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# Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in Egypt and the Mashriq Countries

Nicolas Bremer\*

## ABSTRACT:

*Asserting a claim in an international transaction is often complex. If a transaction involves parties from different countries, the venue of dispute resolution will often be in a jurisdiction different from that where enforcement may have to be sought. In such a case, any ruling obtained will have to be recognized by the competent authority of the country where enforcement is sought (known as requested country). Obtaining recognition of a foreign ruling in the Middle East and North Africa is considerably challenging. Despite some progress having been made over the last decade, local courts are still rather reserved towards foreign ruling. In particular, the tendency of local authorities to conduct a full revision au fond under an extensive interpretation of the ordre public exception. This article provides an overview of the regulations in Iraq, Jordan, Lebanon, Syria, and Egypt and formulates some suggestions on strategies of dealing with the challenges posed by the existing regimes.*

## I. INTRODUCTION

This article is published following a prior article on the recognition of foreign judgments and arbitral awards (foreign rulings) in the countries of the Gulf Cooperation Council (GCC).<sup>1</sup> It will consider the exequatur procedure in civil and commercial matters (excluding decisions in family, inheritance, and personal status matters) as applicable in the Mashriq—Iraq, Jordan, Lebanon and Syria—and Egypt (hereinafter Mashriq).<sup>2</sup> Exequatur procedure describes the method by which the competent authority of the requested country—typically a court—will determine

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1. See Nicolas Bremer, *Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries*, 3 MCGILL J. DISP. RESOL. 37 (2016-2017).

2. While Egypt is not part of the *Mashriq*, this article will consider recognition of foreign judgments and arbitral awards in Egypt, since the legal system of Egypt is closely related to that of the *Mashriq* countries.

whether to recognize a foreign judgment or arbitral award, and whether the foreign ruling shall have full legal effect and be enforced in the courts jurisdiction.<sup>3</sup>

Section II will provide the reader with an overview of themes concerning recognition of foreign rulings in the Mashriq region. Section III will describe the exequatur procedure applicable in the individual Mashriq countries comprising of international and regional treaties as well as domestic law. It will highlight the specific challenges for recognition posed by the existing legal provisions and court practice, the tendency of local courts to extensively review foreign rulings they are requested to recognize, the restrictive provisions on jurisdiction, and the specific demands posed by the application of Islamic law in the Mashriq countries. In addition, it will examine whether judgments and arbitral awards made in certain Western jurisdictions—namely, Austria, Canada, France, Germany, Switzerland, the United Kingdom, and the United States—can be recognised in the Mashriq countries.

As a conclusion, Section IV will give some suggestions on strategies for drafting dispute resolution clauses and structuring legal action to address the challenges posed by the existing legal regimes. It will address considerations on choice between litigation and arbitration, and selection of dispute resolution venue, as well as issues of material law to be considered in legal proceedings where the judgment or award sought may have to be enforced in a Mashriq jurisdiction.

## II. COMMON THEMES

The legal and political situation in the Mashriq countries differ considerably. For instance, the ongoing armed conflicts in Iraq and Syria and the resulting political tensions and shifts in effective control within these countries affect enforcement of foreign rulings. In the context of international private law, however, certain similarities can be identified. This is in part due to the influence of Egyptian law on the modern civil and commercial laws of the other Mashriq countries, as well as the legal root in many of these jurisdictions.<sup>4</sup>

With the exception of Iraq, recognition of foreign rulings in the Mashriq countries is governed by the concept of reciprocity, providing that foreign rulings may be recognized in the requested country provided that rulings of the requested country's courts can, in principle, be recognized in the country where the judgement or award was rendered (country of origin). Like the courts of other countries of the Near and Middle East, the Mashriq countries' courts have traditionally been rather restrictive when asked to recognize foreign judgments.<sup>5</sup> They assume extensive

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3. Should the foreign ruling be recognized, the enforcement will usually be executed by specific administrative authorities. This article will, however, not consider the (administrative) enforcement procedure but focus on the (judicial) exequatur procedure only.

4. Unlike in the case of the other *Mashriq* countries, Lebanese civil law is not based on Egyptian law. The central piece of legislation of Lebanese civil law is the Civil Code enacted in 1932 during the time of French Mandate, which was developed based on and inspired by the French Code Civil. HERBERT J LEIBNESY, *THE LAW OF THE NEAR AND MIDDLE EAST. READINGS, CASES AND MATERIALS* (1975) at 57. Still, since the Egyptian Civil Code also was developed based on the French Code Civil similarities do exist. *Id.* at 48.

5. See Court practice in Bahrain, Saudi Arabia and the United Arab Emirates; Bremer, *Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries* *supra* note 1, at 42, 56, 59.

authority to review foreign judgments under the guise of a review in respect to compliance with the requested country's *ordre public*.<sup>6</sup> Likewise, jurisdictional issues—or more precisely, the approach taken by courts of some Mashriq countries in respect to competing jurisdiction—pose a considerable hindrance for the recognition of foreign judgments.<sup>7</sup> Enforcement of foreign judgment is particularly restricted in Jordan where only judgments concerning specific claims may be recognized.<sup>8</sup> Still, there have been some positive developments in recent years. In particular, with Egyptian courts taking a less restrictive position towards competing jurisdiction and judgments rendered in absentia, these issues appear to be much less of an obstacle for recognition of foreign judgments in the region.

Notably, apart from Iraq, all Mashriq countries are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“The New York Convention” or “The Convention”).<sup>9</sup> The fact that only Lebanon limited the application of the convention to awards made in another member of the Convention, and Jordan limited its application only in respect to Israel, speaks to the growing arbitration-friendly environment in the region. Nonetheless, some obstacles for recognition of foreign awards still exist. The extensive application of the *ordre public* reservation in respect to recognition and the exclusion of some matters from dispute resolution by arbitration limit the parties’ choice as to applicable law and method of dispute resolution.

### III. INDIVIDUAL LEGISLATIONS

#### A. Egypt

##### i. Foreign Judgments

Verdicts and other decisions of foreign courts (foreign judgments) may be recognized in Egypt where reciprocal recognition is established between Egypt and the country of origin by treaty or practice.

##### a. Treaties

Provisions on recognition of foreign judgments may be found in specific bilateral or multilateral agreements facilitating judicial cooperation or other more general trade agreements. The most relevant treaty on the reciprocal enforcement of

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6. In private international law, *ordre public* (also public policy) describes the body of fundamental legal principles of a state’s legal system. It is made up of the social, moral and economic values common to the society of the relevant state. Martin Gebauer, *Ordre public (Public Policy)*, Max Planck Encyclopedia of Public International Law [MPEPIL], at 1, available online at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1448> (last visited November 7, 2017).

7. Bremer, *Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries*, *supra* note 1, at 42, 48, 51, 54, 56, 59.

8. See below at: III.C.i.a.

9. See *Contracting States – List of Contracting States*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/list+of+contracting+states> (last visited November 7, 2017).

foreign judgments in inter-Arabian relations is the Riyadh Arab Convention on Judicial Cooperation of 1983 (“Riyadh-Convention”),<sup>10</sup> which provides for reciprocal recognition among most members of the Arab League.<sup>11</sup> While not a member to this treaty, Egypt—as are all other Mashriq countries—is a member of the predecessor treaty to the Riyadh-Convention, the Arab League Convention on the Enforcement of Foreign Judgments and Arbitral Awards of 1952 (Arab League Convention).<sup>12</sup>

The Riyadh Convention replaced the Arab League Convention inter-parts among the members of the Riyadh Convention.<sup>13</sup> The provisions of the Arab League Convention, however, continue to apply in respect to those of its member countries of that did not join the Riyadh Convention, such as Egypt.<sup>14</sup> Thus, where an Egyptian court is requested to recognize a judgment rendered by a court of a member of the Arab League Convention it may be compelled to do so under the convention. Under this Convention, the requested court may not review the foreign judgment on its merits.<sup>15</sup> Recognition may only be denied, where:<sup>16</sup>

1. The foreign court did not have jurisdiction over the subject matter according to the country of origin’s *lex fori*;
2. The defendant was not duly summoned;
3. The foreign judgment contradicts the *ordre public* of the requested country; or
4. The foreign judgment conflicts with a prior judgment rendered by the courts of the requested country or where a legal action concerning the same subject matter is currently heard by the requested country’s courts.

Since all other Mashriq countries are parties to the Arab League Convention, Egyptian courts may be requested to recognize judgments passed by courts of the other Mashriq countries under the convention.

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10. ABDEL HAMID EL-AHDAB & JALAL EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES* 889 (3rd ed. 2011); *Riyadh Arab Agreement for Judicial Cooperation*, COUNCIL OF ARAB MINISTERS OF JUSTICE (Apr. 6, 1983), <http://www.refworld.org/docid/3ae6b38d8.html> (last visited November 7, 2017).

11. The Riyadh-Convention broadly governs judicial cooperation between its parties. The reciprocal recognition and enforcement of judgments and arbitral awards among the states parties to the Riyadh Convention is regulated in Articles 25 through 37 Riyadh-Convention. *Riyadh Arab Agreement for Judicial Cooperation*, *supra* note 10, at arts. 25-37.

12. *See 1952 – Arab League Convention*, ARAB & INTERNATIONAL ARBITRATORS (2011), <https://www.aia-adr.com/blank-c10t5> (last visited November 7, 2017).

13. *Riyadh Arab Agreement for Judicial Cooperation*, *supra* note 10, at art. 71.

14. While the Riyadh-Convention is considered the successor convention to the Arab League Convention, the Arab League Convention was never repealed. Thus, its provisions remain in place where they are not superseded by those of a newer convention; i.e. the Riyadh-Convention. Consequently, the Arab League Convention remains applicable in respect to Egypt, since the provisions of the Riyadh-Convention are not binding to Egypt as a non-member. For the concept of legal hierarchy between prior and later convention under public international law *see* MALCOLM N. SHAW, *INTERNATIONAL LAW* 91-95 (8th ed. 2017).

15. *1952 – Arab League Convention*, *supra* note 12, at art. 2.

16. *Id.*

The only western jurisdiction considered by this Article that concluded a treaty on reciprocal recognition with Egypt is France. In 1982 the two countries concluded the Convention on Judicial Cooperation in Civil Matters, including Personal Statute, Social, Commercial, and Administrative Matters (“EGY-FRA Convention”).<sup>17</sup> Pursuant to the EGY-FRA Convention, judgments made in one of the two countries may be recognized in the other provided that:<sup>18</sup>

1. The judgment is final under the law of the country of origin;
2. The foreign court was competent to hear the dispute pursuant to the country of origin’s *lex fori* or the provisions on jurisdiction comprised in Article 26 EGY-FRA Convention;
3. The parties were duly summoned and represented or the judgment was legally passed in *absentia* in accordance with the country of origin’s law;
4. The judgment does not conflict with the *ordre public* of the requested country; and
5. The subject matter is not subject to legal proceedings in the requested country initiated prior to those brought in the country of origin or a prior judgment rendered by the courts of the requested country or the courts of a third jurisdiction, provided that the requested country has already recognized the judgement rendered in the third jurisdiction.

Where recognition of a French judgment is sought in Egypt under the EGY-FRA Convention, the *ordre public* requirement of Article 25(4) of the EGY-FRA Convention may be problematic. As other courts of countries in the Near and Middle East, Egyptian courts consider themselves competent to extensively review a foreign judgment they are requested to recognize on its merits under the *ordre public* requirement. While Egyptian courts will generally not conduct a full revision *au fond* based on the *ordre public* requirement, parties to a dispute that comprises claims that may have to be enforced in Egypt will, nonetheless, should consider Egyptian law when filing legal action.

For Western investors, the influence of Islamic law may be quite unfamiliar in this regard. While the provisions of Islamic law have considerably less influence on Egyptian civil and commercial law than on other fields of law such as for instance family or inheritance law,<sup>19</sup> Islamic law is the principle source of Egyptian law.<sup>20</sup> The central principles of Islamic law will, thus, be considered part of the

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17. *Convention Between the French Republic and the Arab Republic of Egypt on Judicial Cooperation in Civil Matters, Including Personal Status, and in Social and Commercial Matters and Administrative* (July 8, 1983), <http://www.trx-legal.com/wp-content/uploads/2015/06/France-Egypte-15-mars-1982.pdf> (last visited November 7, 2017).

18. *Id.* at art. 25.

19. ANDREAS K. PATTAR, *ISLAMISCH INSPIRIERTES ERBRECHT UND DEUTSCHER ORDRE PUBLIC* 283 (2007).

20. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 2 (Egypt), <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf> (last visited November 7, 2017).

Egyptian *ordre public*. In economic transactions, Islamic doctrine governing interest, consequential, and liquidated damages and assignment of rights will be particularly relevant.

Pursuant to the Islamic law principle of ربا (*riba*), charging interest in consideration of a loan is prohibited.<sup>21</sup> Despite there being some dispute among the different schools of Islamic law on this matter, the principle of *riba* is widely perceived as prohibiting default interest as well.<sup>22</sup> Egyptian law, however, generally allows charging interest in civil and commercial transactions. Interest may be charged, for instance, in consideration of a loan<sup>23</sup> and for delay in or failure to fulfil a monetary obligation.<sup>24</sup> The statutory rate of four percent in civil and five percent in commercial transactions<sup>25</sup> may be increased to a maximum of seven percent by agreement of the parties,<sup>26</sup> provided that the total amount of interest charged does not exceed the principle it is charged on.<sup>27</sup> The provisions of Egyptian law governing interest—including those concerning limits on interest rates—are deemed part of Egyptian *ordre public*.<sup>28</sup>

Furthermore, consequential damages may be difficult to recover under Islamic law. According to the principle of غرر (*gharar*) claims that cannot be quantified and substantiated at the time the agreement they arise from is made are deemed

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21. MOHAMMAD N. SIDDIQI, RIBA, BANK INTEREST AND THE RATIONAL OF ITS PROHIBITION 41 (2004).

22. MATHIAS ROHE, ISLAMIC LAW IN PAST AND PRESENT 299 (2014).

23. See Egyptian Civil Code (*al-Qanun al-Madani*) [EGY-CC] of July 29, 1948, art. 542; Law no. 17, art. 50(1) of Oct. 1, 1999 on Egyptian Commercial Transaction Law [EGY-CTL] Where the loan is a civil transaction the rate of interest must be proportionate to the benefit received by the obligee in exchange for paying the interest. EGY-CC, arts. 129-30. The interest rate for commercial loans shall not exceed the rate prescribed by the Egyptian Central Bank, which currently is seven per cent. EGY-CTL, art. 50(3). However, banks may charge a higher rate of interest. Law no. 88, art. 40(1), of June 15, 2003 on Egyptian Central Bank Law. [http://hrlibrary.umn.edu/research/Egypt/Law%20No\\_%2088%20of%2003.pdf](http://hrlibrary.umn.edu/research/Egypt/Law%20No_%2088%20of%2003.pdf) (last visited November 7, 2017).

24. EGY-CC, art. 226.

25. *Id.*

26. *Id.* at art. 227.

27. *Id.* at art. 232. EGY-CTL, art. 64.

28. Some commentators have argued that in its decision of 22 January 2008 the Egyptian المحكمة النقض (*Court of Cassation*) (commercial circuit, case no. 2010/64, decision of 22 January 2008) has taken a different position and found that the provisions on default interest are not part of the Egyptian *ordre public*; see *i.e.* DIRK OTTO & OMAIA ELWAN, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS. A GLOBAL COMMENTARY OF THE NEW YORK CONVENTION 392 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola C. Port eds., 2010). They base this interpretation on the fact that the Egyptian Court of Cassation recognized a foreign award that—in a dispute over a commercial transaction—granted a claim for default interest in the amount of five percent plus additional damages in the amount of USD 50,000 for delay in performance despite these (cumulative) default damages exceed the limits set by Article 226 EGY-CC. However, this interpretation fails to appreciate the provisions of Egyptian law on default damages and their interpretation by the Court of Cassation. While Article 226 EGY-CC does—in principle—limit default interest in commercial transactions to five percent, Article 231 EGY-CC allows charging complementary compensation in addition to default interest, where the creditor can establish that the default was caused by the debtor in bad faith. In fact, the Court of Cassation explicitly held that the provisions on default interest are part of Egyptian *ordre public*; case no. 2010/64, decision of Jan. 22, 2008, Court of Cassation [Egyptian Judicial review]. English translation available at 1 INT'L J. ARAB ARB. 177 (2009).

void.<sup>29</sup> Thus, claims for consequential damages are commonly not enforceable under Islamic law.<sup>30</sup> The same is true under Egyptian law. However, pursuant to EGY-CC compensation for loss of profit may be recovered, where the loss is a direct result of delay in or failure to perform an obligation and provided that such loss of profit could not be prevented by the creditor by making reasonable efforts.<sup>31</sup> Where the relevant obligation is a contractual obligation, loss of profit will only be recoverable as far as the losses accrued were foreseeable at the time the underlying agreement was made.<sup>32</sup>

Liquidated damages also conflict with the Islamic law principle of gharar. Liquidated damage clauses pre-define a compensation for a specific breach of contract. Thus, they define the amount of damages for an event that has not occurred yet. Consequently, the damages caused will usually not be quantifiable at the time the relevant agreement is made. Liquidated damages are, therefore, not recoverable under Islamic law.<sup>33</sup> Under Egyptian law, liquidated damage clauses are, however, permissible.<sup>34</sup> However, in an effort to ensure compliance with Islamic law, Egyptian law provides that the liquidated damage clause may not be invoked where no loss was suffered and that a judge of competent jurisdiction may reduce the amount of compensation owed under the liquidation clause where the actual loss incurred fall short of the amount agreed upon.<sup>35</sup>

Assignment of obligations is recognized by Islamic law under the principle of حوالة (hawala). It requires an agreement among the assignee, assignor, and original debtor or their consent to the assignment. Whether assignment of rights is permissible under Islamic law is, however, somewhat disputed. Those commentators who argue in favour of assignment of rights appear to agree that it requires the consent of the debtor—unlike an assignment of rights under most western jurisdictions.<sup>36</sup> Under Egyptian law, however, assignment of rights and obligations is regulated fairly similarly to European civil law jurisdictions.<sup>37</sup> In particular, assignment of rights is valid without consent of the debtor.<sup>38</sup>

Thus, to successfully assert a claim that may have to be enforced in Egypt, the creditor must be aware that Egyptian courts will conduct a comprehensive review of foreign judgments they are requested to recognize as to their compliance with Egyptian law and Islamic law principles under the guise of an *ordre public* review.

29. Nicholas H. D. Foster, *Owing and Owning in Islamic and Western Law*, 10 Y.B. ISLAMIC & MIDDLE E. L. 59, 85-86 (2003-2004); WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 243-44 (2009).

30. See i.e. Foster, *supra* note 29, at 86; HALLAQ *supra* note 29, at 243.

31. EGY-CC, art. 221(1).

32. EGY-CC, art. 221(2).

33. For a discussion of liquidated damages under Islamic law see Nicolas Bremer, *Liquidated Damages under the Law of the United Arab Emirates and its Interpretation by UAE Courts*, GAIR MITTEILUNGEN 199, 204 (2015), <http://www.gair.de/publikationen-2/gair-mitteilungen/> (last visited November 7, 2017).

34. EGY-CC, art. 223.

35. See EGY-CC, art. 224. A similar approach has been taken by many Near and Middle Eastern countries; Bremer, *Liquidated Damages under the Law of the United Arab Emirates and its Interpretation by UAE Courts*, *supra* note 33, at 205; See also GREGOR RUTOW, RECHTSVERGLEICH ÜBER DIE ZULÄSSIGKEIT VON HAFTUNGS AUSSCHLÜSSEN, HAFTUNGS BESCHRÄNKUNGEN UND PAUSCHALIERTEM SCHADENSERSATZ IN EINZELNEN ARABISCHEN RECHTSORDNUNGEN 171 et seq. (2014).

36. RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) 23.02 (2011); HALLAQ, *supra* note 29, at 260.

37. EGY-CC, art. 303.

38. *Id.*



The Egyptian courts will most likely do the same where recognition of a French judgment is sought under the EGY-FRA Convention. Thus, when seeking to assert a claim that may have to be enforced in Egypt, the claimant should ensure that any judgment he may obtain complies with (central) provisions of Egyptian law and Islamic law as applicable in Egypt. Claims for interest and consequential damages should be considered with caution.

*b. Domestic Law*

Where no treaty is applicable the recognition of foreign judgments in civil and commercial matters is governed by the Egyptian Civil and Commercial Procedure Law (“EGY-CCPL”).<sup>39</sup> An application for recognition shall be made to the الإبتدائية المحكمة (court of first instance) for the district in which enforcement is sought.<sup>40</sup> Pursuant to the EGY-CCPL, Egyptian courts will recognize foreign judgments, provided that reciprocity is established between Egypt and the country of origin and the conditions of the EGY-CCPL are fulfilled.<sup>41</sup> These are:

1. Egyptian courts did not have jurisdiction and the courts of the country of origin had international jurisdiction over the concerned subject matter pursuant to its *lex fori*;
2. The parties were duly summoned and represented;
3. The judgment is enforceable pursuant to the country of origin’s law; and
4. The judgment does not conflict with a prior judgment of an Egyptian court on the same subject matter and the Egyptian *ordre public*.

As described above, Egyptian courts will conduct a rather comprehensive review of foreign judgments as to their compliance with Egyptian as well as Islamic law principles under the *ordre public* requirement.<sup>42</sup> In addition to this potential hindrance for recognition, the approach taken by Egyptian law towards competing jurisdiction will likely prevent the recognition of the clear majority of foreign judgments with connection to Egypt; in particular, since Egyptian law prescribes comparatively wide international jurisdiction to Egyptian courts.<sup>43</sup>

The wording of Article 296(1)(1) EGY-CCPL suggests that no foreign judgment shall be recognized where Egyptian courts had jurisdiction—whether exclusive or competing—over the concerned subject matter pursuant to Egyptian law. Whether such a strict reading of Article 296(1)(1) EGY-CCPL shall be applied is disputed among commentators. Considering the official reasoning given for including Article 296(1)(1) EGY-CCPL, which was to safeguard the Egyptian principles

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39. Civil and commercial Procedure code of Egypt (*Qanun al-Murafa at al-Madaniyah wa al-Tjariyah*) [EGY-CCPL] of May 7, 1968, art. 13.

40. EGY-CCPL, art. 297.

41. *Id.* at art. 296(1).

42. *Id.* at art. 296(1)(4).

43. See KILIAN BÄLZ, *ÄGYPTEN: INTERNATIONALER RECHTSVERKEHR IN ZIVIL- UND HANDELSACHEN* Vol. VI, 1001-8, (Reinhold Geimer & Rolf A. Schütze eds., 49th ed., 2015).

of conflict of laws, most commentators conclude that Article 296(1)(1) EGY-CCPL should be interpreted in a narrow sense. It should be understood as excluding recognition of foreign judgments only where Egyptian courts have exclusive jurisdiction over the concerned subject matter.<sup>44</sup> Furthermore, this interpretation would be in line with Article 296(1)(4) EGY-CCPL, which requires that a foreign judgment recognition which is sought in Egypt does not conflict with a prior Egyptian judgment on the same matter. This provision would be redundant, if no foreign judgment could be recognized in Egypt where Egyptian courts had competing or exclusive jurisdiction. Nonetheless, the risk that an Egyptian court would refuse recognition of a foreign judgment where an Egyptian court had jurisdiction over the concerned subject matter—regardless of whether such jurisdiction was exclusive or competing—remains. Such a wide interpretation of Article 296(1)(1) EGY-CCPL would significantly limit the parties' freedom to freely choose their venue of dispute resolution in transactions with a link to Egypt.

Finally, Egyptian courts may refuse to recognize foreign judgments rendered in absentia. The second condition requires that the parties to the underlying dispute be “represented” in the proceedings.<sup>45</sup> However, it appears that Egyptian courts tend to be less strict with this requirement and permit the recognition of foreign judgments rendered in absentia, provided that the parties of the dispute were duly summoned and the judgment was legally rendered in absentia.

### *c. Reciprocity*

Reciprocity is established between France and Egypt by the EGY-FRA Convention.<sup>46</sup> Where no treaty is applicable, foreign judgments may be recognized where reciprocity is established by practice.<sup>47</sup> Thus, a foreign judgment may be recognized in Egypt, if judgments of Egyptian courts are—in principle—recognized in the country origin.

Similarly under German law, foreign judgments may be recognized if reciprocity is established by treaty or practice.<sup>48</sup> It is generally accepted that this is the case in respect to Egypt.<sup>49</sup>

Based on a comparison of the relevant provisions governing recognition of foreign judgments under Swiss and Egyptian law, Egyptian courts will likely consider reciprocity to be established between the two countries. Swiss law does not consider reciprocity a requirement for the recognition of foreign judgments.<sup>50</sup> Thus,

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44. BÄLZ, *supra* note 44, at 1001-06. A similar trend can be observed in the GCC countries; See Bremer, *Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries*, *supra* note 1, at 42, 53-56.

45. EGY-CCPL, art. 296(1).

46. *Convention Between the French Republic and the Arab Republic of Egypt on Judicial Cooperation in Civil Matters, Including Personal Status, and in Social and Commercial Matters and Administrative*, *supra* note 17, at art. 25.

47. EGY-CCPL, art. 296.

48. German Code of Civil Procedure (*Zivilprozessordnung*) [ZPO] of Dec. 5, 2005, § 328(1)(5).

49. See Peter Gottwald, § 328, in MÜNCHNER KOMMENTAR ZPO, (Wolfgang Krüger & Thomas Rauscher eds., 4th ed., 2013); Regional Court of Appeals (Ordinary) (*Oberlandesgericht*) [OLG] of Frankfurt am Main, 276 WM (1987).

50. Reciprocity is not a requirement comprised in Article 25. Switzerland Federal Law on International Private Law, (*Bundesgesetz über das Internationale Privatrecht*) [SWI-FIPL] of Dec. 18, 1987, art. 25. The list of requirements of Article 25 is exclusive; Heinrich Däppen & Claudia Mabillard, *Art. 25*,

the strict approach to jurisdiction taken by Egyptian law<sup>51</sup> likely does not hinder recognition of Egyptian judgments in Switzerland, despite Swiss law being much more liberal in its treatment of competing jurisdiction. Reciprocity would, however, still have to be established to satisfy Egyptian law. The requirements for recognition stipulated by the Switzerland Federal Law on International Private Law (“SWI-FIPL”) appear to be compatible with those of Egyptian law.<sup>52</sup> The same is true for the reasons for refusal of recognition provided by the SWI-FIPL.<sup>53</sup> While it may appear that Article 27(2)(b) SWI-FIPL, which requires compliance with essential principle of Swiss procedural law does not have an equivalent in Egyptian law, Article 27(2)(b) SWI-FIPL is understood to be an expression of Swiss (procedural) *ordre public*.<sup>54</sup> Hence, it must be considered as being an equivalent to the *ordre public* requirement of Article 296(1)(4) EGY-CCPL. Still, because no established practice of Egyptian courts supporting this interpretation is available, a risk remains that Egyptian courts will refuse recognition of Swiss judgments.

Reciprocity is not established in respect to Austria. The Austrian Execution Regulation (*Exekutionsordnung*) requires reciprocity to be established by treaty or Austrian regulation.<sup>55</sup> No such treaty or regulation providing for the enforcement of Egyptian judgments in Austria exists.

Whether reciprocity is established in respect to the US remains unclear. There are few judgments addressing reciprocal recognition of judgments between Egypt and the US. In the *Chromalloy Case* the District Court for the District of Columbia refused recognition of a decision of the Egyptian *محكمة الاستئناف* (court of appeal) in which the Egyptian court vacated an arbitral award rendered by a tribunal in Egypt.<sup>56</sup> However, the US court refused recognition of the Egyptian judgment, because it found that it infringed upon US *ordre public*.<sup>57</sup> Hence, the decision of the US court does not generally exclude recognition of judgments of Egyptian courts. Where no treaty is applicable, US courts will recognize foreign judgments based on reciprocity provided that:<sup>58</sup>

1. The foreign court properly accepted personal jurisdiction over the defendant pursuant to the *lex fori* of the country of origin;
2. The defendant was properly served with notice of the proceedings and given a reasonable opportunity to be heard;

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*in* BASLER KOMMENTAR: INTERNATIONALES PRIVATRECHT (Heinrich Honsell ed., 3rd ed., 2013); Thomas Volken, *Art. 26*, *in* ZÜRCHER KOMMENTAR ZUM IPRG (Daniel Girsberger ed., 2nd ed., 2004).

51. EGY-CCPL, art. 296(1)(1).

52. SWI-FIPL, art. 25.

53. SWI-FIPL, art. 27.

54. Däppen & Mabillard, *supra* note 50, at 16; Volken, *supra* note 50, at 25. Compliance with the Swiss “material” *ordre public* is required under Swi. FIPL, art. 27(1).

55. Law of May 27, 1896 on Austria Execution Regulation (*Exekutionsordnung*) [Aus. ExReg], published in the official gazette of the Austro-Hungarian Empire (*Reichsgesetzblatt für die im Reichsrath vertretenen Königreiche und Länder*) under No. 79/1896, art. 79(2).

56. *Chromalloy Aero Services v. Arab Republic of Egypt*, 939 F. Supp. 907, 908 (D.C.C. 1996).

57. *Id.* at 913.

58. For an overview of the recognition of foreign judgments in the U.S., see *i.e.* S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. OF LIT. 45 (2014).

3. The proceedings were not tainted with fraud; and
4. The foreign judgment does not conflict with the *ordre public* of the US state where recognition is sought.

In principle, these requirements are compatible with those of Egyptian law. Hence, Egyptian courts will likely find that US judgments are recognizable in Egypt. Still, this interpretation is thus far not supported by decisions of Egyptian courts. Furthermore, US courts may refuse recognition of Egyptian judgments should they find that, due to the restrictive approach taken by Egyptian law on jurisdiction,<sup>59</sup> US judgments will not be recognized in Egypt under the same conditions judgments of Egyptian court could be recognized in the US.

Moreover, reciprocity appears not to be established in respect to Canada. The current regime governing recognition of foreign judgments in Canada was established by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*. In this case the court held that a foreign judgment could be recognized, provided that there was a real and substantial connection between the foreign court and (1) the defendant; (2) the cause of action; or (3) the subject matter of the action.<sup>60</sup> Under *Morguard*, Canadian courts will recognize a foreign judgment where the foreign court had jurisdiction according to Canadian *lex fori*.<sup>61</sup> Under Egyptian law the foreign court's jurisdiction has to be determined pursuant to the law of the country of origin.<sup>62</sup> Furthermore, the restrictive position taken by Egyptian law towards competing jurisdiction is not reflected in Canadian law. Hence, the two countries apply different standards for the recognition of foreign judgments and, consequently, reciprocity is not established. Still, since no judgments of Egyptian courts concerning recognition of a Canadian judgment are available, it cannot be excluded that Egyptian courts would not the less recognize judgements of Canadian courts.

Similarly, reciprocity is likely not established in respect to the UK. Where reciprocity is not established by treaty, UK law comprises two regimes for the recognition of foreign judgments: recognition pursuant to statute and recognition under common law.<sup>63</sup> Judgments rendered in certain jurisdictions may be recognized pursuant to the statutory provisions of the UK Administration of Justice Act ("UK-AJA")<sup>64</sup> and the UK Foreign Judgment (Reciprocal Enforcement) Act ("UK-FJA").<sup>65</sup> However, neither of these apply with respect to Egypt. Enforcement of Egyptian judgments may, therefore, only be sought under common law. At common law a foreign judgment will not be recognized, but rather be treated as creating a contractual debt between the parties of the dispute. To enforce this debt, the creditor must file proceedings for simple debt and obtain a summary judgment in the

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59. EGY-CCPL, art. 296(1).

60. *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 1098 (Can.). While the decision in *Morguard* was rendered in respect to the recognition of a judgment passed in one Canadian province in another, the Supreme Court of Canada has since applied its ruling to judgments passed outside of Canada; *See i.e.* *Beals v. Saldanha*, [2003] 3 S.C.R. 416, ¶ 19.

61. *See Moses v. Shore Boat Builders Ltd.* [1993], 83 B.C.L.R. 2d 177 (Can.).

62. EGY-CCPL, art. 296(1).

63. The relevant provisions apply uniformly to all jurisdictions within the UK (England and Wales, Scotland and Northern Ireland). *See* sections 12-13 United Kingdom Foreign Judgment (Reciprocal Enforcement) Act 1933, 23 Geo. 5, c.13.

64. United Kingdom Administration of Justice Act 1920, 10 & 11 Geo. 5, c.81.

65. United Kingdom Foreign Judgment (Reciprocal Enforcement) Act 1933, 23 Geo. 5, c.13.

relevant UK jurisdiction. While similar in result, the common law approach does not correspond with the approach taken by Egyptian law. Egyptian courts will, therefore, likely refuse recognition of UK judgments.

*ii. Foreign Arbitral Awards*

*a. Treaties*

The provisions of treaties governing recognition of foreign rulings take precedence over those of domestic Egyptian law.<sup>66</sup> Egypt has declared accession to the New York Convention without reservation.<sup>67</sup> Thus, foreign arbitral awards will—whether rendered in a country that itself is a member of the New York Convention or not—be recognized in Egypt pursuant to the New York Convention.<sup>68</sup>

Recognition under the New York Convention may be refused at the request of the party against whom the relevant award is invoked, on grounds that:<sup>69</sup>

1. The relevant arbitration agreement is not valid under the law it was subjected to or—in lack of a choice of law—the law of the country of origin;
2. A party to the arbitration agreement was under some form of incapacity;
3. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s), not duly summoned or otherwise unable to present its case;
4. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission;<sup>70</sup>
5. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement or, in lack of an agreement, was not in accordance with the law applicable at the place of arbitration; or
6. The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, it was made.

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66. EGY-CCPL, art. 298.

67. *Contracting States – List of Contracting States*, *supra* note 9.

68. United Nations Convention on the Recognition and Enforcement of Arbitral Awards, NEW YORK ARBITRATION CONVENTION, art. I(1) (June 10, 1958), <http://www.newyorkconvention.org/english> (last visited November 7, 2017).

69. *Id.* at art. V(1).

70. Partial recognition is permissible where the decisions on matters submitted to arbitration can be separated from those not so submitted. *Id.* at art. I(1)(c).

Furthermore, recognition may be refused if the competent court finds that:<sup>71</sup>

1. The subject matter of the dispute may not be settled by arbitration under the law of the requested country; or
2. The recognition of the award would be contrary to the ordre public of the requested country.

Traditionally there has been some disagreement over whether disputes with the government or other public authorities of Egypt may be subjected to arbitration. This debate was, however, ended by the Egyptian Arbitration Law,<sup>72</sup> which was introduced in 1994 and provides that disputes with Egyptian legal persons under public law may be subjected to arbitration with the approval of the competent minister or other official assuming the minister's powers with respect to the concerned legal persons under public law. The necessary approval may be given subsequently.<sup>73</sup>

If no such approval is given, the concerned arbitration clause is void under Egyptian law. Where the underlying agreement—and the relevant arbitration clause—is subjected to Egyptian law, recognition of the concerned award may be refused pursuant to the provisions of the New York Convention upon request of the party against whom the award is invoked.<sup>74</sup> In any case—whether the relevant agreement and arbitration clause is subjected to Egyptian law or not—a foreign award rendered in an arbitration with an Egyptian legal person under public law without the necessary approval will likely not be recognized by Egyptian courts. The courts will most likely find that the subject matter may not be subjected to arbitration pursuant to Egyptian law<sup>75</sup> or that Article 1(2) EGY-Arb. L. is part of Egyptian ordre public and thus deny recognition.<sup>76</sup>

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71. *Id.* at art. I(2).

72. Law no. 27, art. 1(2), of April 18, 1994 on Egyptian Arbitration in Civil and Commercial Matters [Egy. Arb. Law].

73. Egy. Arb. Law, art. 1(2) does not specify when approval has to be given. Thus, the wording of Egy. Arb. Law, art.1(2). allows for subsequent approval; A. EL-AHDAB & J. EL-AHDAB, *supra* note 10, at EG-055.

74. NEW YORK ARBITRATION CONVENTION, *supra* note 68, at art. V(1)(a).

75. *Id.*

76. One could argue that disputes with legal persons under public law may, in principle, be subjected to arbitration pursuant to Egy. Arb. Law, art 1(1), which provides that the Egy.-Arb. Law applies to all arbitral proceedings regardless of whether the parties are private or public persons and whatever the subject matter. Following this argumentation, Egy. Arb. Law, art. 1(2) would not be understood as excluding disputes with legal persons under public law in general, but only as an additional requirement for initiating arbitration in these disputes. This interpretation would be in line with the structure of Article 1 EGY-Arb. L., which in its first paragraph declares that the disputes with Egyptian legal persons under public law may be subjected to arbitration and in its second paragraph introduces an additional requirement, rather than excluding these disputes from arbitration, in principle, and making an exception from this general rule. If one was to follow this interpretation recognition of a foreign award rendered in an arbitration proceeding held based on an arbitration clause that was not approved by the competent authority and invoked against an Egyptian legal person under public law could not be denied under NEW YORK ARBITRATION CONVENTION, *supra* note 68, at art. V(2)(a). Still, Egyptian courts will likely choose to ensure application of the restrictions established by Egy. Arb. Law, art. 1(2) in respect to foreign awards and deny recognition pursuant to NEW YORK ARBITRATION CONVENTION, *supra* note 68, at art. V(2)(a) or (b).

Since Egypt acceded to the New York Convention without reservation, the Arab League Convention—while applicable to arbitral awards<sup>77</sup>—has little relevance in respect to the recognition of arbitral awards in Egypt. Due to the global application of the New York Convention, any award rendered in a country party to the Arab League Convention may also be recognized in Egypt pursuant to the New York Convention.

The Arab League Convention, however, remains relevant for the recognition of Egyptian arbitral awards in Iraq. Since Iraq is not party to the New York Convention and Iraqi law does not provide for the recognition of foreign awards,<sup>78</sup> the Arab League Convention is the only mean for recognition of Egyptian awards in Iraq. Pursuant to the Arab League Convention, the court requested to recognize a foreign award may not review the award on its merits and may only refuse recognition where:<sup>79</sup>

1. The subject matter of the award may not be resolved by arbitration under the law of the requested country;
2. The award issued goes beyond the scope of the relevant arbitration agreement;
3. The arbitrators were not selected in accordance with the arbitration agreement;
4. The defendant was not duly summoned;
5. The award conflicts with the *ordre public* of the requested country; or
6. The award is not final and binding under the law of the country of origin.

#### *b. Domestic Law*

The EGY-Arb. L. does not include provisions on the recognition of foreign awards. Thus, recognition of foreign arbitral awards is regulated by the provisions of the EGY-CCPL governing recognition of foreign judgments.<sup>80</sup> Still, since Egypt acceded to the New York Convention without reservation, the Convention and the regime for recognition of foreign awards established by it applies to all foreign awards. Hence, there is no room for the application of the provisions of the EGY-CCPL governing recognition of foreign judgments in respect to foreign arbitral awards.

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77. 1952 – *Arab League Convention*, *supra* note 12, at arts. 1, 3.

78. See below at: 2.2.2.

79. 1952 – *Arab League Convention*, *supra* note 12, at art. 3.

80. EGY-CCPL, art. 299.

*B. Iraq**i. Foreign Judgments**a. Treaties*

Iraq is party to the Riyadh Convention.<sup>81</sup> Recognition of foreign judgments in Iraq may, therefore, be sought pursuant to the Riyadh-Convention, where the judgment was made in a country that also is a party to the Riyadh Convention and the judgment complies with the conditions provided by the Riyadh Convention for the recognition and enforcement of foreign judgments, which are:<sup>82</sup>

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

Yet, certain judgments (i.e., judgments against governments or government employees relating to their administrative duties) may not be recognized under the Riyadh Convention.<sup>83</sup> In any case, recognition may be rejected if:<sup>84</sup>

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

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81. Iraq is one of the founding parties of the Riyadh-Convention. *See protocol of the meeting of the arbitration committee held on April 22, 1992, Amman, Jordan*, LEAGUE OF ARAB STATES (1992), <http://www.lasportal.org/ar/legalnetwork/Documents/اتفاقية%20عمان%20العربية%20للتحكيم%20التجاري.pdf> (last visited November 7, 2017).

82. *Riyadh Arab Agreement for Judicial Cooperation*, *supra* note 10, at art. 25(2).

83. *Id.* at art. 25(3).

84. *Id.* at art. 30(1).



The first requirement calling for compliance with Islamic law and the *ordre public* of the requested country, in particular, may pose a considerable hindrance for the recognition of foreign judgments. Iraqi courts will usually consider themselves competent to review foreign judgments they are requested to recognize on their merits under the *ordre public* requirement. Thus, when pursuing enforcement of a foreign judgment in Iraq, Iraqi law—or at least its fundamental principles—should be considered in the underlying proceedings. Furthermore, under the *ordre public* requirement of the Riyadh-Convention, Islamic law must be considered. Still, compared to that of other Near and Middle Eastern countries, Iraqi civil and commercial law is hardly influenced by Islamic law. Despite it being prohibited by Islamic law, for example, Iraqi law allows charging interest in civil and commercial transactions. Interest may be charged in consideration of loans, provided that it does not exceed the interest rate prescribed by law.<sup>85</sup> Moreover, default interest is due for failure or delay in fulfilling a monetary obligation at a rate of four percent in civil and five percent in commercial transactions<sup>86</sup> or any other rate agreed by the parties, provided the agreed interest rate does not exceed seven percent<sup>87</sup> and the total amount of interest charged does not exceed the principle it is charged on.<sup>88</sup>

Similarly, Iraqi civil and commercial law does not follow Islamic law in respect to consequential damages. Loss of profit may be recovered as part of a contractual claim for damages<sup>89</sup> as well as under tort law.<sup>90</sup> Compensation for loss of honour, reputation, social standing, and financial credibility may be recovered under tort law as well.<sup>91</sup> Furthermore, the Iraqi provisions concerning liquidated damages reflect the expression of this concept in most western jurisdictions. Liquidated damage clauses are permissible under Iraqi law and the damages agreed upon may only be reduced where the debtor has proven that they were excessive.<sup>92</sup>

Finally, assignment of rights and obligations is permissible under Iraqi law and follows a regime similar to that of Western civil law jurisdictions.<sup>93</sup> Assignment of rights does not require consent of the debtor.<sup>94</sup> Hence, when seeking recognition of foreign judgments in Iraq, principles of Islamic law are less relevant than in another Muslim country.<sup>95</sup> Since most countries party to the Riyadh Convention apply Islamic law considerably stricter than Iraq, judgments rendered in these countries will—in most cases—comply with the principles of Islamic law as applied in Iraq.

85. Iraqi Civil Code [IRQ-CC] of Sept. 18, 1951, art. 692. Iraqi courts will apply the limits for interest rates prescribed by IRQ-CC, art. 171.

86. *Id.* at art. 171.

87. *See* IRQ-CC, art. 172(1). The creditor may charge a complementary compensation in addition to the default interest, if he can establish that he sustained damages exceeding the default interest. IRQ-CC, art. 173(2).

88. *Id.* at art. 174.

89. *Id.* at art. 169(2).

90. *Id.*, art. 207.

91. *Id.* at art. 204.

92. *Id.* at art. 170.

93. Assignment of rights is regulated by IRQ-CC, arts. 362-74 and assignment of obligations by IRQ-CC, arts. 339-61.

94. *Id.* at art. 362.

95. Constitution of Iraq [Iraqi const.] of Oct. 3, 2005, art. 2 declares Islamic law to be the foundation of Iraqi law and Iraqi art. (2)(a) stipulates that no law may be enacted in Iraq that contradicts principles of Islamic law. Since provisions of Iraqi law governing interest, complementary and liquidated damages as well as assignments of rights deviate considerably from Islamic law, they could be regarded as being in violation of the Iraqi Constitution of 2005. It remains to be seen how Iraqi courts would resolve this conflict.

The Riyadh Convention does not apply in respect to Egypt, since Egypt is not a member of this convention. Still, reciprocal recognition of judgment is established between Iraq and Egypt pursuant to the provisions of the Arab League Convention.

*b. Domestic Law*

Where no treaty is applicable, recognition of foreign judgments may be sought pursuant to the provisions of the Iraq Execution Law (“IRQ-EL”)<sup>96</sup> and the Iraq Enforcement Law (“IRQ-Enf. L.”)<sup>97</sup> based on reciprocity. Where reciprocity is established foreign judgments will be recognized if they comply with the provisions of the IRQ-EL:<sup>98</sup>

1. The party against whom the foreign judgment is invoked was duly informed of the initiation of the underlying proceedings;
2. The foreign court had international jurisdiction under the *lex fori* of Iraq;
3. The foreign judgment awards a specific entitlement or claim for a specific sum of money;
4. The foreign judgment does not conflict with the Iraqi *ordre public*;
5. The foreign judgment is enforceable under the law of the country of origin; and
6. The foreign judgment was not obtained fraudulently and the proceedings were held in compliance with the principles of justice and equity.

Iraqi courts consider their scope of review of foreign judgments as to their compliance with Iraqi law under the guise of an *ordre public* review to be wide. They tend to review foreign judgments on their merits under the *ordre public* requirement of the IRQ-EL.<sup>99</sup> Islamic law, on the other hand, is less of a hindrance for recognition.

Jurisdiction may, however, be a considerable obstruction for recognition. The IRQ-EL requires that the foreign court rendering the concerned judgment had international jurisdiction pursuant to Iraqi law.<sup>100</sup> The provisions of Iraqi law governing jurisdiction considerably favour jurisdiction of Iraqi courts.<sup>101</sup> Pursuant to Iraqi law

96. Law no. 30, of 1928 on Iraqi Execution Law [IRQ-EL].

97. Law no. 45, of 1980 on Iraqi Enforcement Law [IRQ-Enf. L.].

98. IRQ-EL, art.11.

99. IRQ-EL, art. 11(4).

100. IRQ-EL, art. 11(2).

101. See Iraqi Civil and Commercial Procedure Law [Iraqi CivComPC] of 1969, art. 36-41. Even where neither the claimant nor the respondent have a domicile in Iraq Iraqi courts – the courts of Baghdad – have jurisdiction over the concerned matter pursuant to Iraqi law. Iraqi CivComPC, art. 41. Likely, the only disputes that will be subjected to the jurisdiction of foreign courts are disputes over real property located outside of Iraq, since disputes over real property are to be resolved by the court in which jurisdiction the concerned property is located. Iraqi CivComPC, art. 36.

most disputes with connection to Iraq or involving an Iraqi party will fall within the jurisdiction of Iraq courts. Recognition of a foreign judgment rendered in such a dispute will, therefore, likely be refused pursuant to the IRQ-EL.<sup>102</sup>

Yet, judgments made in absentia will not be particularly problematic in Iraq. The IRQ-EL requires only that the party against whom the foreign judgment is invoked was duly summoned and not that that party was in fact present or represented in the proceedings.<sup>103</sup>

The authority competent to recognize a foreign judgment is the المحكمة الابتدائية (court of first instance) for the district in which enforcement is sought.<sup>104</sup>

### c. Reciprocity

Iraqi law does not apply the principle of reciprocity. Thus, under Iraqi law reciprocity cannot be established by practice but only by treaty<sup>105</sup> or resolution of the Iraqi legislator.<sup>106</sup>

Reciprocity is established between Iraq and the United Kingdom pursuant to Iraqi law.<sup>107</sup> For lack of an applicable treaty or Iraqi resolution reciprocity is not established in respect to Austria, Canada, France, Germany, Switzerland and the US.

## ii. Foreign Arbitral Awards

### a. Treaties

Iraq is not party to the New York Convention. This significantly reduces the chances of recognition of foreign arbitral awards.<sup>108</sup> Still, as Iraq is a member of the Riyadh Convention, foreign awards rendered in another party to this convention may be recognized in Iraq pursuant to its provisions. The Riyadh Convention requires that foreign awards be recognized unless:<sup>109</sup>

1. The relevant subject matter may not be subjected to arbitration pursuant to the law of the requested country;
2. The arbitration agreement is invalid or the award has not become final;

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102. IRQ-EL, art. 11(2).

103. IRQ-EL, art. 11(1).

104. IRQ-EL, art. 3.

105. IRQ-Enf. L., art. 12.

106. IRQ-Enf. L., art. 11.

107. See Iraqi Resolution no. 21, of 1928. Furthermore, reciprocity is established by resolution i.e. in respect to Jordan (Jordanian Resolution no. 32, of 1952) as well as Lebanon and Syria (Resolution 5/1929). These resolutions are, however, not relevant today, since Jordan, Lebanon and Syria are members of the Riyadh-Convention.

108. It is not entirely clear whether recognition of foreign arbitral awards in Iraq is possible where no treaty is applicable; see below at: III.B.ii.b.

109. *Riyadh Arab Agreement for Judicial Cooperation*, supra note 10, at art. 37(1).

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3. The arbitration agreement does not cover the subject matter of the dispute;
4. The parties have not been duly served with the notice of arbitration; or
5. The award or any part thereof infringes Islamic law or the ordre public of the requested country.

As in the case of foreign judgments, Iraqi courts should be expected to make extensive use of their competence to review foreign awards on their merits under the ordre public requirement of the Riyadh Convention.<sup>110</sup> Furthermore, Iraqi courts will reject recognition of foreign awards concerning disputes between the shareholder/partners of a legal person under the Riyadh Convention,<sup>111</sup> since these disputes may not be subjected to arbitration under Iraqi law.<sup>112</sup>

Aside from the Riyadh Convention, the Arab Convention on Commercial Arbitration of 1987 (“Amman Convention”) may offer a means to enforce foreign arbitral awards in Iraq. The Amman Convention establishes an arbitration center, the Arab Center for Commercial Arbitration (“ACCA”),<sup>113</sup> which will be available for the settlement of commercial disputes that are linked to the countries party to the convention.<sup>114</sup> The Amman Convention also comprises provisions for the recognition of awards rendered by a tribunal convened under the rules of the ACCA.<sup>115</sup> However, since the ACCA has thus far not been established, this option is merely a theoretical possibility as of now.

#### *b. Domestic Law*

Domestic Iraqi law does not address the recognition of foreign arbitral awards. The IRQ-EL and IRQ-Enf. L. do not apply to arbitral awards and the provisions on arbitration of the IRQ-CCPL only consider domestic arbitral awards.<sup>116</sup> It has been suggested that the provisions of the IRQ-EL and IRQ-Enf. L. should be applied to foreign arbitral awards correspondingly.<sup>117</sup> Iraqi courts have, however, not taken a position in respect to such a corresponding application of the IRQ-EL and IRQ-Enf. L. Thus, as of now it appears that foreign arbitral awards cannot be recognized in Iraq pursuant to domestic Iraqi law.

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110. *Id.* at art. 37(1)(5).

111. *Id.* at art. 37(1)(1).

112. A. EL-AHDAB & J. EL-AHDAB, *supra* note 10, at IQ-064.

113. *The Amman Arab Convention on Commercial Arbitration*, 7 Arab L. Q. 83, 84, art. 4(1) (1992).

114. *Id.* at art. 2.

115. With the exception of Egypt all *Mashriq* countries are a member of the Amman-Convention; *See* Preamble of Amman Convention, *Id.* at 83.

116. Thus, foreign arbitral awards will not be recognized pursuant to Iraqi CivComPC, art. 272.

117. A. EL-AHDAB & J. EL-AHDAB, *supra* note 10, at IQ-041, IQ-158.

*C. Jordan*

*i. Foreign Judgments*

*a. Treaties*

Since Jordan is a party to the Riyadh Convention,<sup>118</sup> foreign judgments rendered in another member country of the Riyadh Convention may be recognized pursuant to the provisions of this convention. Furthermore, Jordan is party to the Arab League Convention, providing for reciprocal recognition of foreign judgments between Jordan and Egypt.

*b. Domestic Law*

Where no treaty is applicable, recognition of foreign judgments in Jordan is governed by the Jordanian Law on Enforcement of Foreign Judgments (“JOD-EFJ”)<sup>119</sup> provided that reciprocity is established by practice.<sup>120</sup> The competent court for recognition is the Jordanian المحكمة الابتدائية (court of first instance) that has jurisdiction at the location where the foreign judgment shall be enforced.<sup>121</sup>

Jordanian law is comparatively restrictive when it comes to recognition of foreign judgments. The JOD-EFJ stipulates that only foreign monetary judgments as well as foreign judgments concerning settlement of accounts (i.e. between the parties of a partnership) or delivery of and transfer of title to movable items may be recognized in Jordan.<sup>122</sup> In addition, a foreign judgment shall not be recognized where:<sup>123</sup>

1. The foreign court did not have international jurisdiction over the subject matter;
2. The respondent did not have his place of business or residence within the (territorial) jurisdiction of the foreign court and did not submit to the court’s jurisdiction without objection;
3. The respondent was not duly summoned or represented;
4. The judgment was obtained by fraud;
5. The respondent proved that the judgment has not become final and enforceable;

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118. Jordan is one of the founding parties of the Riyadh-Convention. See *Agreement: Amman Arabic for Arbitration Review*, *supra* note 81.

119. Law no. 8, of 1952 on Jordanian Law of Enforcement of Foreign Judgments [JOD-EFJ].

120. JOD-EFJ, art. 7(2).

121. *Id.* at art. 3.

122. *Id.* at art. 2.

123. *Id.* at art. 7(1).

6. The relevant subject matter conflicts with Jordanian ordre public; or
7. The country of origin does not recognize judgments made by Jordanian courts.

Aside from the restrictions as to which types of judgments may be recognized the issue of jurisdiction, as well as representation in the proceedings, will pose considerable hindrances for the recognition of foreign judgments in Jordan.

While of the first condition set by the JOD-EFJ provides a comparatively liberal approach to competing jurisdiction,<sup>124</sup> of the second condition significantly restricts the possibilities of recognition of foreign judgments where Jordanian parties are involved.<sup>125</sup> Since Jordanian parties will often not have their place of residence or business in the country of origin, the second condition will often hinder recognition of foreign judgments passed against Jordanian parties. Thus, due to the restrictions imposed by the second condition, disputes against Jordanian parties will usually have to be resolved in Jordanian courts. Hence, the second condition also drastically limits the freedom to choose a venue for dispute resolution. Furthermore, certain matters are subject to the exclusive jurisdiction of Jordanian courts, such as disputes concerning commercial agencies operating in the territory of Jordan.<sup>126</sup>

Jordanian courts will consider the central principles of Islamic law as part of Jordanian ordre public, and thus review foreign judgments for their compliance with these principles.<sup>127</sup> The Jordanian Civil Code (“JOD-CC”),<sup>128</sup> does not address interest of any kind.<sup>129</sup> Interest is, however, commonly charged as consideration for loans and other facilities in civil and commercial transactions in Jordan. The Jordanian courts will apply the provisions of Ottoman law when reviewing such agreement.<sup>130</sup> Specific Jordanian regulations exist only in the banking sector. Banks not engaged in Islamic banking may charge interest in consideration for loans or other financial facilities at the rate stipulated by the law.<sup>131</sup> Default interest may be charged pursuant to Article 167 of the Jordanian Civil and Commercial Procedure Law (“JOD-CCPL”),<sup>132</sup> Law 24/1988, provided that the interest rate does not ex-

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124. *Id.* at art. 7(1)(1).

125. *Id.* at art. 7(1)(2).

126. Law no. 28, art. 16(1) of 2001, on Jordanian Commercial Agency Law [JOD-CAL]. *See i.e.* Case no. 369, of Nov. 1, 2006, Jordanian Court of Cassation.

127. While, unlike the constitution of most countries of the MENA-Region, the Constitution of the Hashemite Kingdom of Jordan of 1952 does not declare Islamic law to be the/a (principle) source of Jordanian law, Islamic law principles have, nonetheless been incorporated in Jordanian law, including the civil and commercial law of Jordan. In particular, art 2 Jordanian Civil Code of Jordan [JOD-CC] of 1976 provides that in the absence of applicable law, the court applies the principles of Sharia law.

128. Jordanian Civil Code of Jordan [JOD-CC] of 1976.

129. Even the provisions governing loans neither explicitly allow nor explicitly prohibit charging of interest. JOD-CC, art. 636-657. In fact, they make no reference to interest whatsoever.

130. Under Ottoman law charging interest is permissible in certain transactions excluded from the *riba* ban as interpreted by Ottoman scholars. Still, certain ambiguity exists in respect to the maximum interest rates permissible under Ottoman law. According to differed scholars they vary between 10 and 20 percent per annum; TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST* 147-149 (2011); HAIM GERBER, *STATE, SOCIETY AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE* 107-111 (1994).

131. Law no. 23, art 43(1), of 1971 on Jordanian Central Bank Law.

132. Law no. 24, of 1988 on Jordanian Civil and Commercial Procedure Law [JOD-CCPL].

ceed nine percent. Thus, unless the party charging default interest is a bank, Jordanian courts will consider default interest in excess of nine percent contrary to Jordanian ordre public and refuse recognition of a foreign judgment awarding such a claim.

In respect to liquidated damages, the JOD-CC takes a somewhat different approach than Egyptian and Iraqi law. The JOD-CC allows for a reduction or increase of the damages recoverable under a liquidated damage clause to the actual amount of damage sustained where these deviate from the amount of damages defined in the liquidated damage clause.<sup>133</sup> Consequential damages, such as loss of profit, however, are not recoverable under contractual but only under tort liability.<sup>134</sup> Assignment of rights, on the other hand, is permissible under Jordanian law. It requires a written agreement between assignor, assignee, and original debtor.

It is unclear whether foreign judgments rendered in absentia will be recognized by Jordanian courts. A strict reading of Article 7(1)(3) JOD-EFJ would suggest that the respondent has to be present—or at least duly represented—during the proceedings for a foreign judgment to be recognized in Jordan. While some commentators assume that the provision should be interpreted in such a strict manner,<sup>135</sup> others argue that lack of presence or representation of one party in the proceeding is not a hindrance for recognition pursuant to the JOD-EFJ, provided that the concerned party was duly summoned.<sup>136</sup>

### c. Reciprocity

Reciprocity is established with Germany<sup>137</sup> and most likely with Switzerland<sup>138</sup> and the US.<sup>139</sup> However, as in the case of Egypt, the restrictive position of Jordanian law with respect to jurisdiction may persuade US courts not to recognize judgments rendered by Jordanian courts.

Between Jordan and Austria, reciprocity is not established for lack of a relevant treaty or relevant resolution. With respect to the United Kingdom, reciprocity is probably not established, since judgments of Jordanian courts will not be recognized under the UK-AJA or the UK-FJA. Hence, Jordanian judgments could only be enforced in the United Kingdom at common law. The provisions set by common law as interpreted in the United Kingdom, however, are not compatible with the

133. JOD-CC, art. 364.

134. JOD-CC, arts. 256, 259, 363.

135. See *i.e.* Kilian Bälz, *Anerkennung und Vollstreckung von ausländischen Zivilurteilen und Schiedssprüchen in arabischen Staaten*, 6 RIW 354, 357 (2012).

136. Hamzeh Haddad, *Enforcement of Foreign Judgments and Award in Jordan and Iraq: A lecture addressed to the IBA Conference of Bahrain (Mar. 8, 1989)*, <http://www.aiadr.com/aiadr%20re/2.pdf> (last visited November 7, 2017).

137. Reinhold Geimer, *Anhang IV. Befreiung von der Verpflichtung zur Sicherheitsleistung für die Prozesskosten (§ 110 II Nr 1 u 2 ZPO) und zur Verbürgung der Gegenseitigkeit (§ 328 I Nr 5 ZPO bzw. § 109 IV FamFG)*, in *ZÖLLER ZIVILPROZESSORDNUNG* 3398 (Reinhold Geimer ed., 31st ed., 2016); Rolf A. Schütze, § 328. in *ZIVILPROZESSORDNUNG UND NEBENGESETZE* 558 (Bernhard Wieczorek & Rolf A. Schütze eds., 4th ed., 2015).

138. See *Convention Between the French Republic and the Arab Republic of Egypt on Judicial Cooperation in Civil Matters, Including Personal Status, and in Social and Commercial Matters and Administrative*, *supra* note 17, at art. 25 (reciprocity between Jordan and the US is likely established for the same reasons as in the case of Egypt).

139. *Id.* (reciprocity between Jordan and Switzerland is likely established for the same reasons as in the case of Egypt).

legal regime for the recognition of foreign judgments set by Jordanian law.<sup>140</sup> With respect to Canada, the different approaches taken by Canadian and Jordanian law towards the applicable *lex fori* when determining the foreign court's international jurisdiction will very likely persuade Jordanian courts to not consider reciprocity with Canada.

Reciprocity is also likely not established with France. There is no treaty of recognition between France and Jordan, nor are decisions of Jordanian courts on the matter available. Furthermore, Jordanian courts may consider the French regime governing recognition of foreign judgments not to be compatible with the Jordanian regime. Recognition of foreign judgments under French law is based on the decision of the French Court of Cassation (Cour de Cassation) in the *Prieur* case.<sup>141</sup> In this case the court identified three requirements for the recognition of foreign judgments: (1) compliance with French *ordre public*, (2) international jurisdiction of the foreign court pursuant to French law, and (3) the judgment being obtained without fraud.<sup>142</sup> While the first and third requirement are compatible with Jordanian law—the third requirement essentially being a specific (procedural) variation of the *ordre public* requirement—the second requirement will likely be problematic. Pursuant to the JOD-EFJ, the foreign court has to have had international jurisdiction under the provisions on conflict of laws of the country of origin, while the French courts require application of French *lex fori*.<sup>143</sup> Hence, Jordanian courts will likely refuse recognition of French judgments. Still, no relevant judgments are available. Thus, it cannot be ruled out that Jordanian courts would find that reciprocity is in fact established.

### *i. Foreign Arbitral Awards*

#### *a. Treaties*

Jordan acceded to the New York Convention under the reservation that “the Government of Jordan shall not be bound by any awards made by Israel or to which an Israeli is party.”<sup>144</sup> It is not entirely clear from the wording of the reservation what is meant by “awards made by Israel.” Still, it appears that Jordan sought to exclude the application of the New York Convention with respect to awards rendered in Israel or disputes to which an Israeli is a party. While this reservation is not anticipated in the New York Convention,<sup>145</sup> public international law, in principle, provides for the freedom of countries to attach any reservation when becoming

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140. For an overview of the legal regime for recognition of foreign judgments in the UK, see above at III.A.i.c.

141. Cour de Cassation [Cass.] [supreme court for judicial matters], 1e civ., Feb. 20, 2007, No. 05-14.082, *Cornelissen c/Sté Avianca Inc. et autres* (Fr.).

. This decision repealed the court's former decision of No. 07.01.1965 in the *Munzer* case.

142. *Id.*

143. JOD-EFJ, art. 7(1)(1).

144. *Contracting States – List of Contracting States*, *supra* note 9..

145. NEW YORK ARBITRATION CONVENTION, *supra* note 68, at art. I(3).



party to a treaty.<sup>146</sup> Hence, foreign arbitral awards are recognized in Jordan pursuant to the provisions of the New York Convention, provided that the award was not made in Israel and does not include an Israeli party. Furthermore, since Jordan is party to the Riyadh Convention, awards passed in Jordan will be recognized in Iraq under the Riyadh Convention.

Since disputes concerning commercial agencies operating in Jordan are subject to the exclusive jurisdiction of Jordanian courts<sup>147</sup> recognition of foreign awards concerning such matters will likely be refused under the New York Convention.<sup>148</sup>

#### *b. Domestic Law*

Domestic Jordanian law does not address the recognition of foreign arbitral awards. The Jordanian Arbitration Law,<sup>149</sup> does not contain provisions on recognition and enforcement of foreign awards and the JOD-EFJ does not apply to arbitral awards. Yet, since Jordan only limited the application of the New York Convention with respect to Israel and Israeli dispute parties, this will be of little practical concern.

### *D. Lebanon*

#### *i. Foreign Judgments*

##### *a. Treaties and Domestic Law*

Lebanon is party to the Riyadh Convention as well as the Arab League Convention.<sup>150</sup> Where no treaty is applicable, recognition of foreign judgments in Lebanon is governed by the Lebanese Civil and Commercial Procedure Law (“LEB-CCPL”).<sup>151</sup> The application for recognition shall be addressed to the Lebanese محكمة الاستئناف (court of appeal) in which jurisdiction the person against whom the foreign judgment is invoked has his residence or the assets subject to the judgment are located.<sup>152</sup> Pursuant to the relevant provisions of the LEB-CCPL a foreign judgment shall be recognized if:<sup>153</sup>

1. The foreign court had jurisdiction over the subject matter pursuant to the *lex fori* of the country of origin, provided that jurisdiction was not based on the nationality of the claimant alone;

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146. Vienna Convention on the Law of Treaties of 1969 art. 19, which is generally accepted to be binding customary international law; *See i.e.* Alain Pellet, *1969 Vienna Convention: Article 19: Formulation of Reservations*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 472 (Olivier Corten & Pierre Klein eds., 2011).

147. JOD-CAL, art. 16.

148. NEW YORK ARBITRATION CONVENTION, *supra* note 68, at art. V(2)(1).

149. Law no. 31 of 2001 on Jordanian Arbitration Law [JOD-Arb. L.]. The law applies only to the enforcement of domestic arbitral awards.

150. Lebanon is one of the founding parties of the Riyadh-Convention. *See Agreement: Amman Arabic for Arbitration Review*, *supra* note 81.

151. Law no. 90 of 1983 on Lebanese Civil and Commercial Procedure Law [LEB-CCPL]

152. *Id.* at art. 1010(1).

153. *Id.* at art. 1014.

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2. The foreign judgment is final, binding and enforceable under the law of the country of origin;
3. The defendant was duly summoned and had the opportunity to offer a defense;
4. Reciprocity is established between Lebanon and the country of origin;
5. The foreign judgment does not conflict with Lebanese ordre public; and
6. No prior judgment of a Lebanese court on the same subject matter exists and the subject matter is not subject of a proceeding in front of a Lebanese court.

As the first condition suggests, Lebanese law takes a rather liberal position with respect to jurisdiction.<sup>154</sup> Still, it should be noted that Lebanese courts will not only verify that the foreign court had international jurisdiction, but also whether it had jurisdiction over the venue and subject matter pursuant to the *lex fori* of the country of origin.<sup>155</sup> In addition, Lebanese courts will refuse recognition of a foreign judgment where a Lebanese court had exclusive jurisdiction over the concerned dispute. This is the case, for example, in disputes over or arising with connection to a commercial agency.<sup>156</sup>

Unlike the courts of other Mashriq jurisdictions, Lebanese courts will not conduct an extensive review of the foreign judgment under the *ordre public* requirement. They will, however, review foreign judgments on their merits as far as:<sup>157</sup>

1. The foreign judgment was (partially) based on a forged document;
2. One of the parties held back a document vital to the dispute;
3. The foreign judgment was issued without operative part or without stating the court's reasoning; and
4. Judgments of Lebanese courts are subjected to a *r vision au fond* in the country of origin.

Furthermore, principles of Islamic law have comparatively little impact on Lebanese civil and commercial law. Interest for monetary loans, as well as default interest, may be charged in civil and commercial matters, provided that the interest rate is not excessive.<sup>158</sup> Consequential damages are recoverable pursuant to the LEB-CC;<sup>159</sup> and the amount of damages owed under a liquidated damage clause

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154. *Id.* at art. 1014(1).

155. A. MANSUR & M. AL-AJUZ, *القانون الدولي الخاص* PRIVATE INTERNATIONAL LAW 503 (3rd ed., 2009).

156. Law no. 34, art. 5, of 1967 on Lebanese Commercial Representation [LEB-Com. Rep. L.]/

157. LEB-CCPL, art. 1015.

158. Civil Code of Lebanon [LEB-CC] of Mar. 9, 1932, arts. 265, 767.

159. LEB-CC, arts. 261, 263.

may only be reduced where the relevant court finds the amount to be excessive.<sup>160</sup> Assignment of rights is permissible without the consent of the debtor.<sup>161</sup>

*b. Reciprocity*

Article 1015 LEB-CCPL explicitly allowing for a *révision au fond* may at first appear to exclude reciprocity in respect to many jurisdictions. Yet, Article 1015(1) through (3) LEB-CCPL will have to be considered as a variety of the *ordre public* requirement, which does not go beyond the scope of *ordre public* as interpreted in most jurisdictions. Moreover, Article 1015(4) LEB-CCPL is only applicable where the country of origin provides for a *révision au fond*. Consequently, commentators consider reciprocity to be established in respect to Germany.<sup>162</sup> Since the legal regime for recognition provided by Swiss and US law is compatible with that of Lebanese law,<sup>163</sup> judgments of Swiss or US courts will likely also be recognized in Lebanon.

For lack of a relevant treaty or regulation, reciprocity is not established in respect to Austria. Furthermore, since Lebanese judgments will not be recognized in the UK under the UK-AJA or the UK-FJA and the treatment of foreign judgments at common law is not compatible to the regime for recognition of foreign judgments provided by Lebanese law for the same reasons as in the case of Egypt, UK judgments will likely not be recognized by Lebanese courts. Finally, the position taken with respect to the applicable *lex fori* under Canadian and French law is not compatible with Lebanese law. Consequently, reciprocity is likely not established in respect to these two countries.

*i. Foreign Arbitral Awards*

*a. Treaties*

Lebanon acceded to the New York Convention with the reservation that it shall only apply in respect to other members of the New York Convention.<sup>164</sup> Consequently, awards made in Iraq, for example, cannot be recognized in Lebanon pursuant to the provisions of the New York Convention. Both Iraq and Lebanon are, however, parties to the Riyadh Convention, which provides for the reciprocal recognition of arbitral awards. Thus, foreign arbitral awards originating from a country that is party to the Riyadh-Convention may be recognized and enforced in Lebanon pursuant to its provisions.

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160. LEB-CC, art. 266.

161. LEB-CC, arts. 280-289.

162. Schütze, *supra* note 137, at 564; Kilian Bälz & Dirk Kocher, *Libanon*, in 6 INTERNATIONALER RECHTSVERKEHR IN ZIVIL- UND HANDELSACHEN 1078a-7 (Reinhold Geimer & Rolf A. Schütze eds., 49th ed., 2015).

163. For a description for the provisions concerning recognition of foreign judgments in Switzerland and the US, see above at III.A.i.c.

164. See *Contracting States – List of Contracting States*, *supra* note 9.

*b. Domestic Law*

Where no treaty is applicable, recognition of foreign awards is governed by the provisions of the LEB-CCPL. The LEB-CCPL provides two requirements for recognition:<sup>165</sup>

1. The party invoking the award has to prove its existence; and
2. The foreign award does not conflict with international ordre public.

These rather general requirements are further defined by case-law.<sup>166</sup> Most importantly, Lebanese courts will refuse recognition of foreign awards rendered over a subject matter that may not be subjected to arbitration under Lebanese law, as such a provision on jurisdiction will be regarded as being part of Lebanese ordre public.<sup>167</sup>

For instance, disputes arising over or in connection with a distributorship operating in Lebanon are, in principle, subject to the exclusive jurisdiction of the courts at the place of business of the distributor.<sup>168</sup> Traditionally the Lebanese محكمة النقض (court of cassation) held that only agreements pursuant to which disputes arising over or in connection with distributorships are subjected to dispute resolution by courts outside of Lebanon and not agreements whereby such disputes are subjected to arbitration would be void according to Article 5 LEB-Com. Rep. L.<sup>169</sup> Yet, the Court of Cassation has since changed its position and held that Article 5 LEB-Com. Rep. L. also excludes arbitration,<sup>170</sup> unless the distributor specifically consents to the individual dispute being referred to arbitration.<sup>171</sup>

Disputes with the Lebanese government or public judiciary persons, however, may be subjected to arbitration without the consent of a specific authority pursuant to Article 762(3) LEB-CCPL.<sup>172</sup>

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165. LEB-CCPL, art. 814.

166. The Lebanese legal system – as civil law jurisdictions in general – does not abide to the concept of binding precedence. Nonetheless, Lebanese courts will consider prior decisions of higher courts in their consideration.

167. A. EL-AHDAB & J. EL-AHDAB, *supra* note 10, at 356.

168. Law no. 34, art. 5, of Aug. 5, 1967 on Lebanese Law on Commercial Representation [LEB-Com. Rep. L.]. “Distributorship” within the meaning of this law is understood to comprise sole distributors as well as commercial agents. *Id.* at art. 1.

169. *Id.* at art. 5. For relevant court judgments, *see i.e.* Maḥkamat al-Tamyīz [Tamyīz] [Court of Cassation], decision no. 16, 7 July 1988 (Leb.).

170. *See i.e.* Tamyīz, decision no. 34, 19 July 2001 (Leb.).

171. *See* Tamyīz, decision no. 4, Jan. 11, 2005 (Leb.) (The Court of Cassation held that LEB-Com. Reg. L., art. 5 is a provision for the benefit of the distributor. Consequently, the distributor may choose to waive it. Still, to ensure comprehensive protection of the distributor an arbitration agreement will be considered non-binding pursuant to LEB-Com. Reg. L., art. 5. An arbitration initiated based on it will only be valid under Lebanese law, if the distributor specifically consents to the individual dispute being referred to arbitration.)

172. Prior to its amendment in 2002, the LEB-CCPL provided that disputes with public entities could not be resolved by arbitration. However, per Law no. 440, art. 762, of 2006, LEB-CCPL was amended by two paragraphs, including the current LEB-CCPL, art. 762(3), which explicitly allows disputes involving the Lebanese government and public entities to be referred to arbitration.

*E. Syria*

*i. Foreign Judgments*

*a. Treaties and Domestic Law*

Syria is party to the Riyadh Convention and the Arab League Convention.<sup>173</sup> Treaty provisions governing recognition of foreign rulings take precedence over those of Syrian law.<sup>174</sup> Where no treaty is applicable, foreign judgments may be recognized pursuant to the provisions of the SYR-CCPL,<sup>175</sup> provided that reciprocity is established and the foreign judgment complies with the requirements stipulated by the SYR-CCPL, which provides that:<sup>176</sup>

1. The foreign court was competent to hear the dispute pursuant to the country of origin's *lex fori*;
2. The foreign judgment is final and binding;
3. The respondent was duly summoned and represented;
4. The judgment does not conflict with a prior judgment of a Syrian court on the same subject matter; and
5. The foreign judgment does not conflict with Syrian *ordre public*.

Syrian courts generally recognize judgments passed in *absentia*, provided that the absent party was duly summoned.<sup>177</sup> Furthermore, Syrian law recognizes competing jurisdiction<sup>178</sup> and Syrian courts will only review the international jurisdiction of the foreign court.<sup>179</sup> Thus, the question of jurisdiction will usually not be a problem. However, recognition will be refused where Syrian courts had exclusive jurisdiction over the concerned subject matter. For instance, disputes arising out of or in connection with commercial agencies operating in Syria are subject to the exclusive jurisdiction of Syrian courts.<sup>180</sup>

Disputes over administrative contracts are subject to the exclusive jurisdiction of the Syrian المحاكم الإدارية (administrative courts).<sup>181</sup> The law defines an administrative contract as an agreement between a private entity and a legal entity under

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173. Syria is one of the founding parties of the Riyadh-Convention. *protocol of the meeting of the arbitration committee held on April 22, 1992, Amman, Jordan*, *supra* note 81.

174. Civil and Commercial Procedure code of Syria [SYR-CCPL] of 1953, art. 311.

175. SYR-CCPL, arts. 306-310.

176. SYR-CCPL, art. 308.

177. Andreas Börner, *Syrien*, in 6 INTERNATIONALER RECHTSVERKEHR IN ZIVIL- UND HANDELSACHEN 1135-10 (Reinhold Geimer & Rolf A. Schütze eds., 49th ed., 2015).

178. SYR-CCPL, art. 308(1).

179. Börner, *supra* note 178.

180. Law no. 34, art. 59, of 2008 on Syrian Law Governing Registration of Companies, Organizations and Entities whose Head Offices are outside the Territory of the Syrian Arab Republic [SYR-For. Ent. L.].

181. Law no. 51, art. 66(1), of 2004 on Syrian Law on Contract with Public Entities [SYR-LCPE].

public law regardless of the subject matter.<sup>182</sup> Thus, while the wording of Article 66(1) SYR-LCPE suggests that only certain disputes with public entities would be subject to the exclusive jurisdiction of the Syrian Administrative Court, considering the definition of administrative contracts under the SYR-LCPE, any dispute involving Syrian public entities will be subject to the exclusive jurisdiction of the Syrian Administrative Court. This fact is particularly relevant since due to the significant involvement of the Syrian state in the Syrian economy—even in comparison to other Near and Middle Eastern countries—disputes in economic matters with connection to Syria regularly involve public entities.

As in the other countries of the region, Syrian courts will consider Islamic law as part of Syrian *ordre public*. However, similar to Iraqi and Lebanese law, Syrian civil and commercial law is hardly influenced by Islamic law principles. Pursuant to Syrian law interest to be charged for delay in performance of monetary claims at the statutory rate of four percent in civil and five percent in commercial matters or at the rate agreed upon,<sup>183</sup> provided that the interest rate does not exceed nine percent.<sup>184</sup> Furthermore, interest may be charged for loans and other facilities in civil and commercial matters.<sup>185</sup> Liquidated damages are permissible under Syrian law.<sup>186</sup> Similar to their treatment in Western jurisdictions—and under Iraqi law—the amount of damages agreed upon may only be reduced where the court finds it to be excessive.<sup>187</sup> Consequential damages may be recovered pursuant to the SYR-CC.<sup>188</sup> Finally, Syrian law provides for the assignment of rights. However, as a particularity of Syrian law, assignment of rights requires the written consent of the debtor, which shall state the date upon which the assignment becomes effective.

The competent court to hear applications for recognition of foreign judgments is the المحكمة الابتدائية (court of first instance) under which jurisdiction enforcement is thought.<sup>189</sup>

Still, considering the current situation in Syria, recognition of a foreign judgment may be but a hollow victory. Due to the political instability and ongoing armed conflict, enforcing a judgment will be close to impossible in most parts of Syria.

### *b. Reciprocity*

Reciprocity is established with respect to Germany, and most likely Switzerland and the US.<sup>190</sup> Syrian courts will, most likely refuse recognition, however, of

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182. SYR-LCPE, art. 1(a)(7).

183. Law no. 84, art. 227, of 1949 on Syrian Civil Code [SYR-CC].

184. SYR-CC, art. 228. Furthermore, compensation may be charged in addition to the default interest where the defaulting party acted in bad faith. SYR-CC, art. 232.

185. SYR-CC, art. 647.

186. SYR-CC, art. 224.

187. SYR-CC, art. 225(5).

188. SYR-CC, art. 222.

189. SYR-CCPL, art. 307.

190. For Germany, *see i.e.* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 15, 1967, VIII ZR 50/65, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 49, 50 (Ger.); Oberlandesgericht [OLG] [Higher Regional Court] Feb. 22, 2008, 25 U 2.08 (Ger.). In the case of Switzerland and the US reciprocity is likely established for the same reasons as in the case of Egypt, *see* above at III.A.i.c. Since Syrian law is more liberal in respect to jurisdiction than Egyptian law, the likelihood that reciprocity is established is even higher in the case of Syria.

judgments of Canadian, French, and United Kingdom courts for lack of reciprocity.<sup>191</sup> Since no relevant treaty or regulation establishes reciprocity between Syria and Austria, Syrian judgments will not be recognized in Austria and vice-versa.

*ii. Foreign Arbitral Awards*

*a. Treaties*

Syria is a member to the New York Convention, to which it acceded without reservations,<sup>192</sup> as well as the Riyadh Convention and the Amman Convention.

The main legal obstacle for the recognition of foreign awards in Syria is the exclusion of certain disputes from arbitration. Pursuant to the Syrian Foreign Entities Law (“SYR-For. Ent. L.”) disputes over or arising in connection with a commercial agency may not be subject to arbitration.<sup>193</sup> Hence, recognition of awards concerning a commercial agency operating in Syria will most likely be rejected by Syrian courts under the New York Convention and the Riyadh Convention.<sup>194</sup> Since the Syrian Administrative Courts have exclusive jurisdiction over disputes arising over, or in connection with, administrative contracts<sup>195</sup> these disputes may not be referred to arbitration.<sup>196</sup>

Secondly there are considerable practical hindrances when seeking to enforce a judgment in Syria. The ongoing armed conflict and lack of control of the government over large parts of the country will be a sizeable obstacle when seeking enforcement in many parts of Syria. Furthermore, enforcement proceedings can be extraordinarily lengthy, taking more than ten years by the time all challenges have been exhausted.<sup>197</sup>

*b. Domestic Law*

Outside of the scope of applicable treaties, recognition of foreign awards in Syria is governed by domestic law. Since Syria acceded to the New York Convention without reservation, any foreign arbitral award may be recognized in Syria pursuant to the New York Convention. Consequently, Syrian domestic law will not be applicable unless the party invoking the award chooses to seek recognition under Syrian domestic law.

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191. Reciprocity between Syria and Canada and the UK is likely not established for the same reasons as in the case of Egypt, *see above* at III.A.i.c. In respect to France reciprocity is likely not established for the same reasons as in the case of Jordan, *see above* at III.C.i.c).

192. *See Contracting States – List of Contracting States, supra* note 9.

193. SYR-For. Ent. L., art. 59

194. New York Arbitration Convention, *supra* note 68, at art. V(2)(1).; *Riyadh Arab Agreement for Judicial Cooperation, supra* note 10, at art 37(1)(2).

195. SYR-LCPE, art. 66(1).

196. Law no. 4, art. 2(b), of 2008 on Syrian Arbitration Law [SYR-Arb. L.] explicitly provides that the provisions of the SYR-Arb. L. do not supersede those of the SYR-LCPE. Thus, even after the SYR-Arb. L. was enacted in 2008, SYR-LCPE, art. 66 remains in force and, thus, disputes over administrative contracts may not be subjected to arbitration.

197. *See Jacques El-Hakim, Enforcement of Foreign Judgments and Arbitral Awards in Syria*, 5 ARAB LA.Q. 137, 141 (1990).

The Syrian Arbitration Law (“SYR-Arb. L.”)—and thus its provisions on recognition—only apply to domestic arbitration and international arbitration proceedings conducted outside of Syria but subjected by the parties to the SYR-Arb. L.<sup>198</sup> In a decision rendered in 2009, the Aleppo Court of First Instance held that the SYR-Arb. L. does not apply to foreign arbitral awards and denied recognition of two ICC awards.<sup>199</sup> The court based its decision solely on the fact that the ICC awards were foreign. It did not make any reference to the fact that the relevant proceedings were not subjected to the SYR-Arb. L. by agreement of the parties. Still, the decision cannot necessarily be understood as stating that the SYR-Arb. L. is not applicable to any foreign awards. It remains to be seen how Syrian courts will decide in the future. Should Syrian courts find that the SYR-Arb. L. is applicable to foreign awards where the parties to the dispute agreed to the application of the SYR-Arb. L., the awards may be recognized pursuant to the SYR-Arb. L. provided that.<sup>200</sup>

1. The award does not conflict with a prior judgment of a Syrian court on the same subject matter;
2. The award does not infringe upon Syrian ordre public; and
3. The party against whom the award is invoked was duly served with it.

The competent court to decide in the exequatur proceedings is the Syrian محكمة الاستئناف (court of appeal) competent at the place where the relevant award shall be recognized, unless the parties declare a different Syrian court of appeal to be have jurisdiction.<sup>201</sup> Where the SYR-Arb. L. is not applicable, the exequatur procedure should be governed by the provisions on recognition of foreign judgments as provided by the SYR-CCPL.<sup>202</sup>

#### IV. CONSEQUENCES FOR DISPUTE RESOLUTION AND STRATEGIES

The issues discussed in Section III require consideration of contract drafting and dispute resolution where claims may have to be asserted and enforced in the Mashriq.

Generally speaking, arbitration may in many cases be the better option. Foreign arbitral awards, generally, have the better chance for recognition. In particular, since Egypt and Syria acceded to the New York Convention without reservations and Jordan only limited it in respect to Israel, the application of the convention is comparatively comprehensive in the Mashriq countries.

Yet, Iraq is not a party to the New York Convention. Since Iraqi domestic law does not provide for the recognition of foreign awards, the Riyadh Convention—and in respect to Egypt the Arab League Convention—remains the only mean for recognition of foreign awards in Iraq. Considering the substantial hindrances for

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198. Article 2(1) SYR-Arb. L., art. 2(1).

199. Civil Court of First Instance, Oct. 1, 2009, Aleppo, No. 154 & 155 (Syria).

200. SYR-Arb. L., art. 56(1).

201. SYR-Arb. L., art. 3(1).

202. SYR-CCPL, art. 3(09)..



the recognition of foreign judgments in Iraq, it may, therefore, be advisable to choose dispute resolution through arbitration in a member country of the Riyadh Convention or Egypt. In practice, many foreign investors have chosen to secure their investments by choosing Jordan as a venue for arbitration. Other popular arbitration venues in regard to investments in the Near and Middle East are Dubai and Cairo.

There are also some obstacles for the recognition of foreign awards in the other Mashriq countries. Certain disputes may not be subjected to arbitration under the law of the Mashriq countries. Pursuant to Jordanian, Lebanese, and Syrian law, disputes arising out of or in connection with commercial agencies may not be subjected to arbitration. Furthermore, disputes with the Syrian government and legal entities under public law are excluded from arbitration. Under Iraqi law disputes between shareholders or partners in the same legal person are reserved for resolution by courts. Still, even where the subject matter may be subjected to arbitration, arbitration may not necessarily be the ideal choice in every case. Where the expected disputes are of moderate value or one of the parties refuses to agree to arbitration, resorting to litigation instead may be the better choice.

The significant hindrances for recognition of foreign judgments should be considered when choosing a venue of litigation in the country where claims will most likely have to be enforced. Where this is not an option, one may agree to litigation in a country that has a treaty on reciprocal recognition in place with the country where recognition may be sought—i.e., a member of the Riyadh Convention or in the case of Egypt, a member of the Arab League Convention or France. This would allow the party pursuing a claim to profit from the application of the relevant convention. This is particularly important where claims may have to be enforced in Iraq, since Iraqi law requires that reciprocity be established by treaty or resolution of the federal Iraqi legislator, thus limiting the choices of venue for dispute resolution to a member of the Riyadh Convention, Egypt, and the United Kingdom. Moreover, the restrictive approach to jurisdiction by most Mashriq jurisdictions will limit the recognition of foreign judgments in these countries. In this regard Iraqi and Jordanian law are particularly limiting. Egyptian courts, however, appear to recently have taken a more liberal approach to jurisdiction and competing jurisdiction in particular. Finally, recognition of foreign judgments in Jordan is limited to specific judgments.

Regardless of which dispute resolution mechanism and venue the parties chose, where a foreign ruling may have to be enforced in a Mashriq country special consideration must be given to the particular challenges posed by the legal regimes governing recognition of these countries.

With the exception of Lebanese courts, the courts of the Mashriq countries frequently conduct a comprehensive review of foreign judgments and arbitral awards on their merits in the exequatur procedure. For one, the often-lengthy review conducted by the local courts delays the exequatur procedure. Second, it also significantly limits the parties' options to make a determination as to the applicable law and conflicts with accepted standards on international procedural law, according to which foreign judgments and arbitral awards shall not be reviewed on their merits

but only on certain procedural issues.<sup>203</sup> These standards seek to ensure compliance with accepted standards on conflict of law—standards determining which law will be applicable to a specific subject matter—as well as the parties choice of law, which is an expression of the principle of freedom to contract and an accepted standard in the Mashriq countries. Where a review of foreign judgments and awards on their merits is conducted, these standards are circumvented and the application of the requested country's law is imposed.

To ensure that fundamental principles of the requested country are honoured and no country is forced to recognize a ruling that would contradict these, the *ordre public* requirement allowing for a review of foreign ruling in respect to their compliance with these fundamental principles is included in conditions governing the recognition and enforcement of foreign judgments and arbitral awards. However, the courts of most Mashriq countries interpret the *ordre public* requirement differently from internationally accepted standards and deem it to authorize them to review foreign judgments and awards on their merits. Consequently, where claims under a contract may have to be enforced in these jurisdictions the law of that country has to be considered when drafting the contract and in any legal action brought in connection with it.

In contrast to recognition of foreign judgments and awards in the GCC<sup>204</sup> the application of Islamic law is less of a hindrance for recognition in the Mashriq countries. Claims for interest will not be much of an issue in the Mashriq countries other than Jordan. While Jordanian law provides for default interest and does not explicitly prohibit charging interest in consideration of financial facilities, certain ambiguity exists with respect to claims for interest charged on a loan provided by persons or entities other than banks. This matter is not regulated by Jordanian law and Jordanian courts will apply Ottoman law to determine whether the relevant claim is valid. Still, the enforcement of consequential damages may pose some difficulties in Egypt and Jordan. In these jurisdictions, consequential damages are largely confined to tort. Furthermore, liquidated damage clauses are treated quite differently under Egyptian and Jordanian law in that they give the courts comparatively wide authority to adjust the amount of damages owed under a liquidated damage clause.

In addition, rulings rendered in *absentia* may be problematic in Jordan and Egypt. While it is not clear whether such ruling may be recognized in Jordan, the wording of the relevant provisions of Jordanian law suggests that they may not. The same is true in regard to Egypt. However, Egyptian courts appear to interpret the applicable provisions of Egyptian law somewhat less strict.

Finally, due to the ongoing armed conflicts in Iraq and Syria and the resulting lack of stability in many parts of these countries, recognition of a foreign judgment

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203. Although nearly all countries now regularly recognize foreign judgments and awards, this state practice is not considered specific enough to create a binding rule of customary international law. However, the *ordre public* requirement is internationally understood as comprising only the fundamental provisions of the requested country's domestic law; see i.e. Diego P. Fernández Arroyo, *What's New in Latin American Private International Law?*, 7 Y.B. PRIV. INT'L L. 85, 112-115 (2005); Marie-Elodie Ancel France: *The New Policy of the Cour De Cassation Regarding Islamic Repudiations: A Comment on Five Decisions*, 7 Y.B. PRIV. INT'L L. 261, 262 (2005); ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* 190-193 (2009).

204. For an overview on challenges posed by certain principles of Islamic law for the recognition of foreign judgments and arbitral awards in the GCC, see Bremer, *Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries*, *supra* note 1, at 37-38.

or award may not be much of a victory. The claims may not be enforceable for practical reasons. In many cases it may be impossible to access assets to execute a judgement or award where such assets are located in an area not controlled by the central government. Furthermore, records of the claimant's assets may be lost or inaccessible due to the conflict.

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