanied by a certificate issued by the said authority stating that the adjudication has executive force.

If there be a proper, written agreement under which the parties had consented to submit to the competence of the arbitrators in settling a certain dispute or whatever other disputes arising between the two parties in respect of a certain legal relationship, a certified copy of such agreement must be submitted.

Appendix I: Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC States 1995

Section One Execution of Judgments

Article 1

(a) Each of the GCC countries shall execute the final judgments issued by the courts of any member state in civil, commercial and administrative cases and the personal affairs cases in accordance with the procedures as provided under this agreement, provided that the court that issued the judgment has the jurisdiction in accordance with the international jurisdiction as applicable in the member state where the judgment is required to be executed or has the jurisdiction in accordance with the provisions of this agreement.

(b) The preceding paragraph shall apply to any resolution whatsoever shall be issued in accordance with judicial or venue procedures by courts or any competent party in one of the member states.

Article 2

The execution of a judgment may be rejected in full or in part in the following events:

a) If the judgment is in violation of the provisions of the Islamic Shariaa, the provisions of the Constitution or the public order in the state where the judgment is required to be executed.

b) If the judgment is issued in absence and the judgment debtor is not notified of the suit or the judgment properly.

c) If the dispute in respect of which the judgment is issued was the subject matter of a former judgment issued on the merit of the dispute as between the same litigants, is related to the same right in terms of its subject matter and grounds, and is issued in its final form in the state where the judgment is required to be executed or in any other member state which is a party to this agreement.

d) If the dispute in respect of which the judgment required to be executed is issued is the subject matter of a suit currently heard by one of the courts of the state where the judgment is required to be executed between the same litigants, is related to the same right in terms of its subject matter and grounds, and such suit has been filed prior to the date of referring the dispute to the court of the state in which the judgment is issued.

e) If the judgment is issued against the Government of the state where the judgment is required to be executed or against one of its officials for acts done by such officials during or only due to the performance of the duties of their job.

f) If the execution of the judgment is in conflict with the international conventions and protocols applicable in the state where such execution is required.

Article 3

(a) A judgment issued by the courts of a member state may be executed in any of the states if such judgment may be executed in the state where the court that issued the judgment is located.

(b) The procedures of executing a judgment shall be governed by the law of the state where the judgment is required to be executed, unless this agreement provides otherwise.

Article 4

Other than the cases as provided in Articles 5 and 6 hereof, the courts of the state in which a judgment is issued shall be considered to have jurisdiction in the following events:

(a) If the domicile or place of residence of the defendant at the time of filing the suit is located in the territory of that state.
(b) If the Defendant has an office or a branch in the territory of such state at the time of filing the suit and if the dispute is related to performing the activity of such office or branch.
(c) If the contractual obligation, the subject matter of the dispute, is executed or should be executed in such state.
(d) In the event of non contractual liability, if the act, the subject matter of the liability, occurred in the territory of such state.
(e) If the Defendant expressly accepts the jurisdiction of the courts of such state by giving a domicile or under an agreement, provided the laws of such state do not prohibit such agreement.
(f) If the defendant makes its defense on the merit of the suit without pleading that the court hearing the dispute lacks the jurisdiction to hear it.

Article 5

The courts of the state shall have jurisdiction to hear capacity and personal affairs cases if the dispute arises in connection with the capacity or personal affairs of a person being a citizen of such state at the time of submitting the application to such courts.

Article 6

The courts of the state in whose territory the real estate is located shall have the jurisdiction to conclude the rights in kind in connection with such real estate.

Article 7

The task of the judicial authority of the state where the judgment is required to be executed shall be limited to confirming whether the judgment fulfills the requirements as provided by this agreement, without discussing the subject matter. Such authority shall order to take the required procedures to render the judgment as effective as any judgment issued in the state itself. The application to order the execution of the judgment may cover all or any part of the pronouncement of the judgment, if divisible.

Article 8

The effects of the execution order shall apply to all parties to the suit residing in the territory of the state where the order is issued or to their assets.

Article 9

The party that applies to execute a judgment in any of the member states shall provide:

(a) A true copy of the judgment with the signatures therein being attested by the competent authority.

(b) A certificate that the judgment became final, unless the same is stated in the judgment.
(c) In the case of a judgment issued in absence, a copy of the notification of the judgment, certified as a true copy of the original, or any other document that may confirm that the defendant was properly notified.

Article 10
The settlement made before the competent judicial authorities in any of the member states shall be effective in all the territories of the other member states in accordance with the provisions of this agreement.

Article 11
The executive deeds made in the territory of a member state shall be ordered to be executed in the other member states in accordance with the procedures applicable to judgments.

Article 12
Subject to the provisions of Articles 2 and 4, awards issued by arbitrators shall be executed by any of the member states as provided hereunder, subject to the applicable rules in the state where the award is required to be executed. Section Two Judicial delegation.

Appendix J: The 2005 Hague Convention on Choice of Court Agreements

CONVENTION ON CHOICE OF COURT AGREEMENTS

(Concluded 30 June 2005)

The States Parties to the present Convention,

Desiring to promote international trade and investment through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,

Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude this Convention and have agreed upon the following provisions -

CHAPTER I - SCOPE AND DEFINITIONS

Article 1
Scope

(1) This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.
(2) For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.
(3) For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2
Exclusions from scope

(1) This Convention shall not apply to exclusive choice of court agreements -

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
b) relating to contracts of employment, including collective agreements.
(2) This Convention shall not apply to the following matters -

a) the status and legal capacity of natural persons;
b) maintenance obligations;
c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
d) wills and succession;
e) insolvency, composition and analogous matters;
f) the carriage of passengers and goods;
g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

h) anti-trust (competition) matters;
i) liability for nuclear damage;
j) claims for personal injury brought by or on behalf of natural persons;
k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
l) rights *in rem* in immovable property, and tenancies of immovable property;
m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
n) the validity of intellectual property rights other than copyright and related rights;
o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
p) the validity of entries in public registers.
(3) Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.
(4) This Convention shall not apply to arbitration and related proceedings.
(5) Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.
(6) Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
Exclusive choice of court agreements

For the purposes of this Convention -

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph *c)* and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
c) an exclusive choice of court agreement must be concluded or documented -

i) in writing; or
ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4
Other definitions

(1) In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination

relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
(2) For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State -

a) where it has its statutory seat;
b) under whose law it was incorporated or formed;
c) where it has its central administration; or
d) where it has its principal place of business.

CHAPTER II - JURISDICTION

Article 5
Jurisdiction of the chosen court

(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
(3) The preceding paragraphs shall not affect rules -

a) on jurisdiction related to subject matter or to the value of the claim;
b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6
Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -

a) the agreement is null and void under the law of the State of the chosen court;
b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
e) the chosen court has decided not to hear the case.

Article 7
Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

CHAPTER III - RECOGNITION AND ENFORCEMENT

Article 8
Recognition and enforcement

(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
(2) Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
(3) A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
(4) Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.
(5) This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9
Refusal of recognition or enforcement

Recognition or enforcement may be refused if -

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
b) a party lacked the capacity to conclude the agreement under the law of the requested State;
c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
d) the judgment was obtained by fraud in connection with a matter of procedure;
e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10
Preliminary questions

(1) Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under

this Convention.
(2) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2.
(3) However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where -

a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or
b) proceedings concerning the validity of the intellectual property right are pending in that State.
(4) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11
Damages

(1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
(2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 12
Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 13
Documents to be produced

(1) The party seeking recognition or applying for enforcement shall produce -

a) a complete and certified copy of the judgment;
b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
(2) If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
(3) An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form

recommended and published by the Hague Conference on Private International Law.
(4) If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14
Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15
Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

CHAPTER IV - GENERAL CLAUSES

Article 16
Transitional provisions

(1) This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.
(2) This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17
Contracts of insurance and reinsurance

(1) Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.
(2) Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of -

a) a matter to which this Convention does not apply; or
b) an award of damages to which Article 11 might apply.

Article 18
No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Article 19
Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20
Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21
Declarations with respect to specific matters

(1) Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
(2) With regard to that matter, the Convention shall not apply -

a) in the Contracting State that made the declaration;
b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22
Reciprocal declarations on non-exclusive choice of court agreements

(1) A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph *c)*, and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).
(2) Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if -

a) the court of origin was designated in a non-exclusive choice of court agreement;
b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and
c) the court of origin was the court first seised.

Article 23
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for -

a) review of the operation of this Convention, including any declarations; and
b) consideration of whether any amendments to this Convention are desirable.

Article 25
Non-unified legal systems

(1) In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention -

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.
(2) Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.
(3) A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.
(4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 26
Relationship with other international instruments

(1) This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.
(2) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.
(3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.
(4) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.
(5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.
(6) This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention -

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V - FINAL CLAUSES

Article 27
Signature, ratification, acceptance, approval or accession

(1) This Convention is open for signature by all States.
(2) This Convention is subject to ratification, acceptance or approval by the signatory States.
(3) This Convention is open for accession by all States.
(4) Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28
Declarations with respect to non-unified legal systems

(1) If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
(2) A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
(3) If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
(4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 29
Regional Economic Integration Organisations

(1) A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
(2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
(3) For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.
(4) Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30
Accession by a Regional Economic Integration Organisation without its Member States

(1) At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
(2) In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31
Entry into force

(1) This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.
(2) Thereafter this Convention shall enter into force -

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32
Declarations

(1) Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.
(2) Declarations, modifications and withdrawals shall be notified to the depositary.
(3) A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.
(4) A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.
(5) A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33
Denunciation

(1) This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following -

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;
b) the date on which this Convention enters into force in accordance with Article 31;
c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;
d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.