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A Practitioner's Introduction to Saudi Arabian Law

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NOTES

A PRACTITIONER'S INTRODUCTION TO SAUDI ARABIAN LAW

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I. INTRODUCTION

To many Western practitioners, the law of Saudi Arabia (the Kingdom) appears to be a complex labyrinth of obscure Qur'anic¹ texts, unwritten custom, and regulations in the form of royal decrees. The uninitiated are hampered not only by their unfamiliarity with the traditions and tenets of Islam, but also by the difficulty of understanding the practical operation of the Saudi legal system and discovering the best available sources of Saudi law.

Western practitioners preparing to service clients doing business in Saudi Arabia are well advised to familiarize themselves

1. Many Arabic words have several alternate spellings, each equally correct. For this reason Arabic words that appear in quotations within this Note are reproduced as they appear in the original, rather than conformed to the spelling chosen for this Note. Similarly, where the author of the quoted material chose not to italicize Arabic words, they appear in this Note as in the original.

with Islamic law and the Saudi legal system. In Saudi Arabia, as in other Muslim countries, religion and law are inseparable. Ethics, faith, jurisprudence, and practicality are so interdependent that it is impossible to study *only* Islamic religion or *only* Islamic law. Even Western attorneys who engage exclusively in Saudi corporate law will find themselves at a distinct disadvantage without at least a passing acquaintance with the fundamentals of the Islamic faith and the general principles of Islamic contract law. It is critical, moreover, for Western attorneys to be familiar with Arab social mores and customs if they are to effectively advise or represent United States clients doing business in Saudi Arabia.

There is no Saudi legal code. Although the literature on the Islamic faith is extensive, the only Saudi laws available in the English language are the corporate, tax, and labor regulations. This Note brings together the applicable principles and laws to provide a broad overview of the Saudi legal system: it discusses the way in which Islamic law has evolved in Saudi Arabia, analyzes the major Saudi corporate regulations, and, as an introductory research tool, directs the practitioner to more detailed resources. This Note also gives practical advice to attorneys representing clients doing business in Saudi Arabia, adding needed dimension to the literature in the field.

Four themes will be emphasized in this Note. First, there is little, if any, distinction between law and religion in Islam. Second, the Saudis (and all Muslims) have extensively incorporated Islam into their legal and regulatory structure as well as into their daily lives. Third, the Western attorney should not underestimate the active role which tradition, custom, and the Arab viewpoint play in the Saudis' daily business practices, because even an unintended social *faux pas* can upset a sensitive business negotiation. Last, the practical adaptation of certain restrictive, traditional Islamic teachings to conform to the requirements of modern commercial society ensures Saudi Arabia's continued participation in the international economic community.

II. THE ISLAMIC FOUNDATION

Islam is a system of beliefs and guidelines to be practiced in every facet of a Muslim's life. Islam is both religion and law, but it cannot be cleanly separated into theological and legal components. The *shari'a*, the body of Islamic law, is derived from four

sources:² the *Qur'an*, the *sunna*, consensus (*ijmā'*), and analogy (*qiyā*).³ The four schools of Islam⁴ recognize the *Qur'an* and the *sunna* as the primary sources of Islamic law but accord varying degrees of deference to consensus and analogy. The Government of Saudi Arabia officially recognizes only the Hanbali school,⁵ a highly conservative strain of Islam⁶ that enjoys few adherents outside the Kingdom⁷ and does not recognize the legitimacy of analogy as a source of Islamic law.⁸ This section will summarize the development of Islam in Saudi Arabia and describe the four sources of Islamic law. The basic tenets of Islam and the relationship between religion and law will then be discussed in detail.

A. History

The Prophet Muhammad was born in Mecca in approximately 570 A.D.⁹ In the year 610 A.D. Muhammad, then a trader residing

2. See *infra* notes 34-71 and accompanying text.

3. Vesey-Fitzgerald, *Nature & Sources of the Shari'a*, in 1 *LAW IN THE MIDDLE EAST* 87 (M. Khadduri & H. Liebesny eds. 1955).

4. The four schools of Islam are the Hanafi, Hanbali, Maliki, and Shafii. R. NYROP, B. BENDERLY, L. CARTER, D. EGLIN, R. KIRCHNER, *AREA HANDBOOK FOR SAUDI ARABIA* 120 (3d ed. 1977) [hereinafter cited as R. NYROP]. The relatively liberal Hanafite school has "official status in Iraq, Egypt, Israel, the Sudan, and Libya," and is the predominant Muslim school in Turkey, Syria, Lebanon, Jordan, India, Pakistan, and Afghanistan; the Hanbali school is officially recognized in Saudi Arabia and enjoys adherents in Qatar; the Malikite school claims popularity in North and West Africa, as well as in Kuwait; and the Shafii school is centered in lower Egypt, East Africa, Indonesia, and Malaysia, among other regions. H. LIEBESNY, *THE LAW OF THE NEAR AND MIDDLE EAST* 22 (1975). These schools concede each other's "orthodoxy," J. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* 15 (1975), although they all continue to experience disagreement not only with each other but also among themselves. Vesey-Fitzgerald, *supra* note 3, at 110. Muslims may freely change from one school to another. Khadduri, *Nature and Sources of Islamic Law*, 22 *GEO. WASH. L. REV.* 3, 20 (1953). These schools all are part of the Sunni legal tradition. *Id.* The other Islamic tradition is that of the Shi'ites, who adhere to a more conservative and authoritarian doctrine which imbues the caliphate with infallibility and divine right. *Id.* at 22; see also R. NYROP, *supra*, at 118-19 for an overview of the schism between the two traditions.

5. Schacht, *The Schools of Law and Later Developments of Jurisprudence*, in 1 *LAW IN THE MIDDLE EAST* 70 (M. Khadduri & H. Liebesny eds. 1955).

6. R. NYROP, *supra* note 4, at 120.

7. *Id.*

8. *Id.*

9. BELL'S INTRODUCTION TO THE QUR'AN 10 (W. Watt rev. ed. 1970) [hereinafter cited as BELL'S INTRODUCTION].

in Mecca, received his first messages from God (Allah) through the angel Gabriel.¹⁰ Muhammad began preaching God's word and suffered such persecution in Mecca that in 622 A.D. he and many of his followers emigrated to Medina.¹¹ This trip, the *hijra*, heralds the beginning of the Islamic calendar.¹² Muhammad's following increased so substantially in Medina that eight years later he was able to return victoriously to Mecca, and he eventually became "effective ruler of most of Arabia."¹³ Islam thus became the dominant religion on the Arab peninsula.¹⁴

Muhammad is said to have repeated God's word verbatim;¹⁵ these holy messages, received at various times, were transcribed by Muhammad's followers during the two decades following Muhammad's death.¹⁶ This collection of Allah's revelations comprises the text of the *Qur'an*¹⁷ and is considered the final culmination of the revelations granted to Jews and Christians.¹⁸

Muhammad denied the legitimacy of the polytheism and paganism so widely practiced by the Arabs of his time.¹⁹ Among the changes he introduced were the direction of prayer toward Mecca rather than toward Jerusalem, the establishment of *Ramadan* as a period of fasting,²⁰ and the declaration of Friday as the official day of public prayer.²¹ Perhaps Muhammad's most politically valuable contribution, however, was his encouragement of a cohesiveness which did much to overcome pervasive tribal differences.²² Ironically, his monotheism legitimized *jihād*, warfare for the purpose of unifying Arab tribes under the umbrella of Islam.²³ The traditional tribal blood feuds were thus replaced by less frequent religious wars.

The Hanbali school of Islam, the official school of the Saudi

10. R. NYROP, *supra* note 4, at 113-14.

11. BELL'S INTRODUCTION, *supra* note 9, at 11.

12. *Id.* Thus, dates in Muslim countries are annotated "A.H."

13. *Id.* at 13.

14. For a more detailed account of Muhammad's life and career, see *id.* at 9-15.

15. R. NYROP, *supra* note 4, at 118.

16. Khadduri, *supra* note 4, at 8.

17. *Id.*

18. R. NYROP, *supra* note 4, at 114.

19. *Id.* at 117.

20. See *infra* note 535 and accompanying text.

21. R. NYROP, *supra* note 4, at 117.

22. *Id.*

23. *Id.*

government, was founded two hundred years after the death of Muhammad. Ahmad ibn Muhammad ibn Hanbal, a prominent ninth century Muslim jurist, rejected analogy as a valid source of Islamic law; instead he declared the *Qur'ān* and the *sunna* to be the only completely valid sources, with consensus a permissible means of arriving at the truth only in specified circumstances.²⁴ This conservative approach is consistent with the view that the *Qur'ān* contains a literal transcription, rather than an interpretation, of God's word.

The Hanbali school began a long, gradual decline which grew critical in the fourteenth century²⁵ and was not reversed until the eighteenth century. In 1774 a fateful alliance was concluded between Muhammad ibn Abd al-Wahhab, a fundamentalist Hanbali scholar, reformer, and follower of the prominent fourteenth century Hanbali jurist Ibn Taymiyya,²⁶ and Muhammad ibn Sa'ud, an ambitious Arab chieftain.²⁷ These two powerful protagonists agreed that ibn Sa'ud would fight for the establishment of Wahhabiism, promote the religious teachings of Ibn Taymiyya, and permit al-Wahhab to maintain religious power in Sa'ud's newly conquered territories, although Sa'ud would retain political power in those areas.²⁸ Wahhab introduced conservative reforms in the Hanbali community.²⁹ His followers developed an intolerance for other sects that temporarily threatened Wahhabi legitimacy in the eyes of other Muslim schools.³⁰ The Wahhabi movement,

24. *Id.* at 120; see also Khadduri, *supra* note 4, at 19.

25. Schacht, *supra* note 5, at 70.

26. *Id.* at 69-70.

27. *Id.* at 70.

28. R. NYROP, *supra* note 4, at 121. This alliance of religion and politics had repercussions beyond any that could have been foreseen at that time. Indeed, it has been observed that this "partnership . . . harnessed Wahhabi religious fervor to Saud's dynastic expansionism and . . . resulted in . . . the eventual development of the modern state of Saudi Arabia." *Id.* This observation is accurate on a literal level as well: all the kings of Saudi Arabia since the forging of this alliance have been descendants of al-Sa'ud and Wahhab, *id.* at 113, who agreed that their political and religious power would pass to their respective descendants. *Id.* at 121. Wahhab shared with the Prophet a belief in the need to unify the peninsula politically through the spread of religion. *Id.* at 123. Wahhab, however, accomplished this goal in a more immediate way.

29. For example, he did not permit smoking, shaving, strong language, music, or dancing, and he imposed mandatory attendance at public prayer. R. NYROP, *supra* note 4, at 122.

30. Schacht, *supra* note 5, at 70.

however, has maintained its orthodox status³¹ and, with some moderations, it continues to enjoy the endorsement of Saudi Arabia's ruling family.³² Indeed, "Saudi Arabia owes its national identity to the fundamentalist version of Islam propounded . . . by Muhammad ibn Abd al-Wahhab."³³

B. Sources of Law

The four primary sources³⁴ of Islamic law—the *Qur'an*, the *sunna*, consensus, and analogy—together largely comprise the *shari'a*,³⁵ which means "Whole Duty of Man."³⁶ The *shari'a* is accepted by all Muslims as the law of God.³⁷ The *sunna*, analogy, and consensus all derive "from the Qur'anic axiom of the unity of God's law."³⁸ Throughout the *shari'a* a tension exists between the discipline and the flexibility of its commands. This tension has permitted the *shari'a* to adapt effectively to the changing demands of each successive era.³⁹ Although analogy, or *qiyā*, is not recognized by the Hanbali school as a valid source of Islamic law,⁴⁰ this Note will briefly describe all four sources of the *shari'a* because analogy is so widely recognized by Muslims.

1. *Qur'an*

The *Qur'an*⁴¹ is the holy book of Islam.⁴² Its passages provide

31. *Id.*

32. R. NYROP, *supra* note 4, at 123-24.

33. *Id.* at 113.

34. Other sources or doctrines which fill any remaining gaps have been discovered or invented, and are recognized as well, such as necessity, or *durūra*. Vesey-Fitzgerald, *supra* note 3, at 110-12. Discussion of these sources, however, involves a detailed examination of Islam that is beyond the scope of this Note.

35. At least one student of Islam has noted that "pre-Islamic customary law, and the administrative practice of early Islam" also contributed to the development of the *shari'a*. See J. ANDERSON, *supra* note 3, at 19.

36. Vesey-Fitzgerald, *supra* note 3, at 85.

37. *Id.* at 104.

38. *Id.* at 90.

39. See *id.* at 85-86.

40. Khadduri, *supra* note 4, at 19.

41. Strict transliteration of the title is rendered as *al-qur'an*, although because the title was not revealed to the Prophet and consequently is not part of the sacred text, it is frequently excluded from editions of the book. BELL'S INTRODUCTION, *supra* note 9, at 57.

42. It is believed that the divine law, as given to Muhammad and transcribed in the *Qur'an*, was derived from the "Mother Book," described typically as "the

religious and ethical guidance to the more than 400 million Muslims around the world.⁴³ The text, which cannot easily be characterized,⁴⁴ consists of the revelations of God to the Prophet Muhammad,⁴⁵ Muhammad having repeated God's words verbatim.⁴⁶ The text of the *Qur'ān* is divided into *suras* and verses,⁴⁷ each *sura* beginning with the classic phrase "In the name of God, the Merciful, the Compassionate."⁴⁸ Of all the *suras* in the *Qur'ān*, approximately 500 may have some legal relevance, with only eighty of those having any recognizable modern legal applications.⁴⁹ These *suras* "have been construed," according to one scholar of Islam, "by a method of statutory interpretation which Anglo-American lawyers might well find congenial, so as to extract the utmost ounce of meaning from them."⁵⁰

The *Qur'ān* thus contains both the commands and sanctions of God, encompassing all areas of human existence. The fervor with

embodiment of a universal law or the Law of Nature." Khadduri, *supra* note 4, at 8. The *Qur'ān* indicates this in the following passage: "And it is in the Mother of the Book with us—high and wise." QUR'ĀN, XLIII:3 *quoted in id.* at 6.

43. BELL'S INTRODUCTION, *supra* note 9, at xi.

44. One highly respected scholar in the field made an admirable effort when he described the *Qur'ān* as "neither a treatise on theology, nor a code of laws, nor a collection of sermons, but rather a medley of all three, with other things thrown in." *Id.*

45. R. NYROP, *supra* note 4, at 114. The Prophet's followers transcribed these revelations during the 20 years after his death. See *supra* text accompanying note 16.

46. BELL'S INTRODUCTION, *supra* note 9, at 65. For an inquiry into the authenticity of the *Qur'ān*, see *id.* at 50-56.

47. For a description of the form of these subdivisions, and the style of the *Qur'ān*, see *id.* at 57-61 and 69-85, respectively.

48. *Id.* at 148.

49. Vesey-Fitzgerald, *supra* note 3, at 87. These revelations are believed to have been made to Muhammad upon his request for divine guidance on various legal questions he confronted as a political ruler. *Id.*

50. *Id.* Legal rules have also been derived by analogy from other portions of the *Qur'ān*. *Id.* at 88; see also *infra* notes 68-71 and accompanying text. The process by which legal rules have been derived from the *Qur'ān* has been described as follows:

[T]he derivation of legal rules from the Koran was not so much primary . . . as secondary; for these rules were not so much taken directly from the Koran *in abstracto* as from customary law and administrative practice, as these were confirmed, rejected, or amended by the jurists in the light of Koranic—or, indeed, general Islamic—teaching.

J. ANDERSON, *supra* note 4, at 11 (referring to the scholarly work of Joseph Schacht).

which Muslims believe in the divine authority of the *Qur'ān* imbues it with a particularly self-fulfilling authority.⁵¹ The very strength of that authority became, ironically, the cause of the search by Muslim jurists for further authority; the *Qur'ān* touched on virtually every area of human existence, but it neither addressed every problem or situation that might arise, nor did it specify any acceptable alternate authority, forcing jurists seeking orthodox solutions to turn to other sources of law.⁵²

2. *Sunna*

The *sunna* is comprised of the "traditions as to what Mohamad had said, had done, or had allowed to be done in his presence."⁵³ The sayings of the Prophet which contribute to the *sunna* are Muhammad's own, rather than the words of God as transmitted to him, and are known as the *hadith*.⁵⁴ The roots of the *sunna* are deeply embedded in pre-Islamic customary law. The ethical and legal tenets of the pre-Islamic *sunna*, a body of "rules which were in conformity with the traditions of the Arab world and the ancestral manners and customs,"⁵⁵ were followed by the predominantly pagan Arab society.⁵⁶ Indeed, the *sunna* has been described as "the common law of Islam"⁵⁷ in reference to its evolution from Arab customary law.⁵⁸ The evolution of the *sunna*, which melded Muhammad's sayings and behavior with pre-Islamic customs and practice,⁵⁹ has undermined its credibility

51. An eminent scholar on Islam, Majid Khadduri, addressed the relationship between Qur'anic theology and law in the following manner:

[T]he divine law, revealed to the Prophet Muhammad as a set of all-embracing commands, is both authoritarian and totalitarian in nature. For it includes dogma as well as social and political principles; . . . Law thus has the character of a religious obligation; at the same time it constitutes a political sanction of religion.

Khadduri, *supra* note 4, at 9.

52. *Id.* at 17. For a discussion of the religious and political effects of this search, including its role as a catalyst for the development of the various schools of Islam, see *id.* at 16-18.

53. J. ANDERSON, *supra* note 4, at 12.

54. H. LIEBESNY, *supra* note 4, at 14 (quoting 2 I. GOLDHIZER, *MUSLIM STUDIES* 11 (S. Stern trans. 1972)).

55. *Id.* (quoting 2 I. GOLDHIZER, *MUSLIM STUDIES* 13 (S. Stern trans. 1972)).

56. Khadduri, *supra* note 4, at 4.

57. Vesey-Fitzgerald, *supra* note 3, at 90.

58. Khadduri, *supra* note 4, at 3-4.

59. Ignaz Goldhizer, a respected scholar in the field of Islamic studies, points

with scholars.⁶⁰ Despite the doubts surrounding its derivation, the status of the *sunna* in the Muslim world as the second most persuasive source of religious, ethical, and legal guidance persists.⁶¹

3. *Consensus (Ijmā')*

Consensus as a method of arriving at religious and legal truth enjoys only limited popularity within the Hanbali school in Saudi Arabia. Consensus evolved as a theological and legal tool to fill the gap left by the *Qur'ān* and the *sunna*, which, even together, did not always provide answers to dilemmas that arose, but from which one could deduce solutions to those dilemmas. The use of

out that "the Muslim concept of *sunna* is a variant of an ancient Arab concept . . ." H. Liebesny, *supra* note 4, at 13 (quoting 2 I. GOLDHIZER, *MUSLIM STUDIES* 13 (S. Stern trans. 1972)).

60. *E.g.*, Vesey-Fitzgerald, *supra* note 3, at 93.

That there has been wholesale fabrication of traditions is universally admitted by Muslim and Western scholars alike. . . . It is the formalism rather than the substance of the tradition which lays it open to suspicion, and also its attempt to create a legal theory out of what can hardly have been more than administrative advice.

Id. Arguing that the great scholar Joseph Schacht has in effect proven the fabrications, Vesey-Fitzgerald observed further that

Schacht . . . has recently given very strong reasons for the view that . . . before the time of the six great collections of traditions in the ninth century, there was deliberate forgery of tradition by responsible lawyers on such a scale that no purely legal tradition of the Prophet himself can be regarded as above suspicion.

Id. at 94; *see also* J. ANDERSON, *supra* note 4, at 12 (describing jurist fabrication of Islamic legal tradition).

Some of the traditions derive from legal maxims, or slogans, J. SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* 180 (1950), dating to the early Islamic era. *Id.* at 188. Two examples of such maxims were "[T]here is no divorce and no manumission under duress," and "[T]he spoils belong to the killer." *Id.* at 180. Schacht observed that "[s]ome maxims express counterdoctrines and unsuccessful opinions, but if sufficiently well attested, they were harmonized with the prevailing doctrine." *Id.* at 188.

61. *See* H. LIEBESNY, *supra* note 4, at 13-14 (citing 2 I. GOLDHIZER, *MUSLIM STUDIES* 19-21 (S. Stern trans. 1972)). For a review of the early Muslim jurists, who posited the *sunna* as a source of Islam law equal to or higher than the *Qur'ān*, however, *see id.* at 14 (quoting AL-SHAFF'I, *RISALA* 119 (1961)). Al-Shaff'i, one of the foremost Muslim jurists, equated the duty to obey the *sunna* with the duty to obey the *Qur'ān* on the grounds that both were divine in origin, and that the *sunna* was indispensable to an interpretation of the *Qur'ān*, but continued to relegate the *sunna* to second place in the hierarchy. N. COULSON, *A HISTORY OF ISLAMIC LAW* 56-57 (1964) [hereinafter cited as N. COULSON, *HISTORY*].

consensus for this purpose is sanctioned in the *Qur'an*,⁶² although the notion that consensus is a valid truth-seeking mechanism is itself a deduction from the *Qur'an*, and the *sunna*.⁶³ Some discussion has revolved around what constitutes consensus—agreement among only the jurists (*imāms*) (*ijmā' al-'a'imma*) or agreement among the entire community (*ijmā' al-umma*)⁶⁴—with the Hanbali school approving the former.⁶⁵ The technique of consensus avoids the potential fallibility and subjectivity of the judgment of one individual.⁶⁶ Although consensus enjoys an aura of legitimacy and is an important source of Islamic law, it is always subordinate to the sources from which it derives: the *Qur'an* and the *sunna*.⁶⁷

4. Analogy (*Qiyā*)

Analogy is not recognized by the Hanbali school as a valid source of Islamic law.⁶⁸ It deserves mention, however, as a fourth source widely recognized by other Muslim schools. Although consensus implies recourse to a more subjective standard, analogy, by contrast, is a reasoning process governed by strict rules of inductive logic applied if possible to both the *Qur'an* and the *sunna* or, if not, to "the totality of the law."⁶⁹ Analogy is achieved by *ijtihād*, "the method by which the principles established by the *Qur'an*, *sunna*, and consensus are to be extended and applied to the solution of problems not expressly regulated therein. The role of juristic reasoning is thus completely subordinate to the dictates of divine revelation."⁷⁰ This resort to *ijtihād* has been hailed as a

62. "The learned are the inheritors of Prophets." QUR'AN, III:5, quoted in Khadduri, *supra* note 4, at 14.

63. One commentator observed: "It was a reasonable deduction from Quranic teaching, duly consecrated by a hadith, that God would not permit His people universally to be in error." Vesey-Fitzgerald, *supra* note 3, at 95.

64. Vesey-Fitzgerald, *supra* note 3, at 95.

65. R. NYROP, *supra* note 4, at 187.

66. STACEY INTERNATIONAL, THE KINGDOM OF SAUDI ARABIA 124 (1977). These weaknesses were also avoided through resort to analogy. *Id.*; see *infra* notes 68-71 and accompanying text.

67. K. CRAGG, COUNSELS IN CONTEMPORARY ISLAM 72 (1965).

68. R. NYROP, *supra* note 4, at 120.

69. H. LIEBESNY, *supra* note 4, at 18 (quoting I D. SANTILLANA, ISTITUZIONI DI DIRITTO MUSULMANO MALICITA 46 (1938)).

70. N. COULSON, HISTORY, *supra* note 61, at 60. For an account of the "closing of the gate of personal reasoning" in the third century A.H., see H. LIEBESNY, *supra* note 4, at 27.

“great liberating force . . . bequeath[ing] to Islam . . . [a] vibrant reawakening of will and purpose, and impatience with its status quo of slothful superstition, and, gradually, a sense of meaningful unity as a global community.”⁷¹

C. The Islamic Faith

Western practitioners representing clients doing business in Saudi Arabia are well advised to be familiar with at least the broad outlines of the Islamic faith. Although a serious exegesis of the Islamic faith is not possible within the scope of this Note, the following highlights should provide the practitioner with a useful, albeit general, reference tool.⁷²

1. *Basic Tenets*

The basic creed of Islam is expressed in the *shahāda*: “There is no god but God (Allah), and Mohammed is his Prophet.”⁷³ This statement of belief reflects the three themes which lie at the core of the Islamic faith. First, there is but one God, Allah, who is Himself One.⁷⁴ From this monotheism flows the prohibition against representing God in any visual manner, because it would be considered a regression to pre-Islamic paganism.⁷⁵ God, or Allah, is not beyond the reach of any Muslim. Islam teaches that all sincere Muslims are equal⁷⁶ and have equal access to Allah through prayer;⁷⁷ thus, Islam does not recognize any type of clergy which, by definition, may claim a closer relationship with Allah.⁷⁸ Second, because there is only one divine being, Muhammad was not himself imbued with any divine attributes. Last, be-

71. CHANGE IN THE MUSLIM WORLD 27 (P. Stoddard, D. Cuthell, M. Sullivan, eds. 1981).

72. Excellent books include J. ANDERSON, *supra* note 3; A. FYZEE, OUTLINES OF MUHAMMADAN LAW (1974); LAW IN THE MIDDLE EAST (M. Khadduri & H. Liebesny eds. 1955); H. LIEBESNY, *supra* note 4; and J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (1964).

73. R. NYROP, *supra* note 4, at 114.

74. Vesey-Fitzgerald, *supra* note 3, at 89. This monotheism is central to Islam, and was one of its distinguishing features from its beginning, when polytheism was prevalent among the early commercial centers such as Mecca. R. NYROP, *supra* note 4, at 114.

75. *Id.*

76. *Id.* at 123.

77. *Id.* at 122.

78. *Id.* at 116.

cause Muhammad received God's revelations through the Angel Gabriel,⁷⁹ it is the messages themselves that are sacred.⁸⁰ The divine nature of the *Qur'ān*, in which these revelations appear, thus becomes apparent.

The *Qur'ān* maintains a tension between a strong belief in the omnipotence of God's will, to which all men must submit,⁸¹ and the notion of responsibility for one's actions,⁸² including ethical choices. Indeed, the word "Islam" translates as submission⁸³ to God, who created all things.⁸⁴ Submission is mandated not only by God's omnipotence but also, perhaps more compellingly, by his goodness.⁸⁵ This mandate has been summarized thus: "The sole duty of human life is to serve and obey God with a resignation that accepts what comes as God's will."⁸⁶ At the same time, however, the premise of individual responsibility serves as the theoretical underpinning of Allah's justice, for otherwise man could not justifiably be punished for his evil deeds or rewarded for his good deeds.⁸⁷ This premise is consistent with a belief in the Last Judgment, which is "the second great doctrine of the *Qur'ān*."⁸⁸

Each Muslim must perform five essential duties, the "Five Pillars of Religion."⁸⁹ The first is the *shahāda*,⁹⁰ the profession of

79. Vesey-Fitzgerald, *supra* note 3, at 87.

80. R. NYROP, *supra* note 4, at 115.

81. BELL'S INTRODUCTION, *supra* note 9, at 150.

82. *Id.* at 151-52.

83. R. NYROP, *supra* note 4, at 114.

84. BELL'S INTRODUCTION, *supra* note 9, at 148.

85. "[Assertions that] God is good and . . . all-powerful . . . are supported by calling attention to the 'signs' in nature. . . . All sorts of natural phenomena have been ordered in such a way that they contribute to the maintenance of human life and to the comfort and convenience of individuals." *Id.* This reliance on nature's "signs" requires, to some extent, that faith be tested by scientific knowledge "in a common paradox of the secular and the holy." K. CRAGG, *supra* note 67, at 3.

86. R. NYROP, *supra* note 4, at 122.

87. BELL'S INTRODUCTION, *supra* note 9, at 151.

88. *Id.* at 158.

In essentials this is the doctrine that on the Last Day men will be raised to life and will appear before God to be judged and to be assigned to Paradise or Hell according as their deeds are mainly good or mainly bad. . . . The *Qur'ān*, however, does not assert a natural immortality of the human soul, since man's existence is dependent on the will of God. . . .

Id. at 158-59.

89. *Id.* at 162. There is some authority for the proposition that there are

faith.⁹¹ The second is prayer, or *salāt*. The faithful pray five times each day in a ritual which involves prior purification,⁹² facing toward Mecca, and touching one's head to the ground, as well as reciting the prescribed phrases.⁹³ The third duty is the giving of the *zakāt*, or alms.⁹⁴ The fourth is the fast, or *sawm*, during the holy month of *Ramadān* when eating, drinking, smoking, and sexual activity are not permitted between sunrise and sunset.⁹⁵ The last duty is the pilgrimage to the holy city of Mecca, or *hajj*, which each Muslim (non-Muslims are not permitted in the *harām* at Mecca)⁹⁶ must make at least once in his life⁹⁷ during the twelfth and final month of the Muslim year.⁹⁸ Although fulfillment of these duties is required, circumstances may excuse one's failure to perform them, as when one's life is in peril⁹⁹ or when limited means simply will not permit the pilgrimage.¹⁰⁰ A noted scholar has observed: "This relaxation of the law is permitted under the general principle of 'moderation' by virtue of which the believer may strike a balance between his obligations under the law and the circumstances permitting their fulfillment."¹⁰¹

According to Islamic thought, all human acts fall into one of five categories, each of which engenders distinct consequences depending upon its "value in the sight of God."¹⁰² Acts are either "(1) *fard* or *wajib*—expressly commanded either in the Qur'ān or in the Traditions, or by *ijma*. (2) *sunna* . . . —recommended or desirable. (3) *ja'iz* or *mubah*—permitted or indifferent. (4) *makruh*—reprobated. (5) *haram*—absolutely forbidden and

actually six pillars, the additional one being the *jihād*, or "the permanent struggle for the triumph of the word of God on earth." R. NYROP, *supra* note 4, at 116. This duty has been used to rationalize Islamic holy wars. *Id.*

90. BELL'S INTRODUCTION, *supra* note 9, at 162.

91. See *supra* text accompanying note 73.

92. R. NYROP, *supra* note 4, at 115.

93. BELL'S INTRODUCTION, *supra* note 9, at 162-63.

94. *Id.* at 163. In the early days of Islam, the *zakāt* was a tax collected by the Saudi government. R. NYROP, *supra* note 4, at 115.

95. BELL'S INTRODUCTION, *supra* note 9, at 163; see also *infra* note 533 and accompanying text (regarding the observance of *Ramadān*).

96. R. NYROP, *supra* note 4, at 126.

97. STACEY INTERNATIONAL, *supra* note 66, at 99.

98. *Id.* at 101. This tradition predates Muhammad. *Id.* at 99.

99. Khadduri, *supra* note 4, at 10.

100. STACEY INTERNATIONAL, *supra* note 66, at 99.

101. Khadduri, *supra* note 4, at 10.

102. Vesey-Fitzgerald, *supra* note 3, at 98.

abominable."¹⁰³ Behavior falls within the third category as permitted or indifferent¹⁰⁴ unless valid authority requires its placement in a different category.¹⁰⁵ The first and fifth categories, commanded and forbidden, generally encompass "the spheres of morality, good manners, and pious zeal."¹⁰⁶ Thus, ethical conduct¹⁰⁷ achieves the level of an absolute duty and prohibited conduct¹⁰⁸ constitutes unpardonable sin.

It would be impossible within the scope of this Note to thoroughly explain Qur'anic and other Islamic principles in each area. The practitioner is referred to the literature for additional information about these principles and about Islam in general.¹⁰⁹

2. Religion and Law

There is little, if any, distinction between faith and law in Islam;¹¹⁰ this is particularly true in Saudi Arabia, a country which regards the *Qur'ān* as its national constitution.¹¹¹ Islamic law as forged by the Islamic faith, however, is not always identical to modern legal practice, which has evolved in response to the practical requirements of developing societies.

Law is the command of God;¹¹² it thereby achieves both divine status and, theoretically, immutability.¹¹³ Although law comprises

103. *Id.*

104. Permissibility may be either defined in the *Qur'ān* or inferred from other legal sources. *Id.* at 99. Further, permitted acts may fall within a spectrum of desirability. For example, "[T]he Prophet . . . is reputed to have said that divorce is 'in the sight of God the most detestable of all permitted things'. . . ." *Id.*

105. *Id.*

106. *Id.*

107. Ethical conduct includes such universally acknowledged virtues as "generosity, fairness, honesty, and respect." R. NYROP, *supra* note 4, at 116.

108. Prohibited conduct includes "adultery, gambling, usury, and the consumption of carrion, blood, pork, and alcohol." Vesey-Fitzgerald, *supra* note 3, at 99.

109. *See supra* note 72 and accompanying text.

110. *See* H. LIEBESNY, *supra* note 4, at 3-4 (quoting Anderson, *Law as a Social Force in Islamic Culture and History*, 20 BULL. SCH. ORIENTAL AND AFRICAN STUD. 13-14 (1957)).

111. A. AL-MARAYATI, *MIDDLE EASTERN CONSTITUTIONS AND ELECTORAL LAWS* 293 (1968).

112. N. COULSON, *HISTORY*, *supra* note 61, at 75.

113. J. ANDERSON, *supra* note 4, at 3.

only one part of the "Islamic system,"¹¹⁴ obedience to the law as God's command is so thoroughly perceived as a theological mandate¹¹⁵ that the average Muslim does not consider it separate from his general religious duties.¹¹⁶ Although this bonding of religion and law is represented as absolute, in reality it has been weakened to the extent that a practical distinction is currently drawn between "standards that [are] legally enforceable through the courts and standards that [are] morally desirable through their observance."¹¹⁷

The evolution of this distinction has been aided by resort to "legal devices," or *hiyal*. These legal fictions provide a means of absolving the actor for deviance from the teachings of the *sharī'a*. Many legal devices were created to enable Muslims to participate effectively in the modern commercial world despite Islamic prohibitions against commercial practices which are common elsewhere.¹¹⁸ The purpose of legal devices, according to a renowned Islamic scholar, "was not to facilitate the application of the law but to circumvent its substantive provisions."¹¹⁹ The influence of legal devices in Saudi Arabia may be questioned, because the Hanbali school technically rejects their use.¹²⁰ Nonetheless, the pervasiveness of the *hiyal* and other devices in the Islamic legal system is a testament both to the rigidity of the system¹²¹ and to the ingenuity of its adherents in devising ways to make it work and thus, ironically, contributing to its immutability.¹²² Joseph

114. Vesey-Fitzgerald, *supra* note 3, at 85.

115. In the traditional Islamic setting, a guilty plea in a criminal case could be changed on the theory that God knew whether the defendant was guilty and, if he was, would punish him accordingly. *Id.* at 100. The secular legal system, therefore, operated on the theory that violations of the law would be appropriately punished even where the system failed to execute that responsibility.

116. For a general outline of the main difference between Islamic and Western law, see J. ANDERSON, *supra* note 4, at 2-16.

117. *Id.* at 82; see *supra* notes 102-08 and accompanying text (regarding the five categories of human behavior ranging from commanded to forbidden); see also *id.* at 82-85.

118. See *infra* notes 37-40 and accompanying text for examples of ways in which a transaction could be structured to avoid violating the Islamic prohibition on interest while permitting a lender to earn money on a credit transaction.

119. N. COULSON, *HISTORY*, *supra* note 61, at 140.

120. THE FUNCTION OF DOCUMENTS IN ISLAMIC LAW 13 (J. Wakin ed. 1972) [hereinafter cited as FUNCTION OF DOCUMENTS].

121. Vesey-Fitzgerald, *supra* note 3, at 107-08.

122. See *id.* at 99.

Schacht, one of the foremost scholars in the field, has observed: "[A] balance gradually established itself . . . between [Islamic] legal theory and legal practice; an uneasy truce between the specialists in religious law and the political authorities came into being The laws that rule the lives of the Islamic peoples have never been coextensive with pure Islamic law."¹²³

In spite of this dichotomy, law and faith remain sufficiently interrelated that theologians and lawyers traditionally have been one and the same,¹²⁴ with the former "prescrib[ing] all that [the Muslim] must believe; [the latter], all that he must do or leave undone."¹²⁵ Indeed, Islam may be characterized as both a religion and a political system.¹²⁶ The purpose of the State is to enforce and administer the law, specifically the divine law of God.¹²⁷ The duty to obey the law, however, does not presuppose either the existence or effectiveness of a State or of a leader (*imām*); if no enforcement mechanism is available, the duty of the Muslim is not thereby altered.¹²⁸ Nonetheless, a compelling duty exists to recognize an *imām* who, as the leader of the Muslim community, is responsible for enforcing the law.¹²⁹ The *Qur'ān* obliges "[c]ompassion for the weaker members of society, fairness and good faith in commercial dealing, [and] incorruptibility in the administration of justice"¹³⁰ not only for community leaders but for all Muslims. Islam does not confer upon rulers the power to legislate, which is confined to God alone.¹³¹ Thus, in Saudi Arabia

123. Schacht, *supra* note 5, at 80-81.

124. Vesey-Fitzgerald, *supra* note 3, at 86.

125. J. ANDERSON, *supra* note 4, at 19.

126. Vesey-Fitzgerald, *supra* note 3, at 85.

127. Khadduri, *supra* note 4, at 7. This mandate is translated into practice in Saudi Arabia. For example, article 6 of the Fundamental Law of the Hijaz states, "Legislation in the Kingdom of the Hijaz shall always conform to the Book of God, the Sunna of his Prophet and the conduct of the Prophet's Companions and pious Followers." Fundamental Law of the Hijaz (Saudi Arabia), art. 6 (1926), *cited in* J. ANDERSON, *supra* note 4, at 83.

128. Vesey-Fitzgerald, *supra* note 3, at 85.

129. Khadduri, *supra* note 4, at 7. The *imām* is deemed, according to Islam's constitutional theorists, to have entered into a contract with the Islamic community to administer God's law. Vesey-Fitzgerald, *supra* note 3, at 106. "[A] constitutional theory capable of acting as a check on despotism," however, was not developed. *Id.*

130. N. COULSON, *HISTORY*, *supra* note 61, at 11 (quoting *Qur'ān*).

131. Baroody, *The Practice of Law in Saudi Arabia*, in KING FAISAL AND THE MODERNIZATION OF SAUDI ARABIA 113 (W. Beling ed. 1980).

laws which do not derive from the *sharī'a* are passed by the King in the form of administrative regulations, or decrees.¹³²

In the Islamic world, the confluence of religion and law is continuously translated into practice by the courts.¹³³ The *sharī'a* courts in Saudi Arabia use various works by Hanbali jurists as well as the *sharī'a* itself as reference tools.¹³⁴

III. LEGAL SYSTEM AND PRACTICE

A. Judiciary

Under Islamic law the *sharī'a* is the only permissible source of legislation. It follows that a ruler may not legislate; he may, however, issue regulations of royal decrees (*nizām*, or *marsum*, respectively)¹³⁵ which are consistent with, and supplement, the *sharī'a*.¹³⁶ In Saudi Arabia, regulations are formulated by a committee within the Council of Ministers (the Council); if the Council approves the regulations, it recommends them to the King. Once the King has issued a royal decree and the decree is published in the Official Gazette, the regulations become law.¹³⁷ Thus, the judicial, legislative, and executive powers all reside with the Council of Ministers.¹³⁸ This power to regulate was first used ex-

132. H. LIEBESNY, *supra* note 4, at 107; *see also infra* text accompanying notes 144-50.

133. *See, e.g.*, H. LIEBESNY, *supra* note 4, at 124-25 for an excerpt from the opinion in *Khurschid Jan v. Fazal Dad*, 1965-1 Pak. Law Reports (W. Pakistan) 312, 360, 377, 399 which demonstrates the extent to which the courts in their opinions rely on the *Qur'ān* and the *sunna* even in areas strongly influenced by British common law.

134. H. LIEBESNY, *supra* note 4, at 107. The *sharī'a* prevails in the event of a conflict between its own provisions and that of a Saudi government regulation. Baroody, *supra* note 131, at 113.

135. STACEY INTERNATIONAL, *supra* note 66, at 124.

136. Shamma, *Law and Lawyers in Saudi Arabia*, 14 INT'L & COMP. L.Q. 1035 (1965). As early as 1965 it was observed:

The fiction is that these Regulations serve only to apply and to supplement and enforce the *Sharī'a*, and are well within the competence of the political authority. This permissive legislation, which started in subsidiary spheres, has already acquired wider application. This has led to an unprecedented relationship between religious and temporal law.

Id.

137. Nazer, *Doing Business in Saudi Arabia*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST—SAUDI ARABIA, EGYPT AND IRAN 117 (W. Wickersham & B. Fishburne eds. 1977).

138. *Id.*

tensively in Saudi Arabia by King Faisal who in 1962, even prior to assuming the throne, announced a comprehensive reform program. His program not only set forth a scheme for the promulgation of regulations and the creation of "autonomous agencies,"¹³⁹ but also laid the groundwork for subsequent assurances of the political autonomy of the judiciary.¹⁴⁰ Thus, the Saudi legal system, which must administer both *shari'a* and regulatory law, has spawned a dual system of courts: the *shari'a* courts and the administrative courts, both of which fall under the auspices of the Council of Ministers and the King.

1. *Shari'a* Courts

Three levels of *shari'a* courts handle all causes of action that arise from *shari'a* law, or the common law, rather than from administrative decrees. In ascending order, they are the ordinary courts, the high courts of *shari'a* law, and the appeals courts. First, the ordinary courts (*mahakamat al umur al mustajalah*; also called summary courts)¹⁴¹ which are found in virtually every town,¹⁴² handle minor domestic, personal, civil, and criminal cases,¹⁴³ each of which is decided by an Islamic judge, or *qadi*.¹⁴⁴ Jurisdiction of these courts generally is limited to misdemeanors and small claims.¹⁴⁵ The less numerous high courts (*mahakamat*

139. Baroody, *supra* note 131, at 120. "A large number of important regulations will be issued gradually whereby the State will, before long, have a complete body of laws that will make for progress and greater activity and attract capital." *Id.* (quoting Point VIII: Regulations and Autonomous Agencies of the Reform Program).

140. *Id.* at 123 (quoting Royal Decree No. M/64 (July 23, 1975) (Saudi Arabia) which provides: "Article I: Judges are independent and, in their administration of justice, are subject to no authority other than the provisions of Islamic law and Regulations in force. No one may interfere with the judiciary.") Indeed, the judiciary does enjoy a widespread reputation of impartiality. Telephone interview with Washington, D.C. attorney (Mar. 11, 1982) [hereinafter cited as Mar. 11, 1982 telephone interview]; see also R. NYROP, *supra* note 4, at 189 (judges have a reputation for being just and incorruptible and *shari'a* procedures are considered fair).

141. STACEY INTERNATIONAL, *supra* note 66, at 124.

142. Shamma, *supra* note 136, at 1035.

143. Jensen, *Shari'a: The Foundation of Islamic Law*, Bus. AM. June 30, 1980, at 13.

144. R. NYROP, *supra* note 4, at 189.

145. Buckner, *Political Restraints on Trade With the Arabs*, 3 N.C.J. INT'L L. & COM. REG. 71, 77 (1978). Some branches of the ordinary courts, with similar

al sharia al kubra) have competence over matters not entrusted to the ordinary courts.¹⁴⁶ The appeals courts, one in Riyadh and one in Mecca, hear appeals from both the ordinary and the high courts.¹⁴⁷ These appellate courts are the highest regular appellate courts in Saudi Arabia, but they are not vested with "jurisdiction over the other administrative tribunals or disputes between a lower Shari'a court and another tribunal."¹⁴⁸ At the top of this hierarchy is the twenty-member Supreme Judicial Council which plays a supervisory role as it issues legal and religious opinions (*fatwā*) requested by the King or the Minister of Justice,¹⁴⁹ "and thus . . . adapt[s] the law as traditionally accepted to the changing needs of contemporary life."¹⁵⁰ The Supreme Judicial Council also hears appeals in cases involving more severe sanctions.¹⁵¹ All judicial decisions imposing sentences of execution or mutilation, however, must be approved by the King.¹⁵² The Ministry of Justice, established by King Faisal in 1970, directs this entire system¹⁵³ and in recent years has been largely responsible for the increased standardization of procedures in the Saudi court system.¹⁵⁴ The King and his Council of Ministers oversee the entire judicial structure, including the administrative tribunals, which have jurisdiction over cases arising from outside the purview of the *shari'a* law.¹⁵⁵

2. Administrative Courts

The administrative tribunals attached to the various ministries hear causes of action deriving from laws established by royal de-

competence, have exclusive jurisdiction over cases involving bedouins. R. NYROP, *supra* note 4, at 189.

146. R. NYROP, *supra* note 4, at 190.

147. *Id.*

148. Jensen, *supra* note 143, at 13.

149. Baroody, *supra* note 131, at 123.

150. STACEY INTERNATIONAL, *supra* note 66, at 124.

151. R. NYROP, *supra* note 4, at 189.

152. STACEY INTERNATIONAL, *supra* note 66, at 124. Until recently, the King held public court on a regular basis, personally hearing and deciding cases brought by even the humblest citizens. *Id.*

153. R. NYROP, *supra* note 4, at 188.

154. *Id.* at 189. Prior to the creation of the Ministry of Justice, the judiciary in Saudi Arabia was controlled by the grand *mufti* and, under him, a group of senior *muftis*. During his tenure the grand *mufti* adhered to a conservative interpretation of Islamic law. *Id.* at 188.

155. *See id.* at 189-90.

cree.¹⁵⁶ Separate arbitration boards for commercial and labor disputes are subordinate to the appeals boards connected with the Ministry of Commerce and the Ministry of Labor and Social Affairs, respectively.¹⁵⁷ These, in turn, are subject to oversight by the Commercial Disputes Settlements Committee, and to the Supreme Committee for Settlement of Labor Disputes,¹⁵⁸ all of which fall under the umbrella of the Grievance Board (*Diwan al-Mazalim*).¹⁵⁹ This Board, created in 1955,¹⁶⁰ hears cases involving actions of government ministries, but has virtually unlimited administrative jurisdiction.¹⁶¹ The nature of the Grievance Board's jurisdiction is a reflection of the fact that, unlike Western jurisprudence, Islamic law does not recognize immunity of the State from suits by its citizens.¹⁶² The sphere of the Grievance Board's authority has been summarized as follows:

[It] reviews complaints of injustice brought because of wrongful acts committed by Islamic judges and government officials; complaints are also brought by those who have no recourse in the sharia courts. The grievance board has assumed the role of final arbiter of justice, at least in cases of decree law, although decisions of an Islamic judge are known to be brought in the form of complaints to this body.¹⁶³

Again, the entire administrative court system falls under the supervision of the Council of Ministers, who both issue regulations (approved by the King)¹⁶⁴ and are the authoritative interpreters of those regulations and decrees.¹⁶⁵

B. Procedures

One or more judges, or *qādīs*, preside over the *sharī'a* courts. The *qādī* traditionally was appointed by the *caliph*, an arrange-

156. Buckner, *supra* note 145, at 78.

157. R. NYROP, *supra* note 4, at 189-90.

158. *Id.* at 189.

159. See H. LIEBESNY, *supra* note 4, at 108.

160. R. NYROP, *supra* note 4, at 190.

161. Jensen, *supra* note 143, at 13.

162. Shamma, *supra* note 136, at 1034-35. Government officials, including the King himself, are equally bound by *sharī'a* law and equally answerable for violations of that law. *Id.*

163. R. NYROP, *supra* note 4, at 190.

164. H. LIEBESNY, *supra* note 4, at 107.

165. Shamma, *supra* note 136, at 1035.

ment which highlighted one of the distinguishing features of the traditional Islamic legal system: the open identification of executive and judicial power in one individual or institution.¹⁶⁶ As noted above, this close identification has been rejected recently in Saudi Arabia in favor of a politically independent judiciary,¹⁶⁷ but the Supreme Judicial Council continues to recommend appointment of *qādīs* to the King.¹⁶⁸

In reaching their decisions, the *qādīs* may consult any of a number of sources of *sharī'a* law¹⁶⁹ and with scholars of Islamic law.¹⁷⁰ Case law in Saudi Arabia is virtually nonexistent because cases are not recorded and, therefore, *qādīs* are not bound by even their own precedent.¹⁷¹ *Qadis* attempt where possible to arbitrate rather than simply decide in favor of one party; the emphasis is upon all parties ultimately agreeing upon the propriety of the outcome.¹⁷²

By Western standards, judges play an active role in trials. For example, judges direct questions to witnesses and to the parties to

166. For an interesting outline of guidelines followed by early Muslim judges, see H. LIEBESNY, *supra* note 4, at 240-41 (quoting I I. KHALDŪN, *THE MAQAD-DIMAH, AN INTRODUCTION TO HISTORY* 452-54 (F. Rosenthal trans. 2d ed. 1967)).

167. See *supra* note 140 and accompanying text.

168. R. NYROP, *supra* note 4, at 189.

169. H. LIEBESNY, *supra* note 4, at 107. Six Hanbali works were officially approved in the years following World War I, among them the popular *al-Mughni* by Ibn Qudama. Additional sources have since been approved. *Id.* In making their decisions, *qādīs* of course rely on the direct sources of the *sharī'a* as well. George Baroody, formerly an attorney with ARAMCO in Saudi Arabia, tells the story of a decision facing doctors in the ARAMCO hospital in Dhahran as to whether to perform surgery, in direct contravention of the Muslim tenet against violating a dead body, on the lifeless fetus inside the body of a woman who might die without that surgery. Baroody consulted with the Chief Qadhi of the Shariah Court of Dhahran, who recounted one of the traditions of the *sunna* in which a man stole the clothes from a dead body so that he himself might survive in the cold by keeping warm. The conclusion, of course, was that "if the surgery . . . on the unborn child is necessary to save the life of the mother, and if the unborn child is already dead, [the American doctors] need have no fear of violating the Shariah." Baroody, *supra* note 131, at 114-15.

170. Shamma, *supra* note 136, at 1035.

171. *Id.* The author of that article, writing in 1965, observed that "[t]here may exist, therefore, some divergencies in the administration of justice between the several *hadis* of the country." *Id.* Presumably, as the Ministry of Justice continues its attempts to standardize procedures, that result will be mitigated.

172. Jensen, *supra* note 143, at 12. *Contra* Baroody, *supra* note 131, at 116.

the proceeding,¹⁷³ although with the *qāḍī's* approval the parties may cross-examine each other and each other's witnesses.¹⁷⁴ Furthermore, because there are no juries, *qāḍīs* determine guilt and prescribe punishments, except in cases involving acts for which punishments are specified in the *sharī'a*.¹⁷⁵

Many of the procedural aspects of litigation in Saudi Arabia are governed by the 1952 Regulations for the "Organization of Administrative Functions in the *Shari'ah* Court System."¹⁷⁶ These regulations provide, among other things, that the *qadi* must both set a hearing date when the complaint is filed, and notify the defendant of that hearing.¹⁷⁷ Unless he has been requested to hold an immediate hearing, which he will do if at all possible,¹⁷⁸ the *qāḍī* studies the case files on the day prior to the hearing. All hearings are open to the public "except in circumstances in which the court considers it in the interests of morals for [the hearing] to be in secret."¹⁷⁹ In traditional Muslim proceedings the *qadi* pronounces his decision in open court after studying both the relevant information on the case and the permissible sources of *sharī'a* law.¹⁸⁰ He signs and places his seal on his decision, which begins with the words, "In the name of God, the Compassionate, the Merciful."¹⁸¹

A defendant generally is not required to hire counsel; indeed, a criminal defendant is not permitted to transfer the responsibility for his defense to an attorney.¹⁸² Nor does a defendant have a

173. Jensen, *supra* note 143, at 12.

174. Baroody, *supra* note 131, at 119.

175. *Id.* at 116-17. These crimes, denominated *hadd*, are "(1) crimes against life and limb, consisting of (a) homicide, and (b) physical injury; (2) crimes against the family and morality, consisting of (a) fornication, and (b) qadhf (false accusation of fornication); (3) crimes against property, consisting of (a) theft, and (b) highway robbery." Maydani, *Uqūbāt: Penal Law*, in 1 *LAW IN THE MIDDLE EAST* 227 (M. Khadduri & H. Liebesny eds. 1955).

176. STACEY INTERNATIONAL, *supra* note 66, at 125.

177. *Id.*

178. *Id.*

179. *Id.* (quoting the 1952 Regulations for the "Organization of Administrative Functions in the Shariah Court System").

180. Maydani, *supra* note 175, at 233.

181. *Id.* Interestingly, the *qāḍī* commanded such respect that his sentences could be implemented without use of force on the defendant. *Id.*

182. Jensen, *supra* note 143, at 12. *Contra* STACEY INTERNATIONAL, *supra* note 66, at 125.

right to a jury trial.¹⁸³ A defendant is presumed innocent until proven guilty.¹⁸⁴ It may be difficult, however, because of the number of witnesses he must produce, for a plaintiff to meet his burden of proof on the defendant's guilt. For example, to prove most charges, a plaintiff must produce two witnesses to the act; four witnesses are required in more serious cases.¹⁸⁵ When the plaintiff needs only two witnesses, he must produce either two males or one male and two females.¹⁸⁶ If the plaintiff can produce only one male witness, the plaintiff may be permitted to take an oath and substitute himself for his second witness.¹⁸⁷ Alternatively, he may ask the defendant to take an oath; the defendant's failure to do so is considered to be proof of his guilt.¹⁸⁸ The Muslim sense of honor is so ingrained that it is considered almost inconceivable that anyone would perjure himself by taking a false oath.¹⁸⁹ The taking of the oath is, therefore, a pivotal point in any hearing.¹⁹⁰ As prescribed by the *shari'a*, Jews and Christians take different oaths than do Muslims. The Christian oath is: "In the name of God, who gave Jesus, son of Mary, the Holy Bible and made him cure the sick, the leper, and the deaf, I swear."¹⁹¹ In any event, the judge must be satisfied, by testimony of character witnesses if necessary, that any direct witnesses are honorable persons of sound character.¹⁹²

This emphasis upon the testimony of witnesses and oaths for evidence in hearings is a direct reflection of the traditional Islamic mistrust of documents as evidentiary tools.¹⁹³ It is believed that documents are subject to tampering and to misconstruction.¹⁹⁴

183. Baroody, *supra* note 131, at 116.

184. *Id.* at 115.

185. Jensen, *supra* note 143, at 12.

186. *Id.*

187. *Id.*

188. Baroody, *supra* note 131, at 117.

189. *Id.* Perjury is discouraged by, among other things, punishment by imprisonment or lashing, or both. *Id.* at 118-19.

190. For an interesting illustration of the weight given to the taking of the oath, see *id.* at 118.

191. *Id.*

192. Jensen, *supra* note 143, at 12.

193. See H. LIEBESNY, *supra* note 4, at 244-54.

194. H. LIEBESNY, *supra* note 4, at 247-48 (quoting E. TYNAN, *HISTOIRE DE L'ORGANISATION JUDICIAIRE EN PAYS D'ISLAM* 236-39 (2d ed. 1960)).

Documentary evidence had always been regarded with disfavor in legal writings. It had never been regarded in principle as a means of establishing proof by itself. The jurists treated it only as subsidiary evidence Although documents were widely used in legal transactions . . . , proof of the content of private and public documents was not established by the content as such, but by the witnesses who appeared in the document One can say . . . that written proof developed only under the cover of proof established through witnesses¹⁹⁵

Whether a case will be heard quickly is difficult to gauge. An attempt generally is made to schedule hearings promptly; however, the Saudi nonchalance concerning time constraints¹⁹⁶ may counterbalance this effort. Because there are no statutes of limitation or court fees, the court system is highly accessible¹⁹⁷ but as a general rule contract cases will be heard only in the "court closest to the defendant's home, regardless of where [the] contract is executed."¹⁹⁸

The *shari'a* courts may hear both public and private causes of action in the same trial, but may impose penalties only for the latter; determination of sanctions for the former is reserved to the appropriate government officials.¹⁹⁹ The illustration typically given in the literature is that of a motor vehicle accident for which a private party and the government both bring a cause of action. The *qādi* will determine fault and decide on the penalty that the defendant must pay for the private injury, and may recommend lenience before the appropriate government officials decide on the penalty that the government will exact for the public injury.²⁰⁰

There are relatively few attorneys in Saudi Arabia and many of those who do practice in the Kingdom are foreign-trained. This dearth of trained legal professionals apparently resulted in part from the ease of access to the courts. Parties traditionally have been permitted to be represented by "agents experienced in legal court proceedings [T]he procedures of the Shariah Court are intentionally made as simple as possible to enable even the

195. *Id.*

196. *See infra* notes 529-32 and accompanying text.

197. Shamma, *supra* note 136, at 1035.

198. Jensen, *supra* note 143, at 12-13.

199. *Id.*

200. *See, e.g., id.* at 13.

most ignorant bedouin to come out of the desert, lay his complaint before it, and be given a fair hearing."²⁰¹ It is evident that the Saudis are attempting to structure a more organized judicial system than the country has had in the past, while maintaining equal and open access to that system.

IV. ISLAMIC LEGAL THEORY

The Western practitioner with dealings in Saudi Arabia normally will be concerned primarily with Saudi corporate law. Nonetheless, if his contacts with that country are to be anything more than superficial, he should be familiar with the general principles of Islamic law in areas such as contracts, property, and torts. Not only are these principles fundamental in themselves, but they may help to provide a better understanding of the reasons a business transaction is conducted in a particular manner. The following is intended to serve as an introduction for the Western attorney approaching Saudi and Islamic law for the first time. The reader is referred to the sources cited for further research.

A. Contract Law

Islamic law has not forged a systematic theory of contract law.²⁰² Elemental principles of contract law have developed in certain areas, however, particularly in relationship to sales transactions.²⁰³ Two themes run throughout the entire body of Islamic contract law: first, that freedom to contract is highly desirable and second, that the terms of the contract itself are to be respected whenever possible.²⁰⁴

The law presumes a motive for each contract²⁰⁵ and the motive

201. Baroody, *supra* note 131, at 116.

202. H. LIEBESNY, *supra* note 4, at 210.

203. *Id.* Where possible, an effort has been made in this section to concentrate on Hanbali contract theory. Much contract law is of general derivation, however, and may be stated as general Islamic contract theory with the understanding that there may be variations among the four schools.

204. J. ANDERSON, *supra* note 4, at xii. This respect for the contract is reflected in the fact, for example, that Arab attorneys favor the expression, "The contract is the Sharia or sacred law of the contracting parties." *Id.* at xiii. For an interesting example of an arbitration clause entered into by ARAMCO and the Saudi government exemplifying this posture, see *id.* at xii-xiii.

205. H. LIEBESNY, *supra* note 4, at 212 (quoting 2 SANTILLANA, ISTITUZIONI DI DIRITTO MUSULMANO MALICHTA RIGUARDO ANCHE AL SISTEMA SCIAFITTA 22-23

is presumed to be valid.²⁰⁶ Mutual assent, which consists of an offer and acceptance, is necessary for the formation of a contract.²⁰⁷ This assent may be oral, gesticular, or written.²⁰⁸ Subjective intent is not sufficient for the formation of the contract;²⁰⁹ rather, the words used in a verbal offer must indicate a clear and immediate intention to make the offer.²¹⁰ The "connection" (*irtibat*) of offer (*ijāb*) and acceptance (*qabul*) creates an irrebuttable presumption of assent and constitutes the point at which the contract is formed.²¹¹ This connection ordinarily occurs at the "meeting place" (*majlis al 'aqd*).²¹² Unless revoked, the offer remains open as long as the meeting lasts; conversely, either party may revoke his offer or acceptance as long as the meeting lasts,²¹³ even if a contract has been agreed upon earlier during the meeting.²¹⁴ Traditionally, the parties to a contract should not part company without exchanging courtesies.²¹⁵ The offeree need not decide immediately whether to accept the offer²¹⁶ but when conveyed the acceptance must correspond to the offer.²¹⁷ Whether the offer and the acceptance must be communicated to the other party appears to be an open question,²¹⁸ although silence generally is not considered to constitute acceptance.²¹⁹

Consideration for the contract is required and must be both le-

(1938)).

206. *Id.*

207. Hāmid, *Mutual Assent in the Formation of Contracts in Islamic Law*, 7 J. ISLAMIC & COMP. L. (Nigeria) 41, 41 (1977) [hereinafter cited as Hāmid, *Mutual Assent*].

208. Mahmasani, *Transactions in the Shari'a*, in 1 LAW IN THE MIDDLE EAST 192 (M. Khadduri & H. Liebesny eds. 1955).

209. Hāmid, *Mutual Assent*, *supra* note 207, at 41.

210. *Id.* at 44.

211. *Id.* at 44-45.

212. *Id.* at 45. For principles governing offer and acceptance when no meeting takes place, including the general rule that the offeree must accept at the place at which he received the offer, and that the acceptance need be only declared, not communicated, for the contract to form, see *id.* at 51-53.

213. *Id.* at 45.

214. *Id.* at 49-50. This "option of the meeting" derives from one of the traditions of the Prophet: "Each of the parties to a contract of sale has the option against the other party as long as they have not separated." *Id.* at 50.

215. Vesey-Fitzgerald, *supra* note 3, at 99.

216. Hāmid, *Mutual Assent*, *supra* note 207, at 47 (citations omitted).

217. Mahmasani, *supra* note 208, at 192.

218. Hāmid, *Mutual Assent*, *supra* note 207, at 48.

219. Mahmasani, *supra* note 208, at 192.

gal and valid.²²⁰ Similarly, the object of the contract must be specific, deliverable, in existence, and legal.²²¹ The contract may not have been entered into while under ignorance or error,²²² fraudulent misrepresentation,²²³ or duress.²²⁴ Finally, both parties to the contract must have recognized legal capacity.²²⁵ The generally accepted categories of incapacity are slavery, minority, insanity, imbecility, prodigality, debt, and life-threatening illness. Some jurists include women and intoxicated persons in this list as well.²²⁶

With the exception of marriage contracts and contracts for the purpose of creating trusts,²²⁷ Islamic law does not require contracts to be in any particular form.²²⁸ The signing of the contract

220. *Id.* at 195.

221. *Id.* at 194. Exceptions to the rule that contracts for future delivery are void are contracts involving down payments and "contracts for the fabrication of something or for the sale of fruits." *Id.*

222. The error must go to the essential nature of the contract. *Id.* at 193.

223. A sales contract is void "if the disproportion [between the mutual contract obligation] is excessive and if the victim is inexperienced." *Id.*

224. Whether duress has occurred is determined by Muslim jurists according to a subjective standard. *Id.*

225. *Id.* at 196.

226. *Id.* at 196-98.

227. *Id.* at 192.

228. *Id.* at 198. The *Qur'ān* provides:

When ye contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in (terms of) equity. . . . [L]et him who incurreth the debt dictate. . . . Be not averse to writing down (the contract) whether it be small or great, with record of the term thereof. That is more equitable in the sight of Allah and more sure for testimony, and the best way of avoiding doubt between you. . . .

QUR'ĀN II: 282, quoted in H. LIEBESNY, *supra* note 4, at 246. Interestingly, early Islamic jurists resisted this clear Qur'ānic exhortation to reduce at least some types of contracts to writing, preferring instead to treat the passage merely as a recommendation. FUNCTION OF DOCUMENTS, *supra* note 120, at 5-6. This posture was consistent with the *sharī'a's* rejection of documentary evidence and exclusive approval of oral testimony as proof in a legal trial. FUNCTION OF DOCUMENTS, *supra* note 120, at 4. Nonetheless, written documents have been used extensively in various transactions since pre-Islamic times, *id.* at 5, a practice in which the Hanbali sect apparently participated. *Id.* at 13. The failure of the Muslims to stop using written documents in the face of the Islamic teaching that such documents were devoid of value, H. LIEBESNY, *supra* note 4, at 244 (quoting E. TYAN, *LE NOTARIAT ET LE RÉGIME DE LA PREUVE PAR ÉCRIT DANS LA PRATIQUE DU DROIT MUSULMAN* 5-12 (1945)), is perhaps further testament to their ability to adapt the theoretically immutable *sharī'a* law to the practicalities of commercial life. See, e.g., FUNCTION OF DOCUMENTS, *supra* note 120, at 4; H. LIEBESNY, *supra* note 4, at 77-78; see also *supra* notes 193-95 and accompanying text.

should be witnessed by two males or, less preferably, by a male and a female.²²⁹ This emphasis on oral evidence (through witnesses) is consistent with the Islamic precept that a document in itself has no value.²³⁰

Of all the Islamic schools, the Hanbali permits the greatest freedom to insert stipulations in a contract.²³¹ Parties may add rights and obligations to a contract which are not contrary to any other rights and obligations prescribed by law.²³² The freedom to make stipulations is limited only by the requirements that the stipulation itself be both legal and consistent "with the prescribed effects of the contract,"²³³ and that the stipulated benefit be "certain."²³⁴ Stipulations invalidated because of illegality are unseverable, resulting in the voidance of the entire contract; stipulations invalidated because of inconsistency with the contract are severable from the rest of the contract, whose validity remains unimpaired.²³⁵

The *Qur'an* prohibits the charging of interest, which it equates with usury, in strong terms: "Surely they say, usury is like sale. But God has made sale lawful and usury unlawful."²³⁶ Devout Muslims have evaded the *Qur'an's* injunctions against the imposition of interest for centuries in still another attempt to follow the letter of *shari'a* law while continuing to function in a commercial society.²³⁷ A typical evasive technique involved a sale of an item by the debtor to the creditor. The creditor would immediately sell the item back to the debtor for a higher price, the amount due at a later date.²³⁸ Other permissible techniques include "manage-

229. QUR'AN II: 282, quoted in H. LIEBESNY, *supra* note 4, at 246.

230. H. LIEBESNY, *supra* note 4, at 244-45 (quoting E. TYAN, *supra* note 228 at 5-12); see also *supra* notes 193-95, 227 and accompanying text.

231. Hämüd, *The Freedom to Make Stipulations in the Islamic Law of Contract*, 6 J. ISLAMIC & COMP. L. (Nigeria) 22, 30 (1976) [hereinafter cited as Hämüd, *Stipulations*].

232. *Id.* at 31.

233. *Id.*

234. *Id.* (citations omitted).

235. *Id.* at 32.

236. QUR'AN II: 276-77, quoted in Vesey-Fitzgerald, *supra* note 3, at 88.

237. Schacht, *supra* note 4, at 78; Vesey-Fitzgerald, *supra* note 3, at 88. The fact that an interest charge was practiced so widely in pre-Islamic society explains to some extent why the authority of the *shari'a* was not able to prevent indulgence in interest-evading techniques. *Id.*; see also BELL'S INTRODUCTION, *supra* note 9, at 165.

238. Schacht, *supra* note 5, at 78. For an example of a mortgage arrangement

ment or service fees, discounting . . . lending of property to another to invest with profits to be shared in proportions previously agreed [risks, however, remaining with the lender], and sharing in business risks"²³⁹ Thus, although interest itself is prohibited, many alternative devices have been created in response to the need to encourage lending arrangements.²⁴⁰

B. Property Law

Under Islamic law, for property to be owned it must be possessed, have value, and be legally permissible.²⁴¹ Ownership was characterized by the founder of the Hanbali school²⁴² as follows:

The owner of all things is their creator, God. Man possesses only the benefit of them in the manner permitted by the law. He who possesses all benefits is therefore the absolute owner. He who enjoys partial possession has limited ownership and hence is designated by a special name, such as tenant or borrower.²⁴³

Possession creates a rebuttable presumption of ownership, thus requiring a plaintiff without possession to prove ownership.²⁴⁴ Either the property itself, its use, or both, may be the subject of ownership.²⁴⁵

Property falls into one of each of the following categories: measurable or nonmeasurable, fungible or infungible, tangible or in-

in which the lender conditionally purchases land from the debtor and leases it back to him for a higher total amount, see Vesey-Fitzgerald, *supra* note 3, at 108.

239. Jensen, *supra* note 143, at 12.

240. The implications of the proscription against interest and usury in modern Saudi Arabia prompted the following query from one observer regarding the growth of the Middle East oil industry: "Technology has its local Midas touch, more especially in the oil of the Middle East. . . . Having in mind the massive revenues accruing from it in the lands of Islamic genesis what becomes of the Qur'ān's anxiety about usury?" K. CRAGG, *supra* note 67, at 8.

241. Mahmasani, *supra* note 208, at 179. One example of impermissible property is wine. *Id.*

242. See *supra* note 24 and accompanying text.

243. Mahmasani, *supra* note 208, at 181-82 (quoting Ibn Rajab al-Hanbali).

244. *Id.* at 183.

245. *Id.* at 182. One Muslim jurist has accordingly defined ownership as "a legal interest vested in a thing itself or in its usufruct, giving its beneficiary the right to profit from it or receive compensation for it according to the attribution which he possesses." *Id.* (quoting Ibn al-Subkī in al-Suyūti, *al-Ashbāh wa'l-Naza'ir*, 191).

tangible, and movable or immovable.²⁴⁶ The major types of real property are "land held in freehold ownership [*mulk*]; . . . state land leased to individuals [*mīrī*]; . . . land reserved for public purposes [*matrūka*]; . . . land established as a pious foundation [*waqf*]; and . . . dead land [*mawāt*]."²⁴⁷ The fourth type, *waqf*, is in essence an irrevocable trust created for a charitable purpose, and formerly played a far more prominent role in Islamic property law than it currently enjoys.²⁴⁸

Property that is wrongfully appropriated must be returned or replaced.²⁴⁹ If it cannot be replaced, the value of the property at the time of its destruction must be paid to the rightful owner.²⁵⁰ Liability for destruction of property attaches if the offending act is injurious, illegal, and the cause of the injury.²⁵¹

C. Tort Law

Islamic law imposes liability without fault where direct action causes the injury; otherwise, fault must be demonstrated.²⁵² The doctrine of respondeat superior is recognized only to the extent that the employee's actions are ordered by the employer.²⁵³ A defendant is not liable for acts which were not illegal at the time of their commission, nor may he be subject to a penalty not stipulated by law.²⁵⁴ Damages for injury to property are limited to the repair or replacement cost.²⁵⁵ Under *sharī'a* law neither "moral"

246. *Id.* at 179-80.

247. Maydani, *supra* note 175, at 224. For a very brief description of each type of land, see Mahmasani, *supra* note 208, at 181.

248. For an excellent and thorough discussion of the law of *waqf* and its current application, see Cattan, *The Law of Waqf*, in 1 *LAW IN THE MIDDLE EAST* 203-22 (M. Khadduri & H. Liebesny eds. 1955). For a less exhaustive overview see H. LIEBESNY, *supra* note 4, at 226-27.

249. Mahmasani, *supra* note 208, at 189.

250. *Id.*

251. *Id.* at 190-91.

252. H. LIEBESNY, *supra* note 4, at 221-22.

253. *Id.* at 218. Courts in the United States have attempted to examine the Islamic doctrine of respondeat superior in several cases arising from events occurring in Saudi Arabia. *See, e.g.,* Walton v. Arabian Am. Oil Co., 233 F.2d 541, *cert. denied*, 352 U.S. 872 (1956).

254. Maydani, *supra* note 175, at 223-24; *see supra* notes 175, 200 (regarding the *qādi's* discretion in imposing sentences on defendants found to be guilty). For a clear enunciation of general principles of Islamic criminal law, see Maydani, *supra* note 175, at 223-35.

255. Jensen, *supra* note 143, at 12.

(compensatory) damages²⁵⁶ nor damages for "loss of 'opportunity cost'" may be awarded to successful plaintiffs.²⁵⁷ There are indications, however, that in their administrative regulations the Saudis may be willing in certain instances to recognize compensatory damages for pain and suffering.²⁵⁸

V. CORPORATE LAW IN SAUDI ARABIA

A. Introduction

Saudi corporate law is comprised entirely of government regulations and is unique within the sphere of Saudi law in that it does not derive directly from the *shari'a*. The corporate regulations may not, however, run contrary to the dictates of Islamic law;²⁵⁹ the spirit of that law governs in the corporate area as elsewhere. Saudi laws are passed by the Council of Ministers in the form of regulations.²⁶⁰ These regulations are enacted into law upon approval of and issuance of a royal decree by the King. The most comprehensive body of corporate law in Saudi Arabia is the Company Law²⁶¹ which details the eight types of Saudi companies,²⁶² the registration and licensing requirements and procedures, the rights and duties of shareholders and directors, and the requirements for liquidation. The major provisions of the Company Law are highlighted below; brief descriptions of other important commercial regulations follow.²⁶³ This Note is not intended to provide an exhaustive description of the Saudi

256. H. LIEBESNY, *supra* note 4, at 218, 222.

257. Jensen, *supra* note 143, at 12.

258. See H. LIEBESNY, *supra* note 4, at 222 (quoting Labor and Workmen Regulations, Nov. 15, 1969); see also *infra* note 486 and accompanying text.

259. Abrahams, *Company Formation and Structure in Saudi Arabia*, in *CORPORATE DEVELOPMENT IN THE MIDDLE EAST* 3 (R. Nelson ed. 1978); see, e.g., Company Law, Order No. 185, dated 17/3/1385 A.H., arts. 2, 229-230 (Saudi Arabia), reprinted in M. NAFA, *SAUDI ARABIA COMPANY AND BUSINESS LAW* (1977).

260. See *supra* notes 35-38 and accompanying text.

261. Order No. 185, dated 17/3/1385 A.H. (Saudi Arabia).

262. For a helpful chart showing the major regulations and corporate forms in Saudi Arabia, see Hoyt, *Overview of Legal Aspects*, in *CURRENT LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST—SAUDI ARABIA, EGYPT AND IRAN* 15-16 (W. Wickersham & B. Fishburne eds. 1977).

263. Where quoted, the laws appear as translated by M. Nafa in his collection of major Saudi corporate laws. M. NAFA, *supra* note 259. Another translation appears in N. KARAM, *BUSINESS LAWS OF SAUDI ARABIA* (Supp. 4 1978).

corporate regulations. Practitioners should read these regulations in their entirety, as the consequences of not fulfilling a requirement may be quite serious. Article 229(8) of the Company Law, for example, states that failure to comply with a regulation is punishable by imprisonment for three to twelve months, a fine of 5,000 to 20,000 Saudi *riyals*,²⁶⁴ or both. Above all it should be remembered that every company desiring to conduct business in Saudi Arabia, whether or not it is Saudi-owned, must be properly registered with the Ministry of Commerce.²⁶⁵

B. Company Law

1. General Provisions

Article 1 of the Company Law²⁶⁶ defines a company as a "contract by which two or more persons agree to participate in a profit-aiming scheme by contributing a share of money or activity and dividing the resulting profit or loss."²⁶⁷ To acquire a legal identity a company must either be recognized by Islamic law or take one of the following forms: (1) a general partnership; (2) a simple commandite company; (3) a share company; (4) a joint stock company; (5) a commandite share company; (6) a limited liability company; (7) a variable capital company; or (8) a cooperative company.²⁶⁸ A partner may contribute money, work, or the equivalent, but he may not contribute solely his "reputation or influence."²⁶⁹ Each partner shares both the company's profits and losses and any agreement to the contrary is void unless it exempts from loss a partner who has contributed only uncompensated work.²⁷⁰ Dividends may be distributed to the partners only from net profits.²⁷¹ Personal creditors of a partner may be paid from

264. As of January 19, 1983, the exchange rate was approximately 3.44 *riyals* per United States dollar.

265. Commercial Register Law, Royal Decree No. 21/1/4470, 9 Qida 1375 A.H. (June 18, 1956) art. 1 (Saudi Arabia). A company's articles of association are permitted in some instances to vary the black-letter law. Practitioners should also check to see whether new resolutions or decrees (rescripts) have been issued which amend these provisions.

266. Order No. 185, dated 17/3/1385 A.H.

267. *Id.* art. 1.

268. *Id.* art. 2.

269. *Id.* art. 3.

270. *Id.* art. 7.

271. *Id.* art. 6.

these dividends but not from the partner's share in the capital.²⁷² Failure by any company, except a share company, to reduce the articles (and their amendments) to writing, to have them attested by a notary public, or to publish the articles in the prescribed manner may subject company directors or managers to joint liability for any resulting losses to the company, to the shareholders, or to third parties.²⁷³ Companies become "juristic persons" upon formation or incorporation; third parties, however, need not recognize the legal existence of the company until the publication requirements have been met.²⁷⁴ Article 14 rather cryptically states that, except for share companies, each company "shall establish its head office in the Kingdom and shall be considered of Saudi nationality . . . [but] this does not imply necessarily that the Company shall enjoy the rights confined to Saudis."²⁷⁵ Finally, Article 15 lists the events which may trigger termination of a company: the running of the limitation period established for the company; the accomplishment of, or impossibility of, the company's goals; the transfer of all shares of the company to one individual; a reduction of assets to such an extent that further sound investment is impossible; an agreement among the shareholders to terminate the company; a merger into another company; or a resolution to dissolve the company passed by the Board for the Settlement of Commercial Companies Disputes "at the request of a concerned party"²⁷⁶

2. General Partnerships (*sharika tadhamun*)

A Saudi general partnership is defined as a "[c]ompany formed of two or more partners conjointly [sic] responsible in all their possessions for the [c]ompany's debts."²⁷⁷ The name of the partnership must reflect the actual arrangement; inclusion of the

272. *Id.*

273. *Id.* arts. 10, 11.

274. *Id.* art. 13.

275. *Id.* art. 14. Two differences in treatment between 100% Saudi-owned companies and others are that the former may own real property in the Kingdom without obtaining special permission from the Ministry of Commerce, and that it may be taxed at a different rate. Burgoyne, *Specific Problems and Unique Aspects of Doing Business in Saudi Arabia*, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST—SAUDI ARABIA, EGYPT & IRAN 136-37 (W. Wickersham & B. Fishburne eds. 1977).

276. Company Law, Order No. 185, art. 15.

277. *Id.* art. 16.

name of an individual who is not a partner, with his knowledge, renders him jointly liable for the company's debts.²⁷⁸ Unless stipulated otherwise in the articles, stock may be transferred only with the consent of each partner. The partners may not, however, contract out of a restricted share transfer arrangement.²⁷⁹ Within thirty days of formation the company must both publish a "summary" of the articles of association in a daily newspaper of the city in which the corporate headquarters are located and apply for registration in the Companies Register at the Ministry of Commerce, as well as in the Commercial Register.²⁸⁰ All amendments to the articles of association are subject to the same provisions. Amendments to the articles must be approved unanimously; all other issues may be resolved by a majority vote or other margin as stipulated in the articles.²⁸¹ A partner may engage in activities competitive with the partnership only with the permission of every other partner²⁸² and, if he has a nonmanagerial position, he may not "interfere" in the administration of the company.²⁸³ The partners appoint the company officers from within the partnership or from elsewhere.²⁸⁴ The officers are empowered to engage only in activities within the ordinary scope of the company's functions, or as stipulated by the partners or in the articles.²⁸⁵ Notwithstanding any provision in the articles to the contrary, each officer is liable to the company, to the shareholders, and to third parties for losses caused by his violation of the articles or "mistakes" in the course of his employment.²⁸⁶ Termination of the partnership occurs upon the death, detention, bankruptcy, or resignation of a partner, or as stipulated in the articles of association.²⁸⁷

278. *Id.* art. 17.

279. *Id.* art. 18.

280. *Id.* art. 21; *see also infra* notes 409-23 and accompanying text (regarding Commercial Register Law, Royal Decree No. 21/1/4470).

281. Company Law, Order No. 185, art. 25.

282. *Id.* arts. 21, 23.

283. *Id.* art. 24.

284. *Id.* art. 27.

285. *Id.* arts. 29, 30.

286. *Id.* art. 32.

287. *Id.* art. 35.

3. *Simple Commandite Companies (sharika tawsiyah baseetah)*

A simple commandite company, or limited partnership, has "at least one joint partner fully responsible for the [c]ompany's debts, and . . . at least one commanditaire (limited) partner responsible for the [c]ompany's debts within the limit of his share in the capital only."²⁸⁸ The limited partner may participate in the internal administration of the company but not in its external operations; if his behavior creates the impression that he is an unlimited partner, he may be jointly liable for the partnership's debts.²⁸⁹ If a company has two or more unlimited partners, it is considered to be a general partnership for certain purposes and specified provisions relating to general partnerships apply.²⁹⁰

4. *Share Companies (sharika mahassah)*

Share companies are "unrevealed to third parties, hav[e] no juristic personalities and [are] not subject to publication procedures."²⁹¹ The obligatory articles of association of the share company must specify "its aims, the rights and obligations of partners and the methods of distribution of profits and losses among them."²⁹² Although it has no legal personality, the existence of such a company may be proven by "all means of procedure including the hearing of evidence."²⁹³ New partners may join the company only with the consent of all the partners.²⁹⁴ A partner dealing with a third party is personally liable to that party unless his acts make the existence of the company clear, in which case the share company is treated as a general partnership.²⁹⁵

Comment. Although share companies may not always be the preferred choice by Western businessmen, the form may enjoy certain advantages, such as the ability to purchase land for development.²⁹⁶

288. *Id.* art. 36.

289. *Id.* art. 38.

290. *Id.* art. 39.

291. *Id.* art. 40.

292. *Id.* art. 43.

293. *Id.* art. 45.

294. *Id.* art. 44.

295. *Id.* art. 46.

296. Abrahams, *supra* note 259, at 11.

5. *Joint Stock Companies (sharika musāhama tadāmuniyya)*

a. General provisions

A joint stock company must have at least five shareholders.²⁹⁷ When a joint stock company's shares are sold publicly, its capital must be worth at least one million Saudi *riyals*; if the shares are not offered for public sale, the company must have at least 200,000 *riyals* worth of capital.²⁹⁸ Prior to incorporation, at least one-half of the capital must be paid in and the value of each share must be at least fifty *riyals*.²⁹⁹ Joint stock companies "treated by or with the participation of, the government or other public juristic persons and formed by royal rescript" are exempt from any provisions of this law which "contradict the status given to them and the provisions of their special regulations."³⁰⁰

b. Formation of joint stock companies and publications

This section details the procedure which must be strictly followed to form a valid joint stock company. First, an application for a license must be filed, along with a copy of the articles of association and the company regulations or by-laws, in a register of the Ministry of Commerce.³⁰¹ The application must be signed by at least five shareholders and must state "the method of subscription in the [c]ompany's capital, the number of shares taken by the founders for themselves and the amount subscribed by each of them."³⁰² Each copy of the articles and regulations must be signed by the shareholders and by the other persons involved in the company's formation.³⁰³ The royal rescript, or decree, authorizing the incorporation of the company is then published in the Official Gazette and within thirty days any shares being sold publicly must be offered for sale³⁰⁴ in the prescribed manner.³⁰⁵

297. Company Law, Order No. 185, art. 48.

298. *Id.* art. 49; see also *supra* note 264 (regarding current exchange rates).

299. Company Law, Order No. 185, art. 49.

300. *Id.* art. 51.

301. *Id.* art. 52.

302. *Id.*

303. *Id.* The persons involved in the company's formation, or founders, are the "signator[ies] of the memorandum of association (charter) . . . contributor[s]-in-kind or . . . participant[s] in its organization." PRICE WATERHOUSE, DOING BUSINESS IN SAUDI ARABIA 22 (1979).

304. Company Law, Order No. 185, art. 54.

305. See *id.* art. 55.

The offer remains open for ten to ninety days. The company is not incorporated until all the shares have been sold,³⁰⁶ and the amount paid for each share must be at least one-fourth of its nominal value.³⁰⁷ Upon incorporation, the founders, or promoters, of the company invite all the shareholders to a general meeting to take place at least fifteen days after the invitation.³⁰⁸ At that meeting the shareholders examine the capitalization of the company, approve the company's regulations, consider the initial company report concerning operations and expenses and, if this has not been done, appoint the officers and an auditor.³⁰⁹ Within fifteen days of this meeting, the company must apply to the Minister of Industry and Electricity (Minister of Industry)³¹⁰ for an announcement that the company has been officially incorporated.³¹¹ If the proper documents are attached to the application,³¹² the Minister of Industry will issue a resolution announcing the incorporation.³¹³ This resolution, along with the articles of association and the company regulations, will be published in the Official Gazette.³¹⁴ To become properly registered the directors must then apply within fifteen days in the Companies Register at the Ministry of Commerce, as well as in the Commercial Register.³¹⁵

306. *Id.* art. 56.

307. *Id.* art. 58.

308. *Id.* art. 61. If any shares are sold "in kind" or if "special benefits" are given to any shareholders, the Ministry of Commerce may arrange for expert valuation of these items, and order the expert's report to be distributed to the shareholders and deposited in the main office of the company at least two weeks before the general meeting. *Id.* art. 60.

309. *Id.* art. 62.

310. M. NAFA, *supra* note 259, translates this as the Minister of Trade and Industry, referred to elsewhere as the Minister of Commerce and Industry. *Id.* at 24. The Ministry of Commerce and Industry, created in 1954, was divided in 1975 into the Ministry of Industry and Electricity, and the Ministry of Commerce. R. NYROP, *supra* note 4, at 179. For convenience the Ministry of Industry and Electricity will be referred to throughout this Note as the Ministry of Industry.

311. Company Law, Order No. 185, art. 63.

312. *See id.*

313. *Id.* art. 64.

314. *Id.* art. 65.

315. *Id.*; *see infra* notes 409-23 and accompanying text (regarding Commercial Register Law, Royal Decree No. 21/1/4470).

c. Administration of joint stock companies

Directors are appointed by the shareholders to serve for a maximum period of three years.³¹⁶ They may be dismissed by the shareholders at any time and are responsible for management of the company.³¹⁷ Every joint stock company must have a minimum of three directors,³¹⁸ each of whom must own at least 200 shares of the company. These shares are deposited in a designated bank and are "reserved to guarantee [his] responsibility."³¹⁹ Directors may not have any personal interest in the company's operations³²⁰ or engage in activities competitive with the company.³²¹ As a general rule, a joint stock company may not make or guarantee loans to its directors.³²² The directors have broad power to manage the company³²³ and are held to a confidentiality standard regarding company secrets.³²⁴ Actions by the Board of Directors bind the company. Although the company is liable to third parties for damages caused by illegal activities of Board members in the course of their duties,³²⁵ the company is entitled to indemnity from Board members for losses caused by directors' mismanagement.³²⁶ Any shareholder who is injured by the Board's error may sue the Board, provided that the company's "rights to prosecution [are] still valid."³²⁷ Articles 79 through 82 designate the formalities to be observed at Board meetings.

Shareholders' meetings are either ordinary or extraordinary (special) general assemblies.³²⁸ The former meets at least once a year, during the first half of the fiscal year, and deals with com-

316. Company Law, Order No. 185, art. 66.

317. *Id.*

318. *Id.*

319. *Id.* art. 68.

320. *Id.* art. 69. A director is permitted to have a personal interest, however, if he has the annual approval of the ordinary general assembly, or if his interest is created by submitting the best bid in a public tender, and if he informs the rest of the Board of his interest. *Id.*

321. *Id.* art. 70.

322. *Id.* art. 71.

323. *Id.* art. 73.

324. *Id.* art. 72.

325. *Id.* art. 75.

326. *Id.* art. 76.

327. *Id.* art. 78.

328. *Id.* arts. 84, 87.

pany matters not reserved to the latter.³²⁹ The classes of shareholders who may attend general assemblies are stipulated in the company's articles, but all persons who own at least twenty shares have the right to attend.³³⁰ Notification of meetings must be properly published³³¹ and, at either type of assembly, shareholders representing at least half the capital of the company must be present in order to create a quorum.³³² The ordinary general assembly passes resolutions by an "absolute majority of shares represented at the meeting."³³³ With some exceptions,³³⁴ the extraordinary general assembly passes resolutions by a two-thirds majority vote of the shares represented.³³⁵

d. Stock issued by joint stock companies

Shares of a joint stock company may be issued for more than but not less than their par value³³⁶ and may be paid for either in cash or in kind.³³⁷ Special regulatory restrictions³³⁸ govern the negotiability of promoters' shares and shares in kind, but in general a company is free to establish its own nonprohibitive restrictions on negotiability.³³⁹ Equal rights and duties attach to shares of the same class; owners of preferred shares enjoy priority status upon liquidation.³⁴⁰ The shareholders receive dividends at the rate specified in the corporate articles, but the maximum rate is five percent.³⁴¹ Dividends paid out when no net profits have been

329. *Id.* art. 84. One of the rights reserved to the extraordinary general assembly is the introduction of certain types of amendments to the corporate articles. *See id.* art. 85.

330. *Id.* art. 83.

331. *See id.* art. 88.

332. *Id.* arts. 91, 92. For provisions providing for calling a second meeting in the event a quorum is not met, *see id.*

333. *Id.* art. 91.

334. Resolutions concerning changes in the amount of capital, extensions of the period of the company's existence, and dissolution or merger all require three-fourths of the shares represented. *Id.* art. 92.

335. *Id.* art. 92.

336. *Id.* art. 98.

337. *Id.* art. 99.

338. *Id.* art. 100.

339. *Id.* art. 101.

340. *Id.* art. 103.

341. The articles may provide for distribution for a five-year period only. *Id.* art. 106.

made are deducted from future profits.³⁴² The rights of shareholders include the right to receive dividends, to receive a share of the assets of the liquidated corporation, and to attend and participate in shareholders' meetings.³⁴³ In addition, any shareholders who represent at least five percent of the company's capital and who suspect mismanagement may request that the Board for the Settlement of Commercial Disputes conduct an investigation into the company. The shareholders are liable for the costs of the investigation.³⁴⁴ Articles 112 through 115 deal with promoters' shares, and articles 116 through 122 cover the issuance of bonds.

e. Finances of joint stock companies

At the end of each financial year the Board must prepare a financial statement, a balance sheet, a statement of the company's credit and debit on due date, and a profit and loss account.³⁴⁵ Rules governing the allocation of ten percent of the company's net profits to a reserve account are set forth in articles 125 through 127. The shareholders appoint and authorize the salary and length of appointment of one or more Saudi-licensed auditors, none of whom may have any connection with the company.³⁴⁶ The auditor has access to all corporate documents³⁴⁷ and submits an annual report to the ordinary general assembly.³⁴⁸

f. Alteration of the company's capital

Once the company's original capital has been completely paid in, the extraordinary general assembly may vote to increase that amount "one or several times."³⁴⁹ Existing shareholders must be given priority in purchasing new cash shares; specified procedures must be followed both in offering shares to shareholders and subsequently to the public,³⁵⁰ and in the issuance of the new shares.³⁵¹ Conversely, the extraordinary general assembly may in

342. *Id.*

343. *Id.* art. 108.

344. *Id.* art. 109.

345. *Id.* art. 123.

346. *Id.* art. 130.

347. *Id.* art. 131.

348. *Id.* art. 132.

349. *Id.* art. 134.

350. *See id.* art. 136.

351. *See id.* arts. 137-41.

certain circumstances vote to reduce the company's capital; the regulations detail the proper procedures.³⁵²

g. Termination of joint stock companies

When one shareholder purchases all the shares of the company, he becomes responsible for the company's debts to the extent of its assets.³⁵³ If the company suffers a loss of three-quarters of its capital, and if the Board does not first convene an extraordinary general assembly to vote on the matter, "any person concerned may request the dissolution of the Company."³⁵⁴

h. Comment

The joint stock company (along with the general partnership, the simple commandite company, and the limited liability company) may take the form of a joint venture.³⁵⁵ Because it is governed by so many legal requirements, such as the issuance of a royal decree, a joint stock company is not the most practical entity for a foreign company.³⁵⁶

6. *Commandite Share Companies (sharika tawsiyah bi al-ashum)*

A commandite share company has "at least one joint partner responsible with all his assets for the [c]ompany's debts, and [at least four] . . . shareholding partners . . . who shall only be responsible for the [c]ompany's debts to the extent of their share in the capital."³⁵⁷ This variation on the simple commandite company must be financed with at least 100,000 *riyals*—not less than half the capital being paid up at the time of incorporation.³⁵⁸ Each share must be worth at least fifty *riyals*.³⁵⁹ Unless it receives an exemption from the Minister of Industry, the commandite share company must use model articles of association promul-

352. *See id.* arts. 142-46.

353. *Id.* art. 147.

354. *Id.*

355. Shamma & Morrison, *The Use of Local Representatives in Saudi Arabia*, 11 INT'L LAW. 453, 463-64 (1977) [hereinafter cited as Shamma & Morrison, *Representatives*].

356. *Id.* at 464.

357. Company Law, Order No. 185, art. 149.

358. *Id.* art. 150.

359. *Id.*

gated by the Minister.³⁶⁰ The management of the company is the responsibility of any number of joint partners³⁶¹ working under a supervisory board appointed by the shareholders and composed of at least three shareholders.³⁶² Regulations governing joint partners,³⁶³ licensing procedures,³⁶⁴ the rights and duties attached to ownership of shares,³⁶⁵ and termination of the company³⁶⁶ also appear in this section.

7. *Limited Liability Companies (sharika musahama mahduda)*

The limited liability company must have at least two but no more than fifty partners, each of whom is liable "for the [c]ompany's debts to the extent of [his] share in the capital."³⁶⁷ The company's capitalization must amount to at least 50,000 *riyals*,³⁶⁸ with indivisible non-negotiable shares of equal value.³⁶⁹ The company, which may not engage in the insurance, savings, or banking industry,³⁷⁰ is not fully incorporated until all shares are fully paid for and distributed to the partners and the contributed cash is deposited with a bank designated by the Minister of Industry.³⁷¹ The company is formed by the signing of the articles by each partner.³⁷² Thirty days thereafter the company must apply

360. *Id.* art. 151.

361. *Id.* art. 152.

362. *See id.* art. 153.

363. *See id.* art. 154.

364. *See id.* art. 155.

365. *See id.*

366. *See id.* art. 156.

367. *Id.* art. 157.

368. *Id.* art. 158. At least one observer has questioned, however, whether the Ministry of Industry will "take seriously" the application of a limited liability company with a non-Saudi partner that has a capitalization of only 50,000 *riyals*. Nazer, *supra* note 137, at 120.

369. Company Law, Order No. 185, art. 158.

370. *Id.* art. 159.

371. *Id.* art. 162. All banks in Saudi Arabia fall within this category. Mustafa, *Forms of Doing Business in Saudi Arabia*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST—SAUDI ARABIA, EGYPT AND IRAN 123-25 (W. Wickersham & B. Fishburne eds. 1977).

372. Company Law, Order No. 185, art. 161. The signing of the articles has been characterized as "the most significant step in the formation process," because the articles constitute a binding contract. Mustafa, *supra* note 371, at 125. For a discussion of the reasons why precise translation of the articles into Arabic

for publication of its articles in the Official Gazette and for registration in both the Companies Register at the Ministry of Commerce and in the Commercial Register.³⁷³ Each partner may transfer his share consistent with the terms of the articles and each has a right of preemption or restitution if another partner wishes to sell his share outside the company.³⁷⁴ Shares may not be offered publicly to create or increase capital or to acquire a loan.³⁷⁵ Each year the company must deposit ten percent of its net profits into a special reserve account, until the amount in the account is equal to one-half of the company's capital.³⁷⁶ The partners agree, either in the articles or by contract, on one or more directors or managers. These directors may be nonpartners³⁷⁷ and, notwithstanding any contractual stipulation to the contrary, are jointly liable for damages to the company, to the partners, or to third parties caused by their mismanagement.³⁷⁸ Each partner has the right to vote on company affairs, or to delegate his votes to another partner who is not a director.³⁷⁹ A partner is entitled to one vote for each share he owns. The partners meet in a general assembly to pass resolutions unless the company consists of fewer than twenty partners, in which case the partners may vote by letter.³⁸⁰ Resolutions may be passed only by the vote of partners representing at least one-half of the company's capital.³⁸¹ The retirement, detention, bankruptcy, or insolvency of a partner does not terminate the limited liability company.³⁸²

Comment. Many practitioners agree that for most Western business purposes the limited liability company, which may be a joint venture, is the preferable corporate form.³⁸³ The structure is rela-

is important, including the fact that should a question arise later the Arabic version will prevail, see Abrahams, *supra* note 259, at 11.

373. Company Law, Order No. 185, art. 164; *see also infra* notes 411-23 and accompanying text (regarding Commercial Register Law, Royal Decree No. 21/1/4470).

374. Company Law, Order No. 185, art. 165.

375. *Id.* art. 158.

376. *Id.* art. 176.

377. *Id.* art. 167.

378. *Id.* art. 168.

379. *Id.* art. 171.

380. *Id.* art. 172.

381. *Id.*

382. *Id.* art. 178; *see also id.* arts. 179-80 (regarding termination of the company).

383. *See, e.g.,* Abrahams, *supra* note 259, at 9; Burgoyne, *supra* note 275, at

tively simple, and in spite of the special reserve requirements,³⁸⁴ procedures for establishing the company are relatively streamlined. Profit distribution is unusually flexible in that the articles of association may specify a distribution arrangement which does not precisely reflect the partners' ownership interests.³⁸⁵ Unlike joint stock companies, limited liability companies need not be approved by royal decree or have a minimum of five shareholders, nor are they as extensively regulated as joint stock companies. It has been estimated that "possibly more than 90 percent of the companies and joint ventures in Saudi Arabia take the form of a limited liability company."³⁸⁶ Limited liability companies are sometimes called limited liability partnerships, because in Arabic the same word is used to denote "partnership" and "company."³⁸⁷

8. *Variable Capital Companies (sharika that ras al-mal al-kabil littaghayyur)*

Variable capital companies³⁸⁸ provide in their articles or by-laws for either an increase in capital through new payments from existing partners or by the addition of new partners, or for a reduction in capital through the redemption of shares.³⁸⁹ These companies must begin with a capitalization of at least 50,000 *riyals*,³⁹⁰ and some restriction on transferability of shares is permitted.³⁹¹

9. *Cooperative Companies (sharika taawoniyya)*

Joint stock and limited liability companies may fall within this category if the goals of the partners include the reduction of "the cost of purchase or selling price of certain products and services by performing the work of producers or middlemen," or "[t]he improvement of the quality of products or standard of service of-

138-39; Mustafa, *supra* note 371, at 124, 127. The limited liability company has been characterized by one observer as "really a private shareholder's company." Nazer, *supra* note 137, at 120.

384. See *infra* text accompanying note 376.

385. Shamma & Morrison, *Representatives*, *supra* note 355, at 464.

386. Nazer, *supra* note 137, at 119.

387. See Mustafa, *supra* note 371, at 123.

388. Company Law, Order No. 185, arts. 181-88.

389. *Id.* art. 181.

390. *Id.* art. 184.

391. *Id.* art. 185.

ferred by the company to the partners or by the latter to the consumer."³⁹² Cooperative companies are governed by the special provisions of articles 189 through 209 and, where not inconsistent, the sections governing joint stock companies and limited liability companies.³⁹³

10. *Alteration and Merger of Companies*

All companies except cooperative companies may be converted to another form by a properly executed resolution.³⁹⁴ The new entity continues to enjoy the rights, and is subject to the obligations, of the old.³⁹⁵ The alteration of a general partnership or a commandite company, however, will not without its creditors' approval exonerate the joint partners from liability for the company's debts.³⁹⁶ Similarly, all types of companies, except cooperative companies, may merge with any other type³⁹⁷ as long as a resolution approving the merger is passed by each participating company.³⁹⁸ Opposition by creditors of the merged company will result in a suspension of the merger until specified events occur.³⁹⁹

Comment. Despite the lack of restrictions on mergers, they appear to be uncommon in Saudi Arabia.⁴⁰⁰

11. *Liquidation of Companies*

Articles 216 through 226 detail liquidation procedures and the powers and duties of liquidators. The liquidators of a company are appointed by the partners or by the general assembly.

12. *Foreign Companies*

Article 227 stipulates that "without prejudice to" the Invest-

392. *Id.* art. 189.

393. *Id.* art. 190.

394. *Id.* art. 210.

395. *Id.* art. 211.

396. *Id.* art. 212.

397. *Id.* art. 213. In spite of the lack of restrictions on mergers, "in practice mergers as yet do not form part of the business scene in Saudi Arabia." PRICE WATERHOUSE, *supra* note 303, at 14.

398. Company Law, Order No. 185, art. 214.

399. *Id.* art. 215.

400. *See supra* note 397.

ment of Foreign Capital Law⁴⁰¹ or to special agreements with certain other companies, foreign companies doing business in Saudi Arabia are subject to Saudi incorporation laws. A license from the Minister of Commerce is a prerequisite⁴⁰² to the sale of securities by a foreign company in Saudi Arabia and to the establishment by a foreign company of a branch, agency, or office to represent that company in Saudi Arabia. Failure to meet Saudi legal requirements prior to the commencement of any business activity renders the individuals who perform that activity jointly and severally liable.⁴⁰³

13. *Penalties*

“Without prejudice to the requisites of the provisions” of the *shari'a*, certain acts are punishable by three to twelve months imprisonment, a fine of 5,000 to 20,000 *riyals*, or both.⁴⁰⁴ Article 229 specifies these acts; they include deliberate falsification of information in the articles of association or other documents of the company, the public offering of shares in knowing violation of the Company Law, the distribution of fictitious dividends, and the failure to comply with the regulations of or requests for access by the Ministry of Industry.⁴⁰⁵ Among the acts punishable by a fine of 1,000 to 5,000 *riyals* are the failure to include on official papers the company name, headquarters location, a “statement of its nature,”⁴⁰⁶ and the failure to submit any required documents to the Ministry of Commerce.⁴⁰⁷

14. *Board for the Settlement of Commercial Companies' Disputes*

Article 232 creates a three-man Board for the Settlement of Commercial Companies' Disputes. The Board has authority to

401. See *infra* notes 443-60 and accompanying text.

402. For a brief discussion of the discretion the Minister of Commerce may exercise in granting permission to register, see Mustafa, *supra* note 371, at 127-28. For brief mention of the regulations governing professional businesses, see *id.* at 128.

403. Company Law, Order No. 185, art. 228.

404. *Id.* art. 229.

405. The last two provisions were added in 1967 by Royal Decree No. M/5 dated 12/2/87 A.H., N. KARAM, *supra* note 263, at 1-71.

406. This stipulation is contained in article 12, to which article 230 refers.

407. Company Law, Order No. 185, art. 230.

settle disputes arising from the provisions of the Company Law.⁴⁰⁸

C. Commercial Register Law

1. *Commercial Register*

The Commercial Register Law⁴⁰⁹ regulates "merchants" and all companies "whatever their nature and the activity which they pursue."⁴¹⁰ The manager of every commercial company formed in Saudi Arabia or with a main office in Saudi Arabia, and every merchant, must submit an application for registration in the Commercial Register within one month of incorporation or establishment of a business office.⁴¹¹ A separate application must be prepared for each business office within a month of opening.⁴¹² Similarly, article 4 stipulates that "[p]ersons responsible for the administration of branches or commercial agencies pertaining to foreign companies whose main offices are situated abroad shall submit an application for registration within a month"⁴¹³ of the opening of the branch or agency.

The Commercial Register Office must be notified of amendments to information contained in the original registration and license applications within one month of the event triggering that amendment.⁴¹⁴ Cancellation of registration must be requested within one month of the merchant's death or the abandonment or liquidation of the company.⁴¹⁵

408. *Id.* art. 232.

409. Royal Decree No. 21/1/4470, 9 Qida 1375 A.H. (June 18, 1956) (Saudi Arabia).

410. *Id.* art. 13. "Merchant" is defined as:

[A]ny person adopting the profession of purchasing movable goods with the intent of reselling or renting them, contractors of any variety, brokers, commission agents, agents and commercial intermediaries of any kind, bankers, importers, exporters, dealers in banking and sea, land and air transport, and, in general, any person who deals in any commercial activity or who is considered a merchant by virtue of a Regulation of the Kingdom. . . .

Id.

411. *Id.* arts. 2-3.

412. *Id.*

413. *Id.* art. 4.

414. *Id.* art. 6.

415. *Id.* art. 7.

2. General Provisions

Abstracts on individual merchants and companies are available to third parties from the Commercial Registrar.⁴¹⁶ The name of the Commercial Registration Office at which the merchant or company is registered must appear on all business correspondence, or other business documents, and "on the frontage" of the business premises.⁴¹⁷ Article 12 empowers Commercial Register officials to inspect business premises for compliance with the regulations.⁴¹⁸

3. Penalties

Specified acts carry penalties of either 300⁴¹⁹ or 200 *riyals*.⁴²⁰ Misrepresentations in registration applications or false pretensions to nonexistent registration will result in a fine of 500 *riyals*.⁴²¹ Article 18 delineates the procedures for imposing penalties and filing appeals.

4. Comment

The Commercial Register Law requires every company to register in the Commercial Register within one month of opening.⁴²² Note that the Saudis will not permit registration of a foreign company until the Committee for Foreign Capital Investment approves the company's application for a foreign investment license.⁴²³

D. Commercial Agencies Law⁴²⁴

The Commercial Agencies Law prohibits foreigners, including non-Saudi corporations, from acting as commercial agents in

416. *Id.* art. 11.

417. *Id.* art. 9.

418. *Id.* art. 12.

419. *Id.* art. 14.

420. *Id.* art. 15.

421. *Id.* art. 17.

422. Shamma & Morrison, *Qualification, Licensing & Registration of Foreign Companies in Saudi Arabia*, 11 INT'L LAW. 693, 695 (1977) [hereinafter cited as Shamma & Morrison, *Foreign Companies*].

423. Shamma & Morrison, *Representatives*, *supra* note 355, at 456; see also *infra* notes 460-78 and accompanying text.

424. Royal Decree No. 11, dated 20 Safar 1382, (July 2, 1962) (Saudi Arabia).

Saudi Arabia.⁴²⁵ A corporate entity acting as a commercial agent must be entirely Saudi-owned and all directors, members, and authorized representatives must be Saudis.⁴²⁶ If a non-Saudi individual or a Saudi company with even one non-Saudi partner acts as a commercial agent, it is subject to a fine of 1,000 to 5,000 *riyals*, termination of agency activities, and, possibly, suspension of trading activities, deportation, or both.⁴²⁷

Comment. The Commercial Agencies Law essentially allows only Saudi agents to conduct sales of imported goods.⁴²⁸ The law does not apply to services. Saudi officials have clarified this law elsewhere to require that "[a]ll imports to the Kingdom [be] carried out through Saudi merchants and agents and not through any other sources regardless of their headquarters."⁴²⁹ As a result of this law, imported goods are sold almost exclusively through Saudi corporate agents, although direct sales are not absolutely prohibited.⁴³⁰

E. New Regulations on Agents' Commissions⁴³¹

This regulation governs "all contracts entered into and executed by a foreign contractor [individual, or corporate consultant]⁴³² with the Government of the Kingdom of Saudi Arabia."⁴³³ All foreign contractors without a Saudi partner must have a Saudi service agent⁴³⁴ unless the relevant contract is between two

425. *Id.* art. 1.

426. *Id.* All commercial agents must be properly registered with the Ministry of Industry. *Id.* art. 3.

427. *Id.* art. 4.

428. Shamma & Morrison, *Foreign Companies*, *supra* note 422, at 694.

429. Shamma & Morrison, *Representatives*, *supra* note 355, at 455 (quoting Release of Ministry of Commerce and Industry, Feb. 3, 1971).

430. *Id.* Further, agents may not be used in negotiations for certain government contracts. *Id.* n.10 (citing the Regulation of Tenders and Auctions Resolution, Royal Decree No. M/6, dated 24 Safar 1386 A.H. (June 13, 1966) (Saudi Arabia); see also Taylor & Weissman, *Middle East Agency Law Survey: Legal Requirements for Commercial Agency Arrangements in the Middle East*, 14 INT'L LAW. 331, 351 (1980).

431. Royal Decree dated 1398 (Jan. 17, 1978) (Saudi Arabia). Translations of this regulation are those of N. KARAM, *supra* note 263.

432. Foreign consultants are treated as foreign contractors for the purposes of this regulation. *Id.* art. 1.

433. *Id.* art. 2.

434. *Id.* art. 3.

governmental parties or deals with armaments.⁴³⁵ The Saudi agent must be registered in the Commercial Register.⁴³⁶ A foreign contractor may hire more than one Saudi agent if the nature of his work is sufficiently varied; conversely, each Saudi agent may work for up to ten foreign contractors.⁴³⁷ The parties must draw up an agency contract⁴³⁸ which, among other things, limits the agent's fee to no more than five percent of the "contract value being performed by the foreign contractor."⁴³⁹ The regulation warns that "[t]he object of any agency may not be the exploitation of influence or mediation,"⁴⁴⁰ and confers jurisdiction to hear contractor-agent disputes on the Board for the Settlement of Commercial Companies' Disputes.⁴⁴¹ Contractors and agents who violate this regulation are subject to a freeze on business activities in Saudi Arabia and license cancellation, respectively.⁴⁴²

F. Investment of Foreign Capital Law

The Investment of Foreign Capital Law⁴⁴³ governs the responsibilities and benefits which attach to the investment of foreign capital in Saudi Arabia.⁴⁴⁴ The law benefits foreign capital "invested in economic development schemes⁴⁴⁵ which do not comprise . . . petroleum or mining industrial schemes" and which are

435. *Id.* art. 4.

436. *Id.* art. 5.

437. *Id.* art. 6.

438. *Id.* art. 7.

439. *Id.* art. 8.

440. *Id.* art. 10.

441. *Id.* art. 11; *see also supra* text accompanying note 408 (regarding Company Law, Order No. 185, art. 232).

442. *Id.* art. 12.

443. Royal Decree No. 35, dated 15 Shawal 1383 A.H. (Feb. 25, 1964) (Saudi Arabia).

444. *Id.* art. 1. "Foreign capital" includes "money, banknotes, commercial bills, machines and appliances, spare parts, raw materials, products, means of transport, abstract rights, e.g. patents, trademarks and similar values, owned by a physical or juristic person who does not hold the nationality of the Kingdom of Saudi Arabia." *Id.* Upon the recommendation of the Minister of Industry, the Council of Ministers may, in its discretion, grant individual organizations "exceptional permanent licenses if their exclusion [from the provisions of this regulation] is warranted by a fundamental interest." *Id.* art. 11.

445. The term "economic development schemes" encompasses most projects except those that are strictly commercial sales endeavors. Shamma & Morrison, *Representatives*, *supra* note 355, at 463.

approved by the Minister of Industry, but does not apply either to investment projects under way prior to promulgation of the regulation or to projects authorized according to "special agreements."⁴⁴⁶ An application⁴⁴⁷ for an investment license is filed⁴⁴⁸ with the Ministry of Industry's Bureau of Foreign Capital Investment.⁴⁴⁹ The Bureau then forwards the application to the influential Committee for Foreign Capital Investment.⁴⁵⁰ The Foreign Capital Investment Committee approves license applications, hears complaints arising from the regulations, and recommends penalties for violations.⁴⁵¹ In issuing the license, the Foreign Capital Investment Committee may set time limits for completing various phases of the licensed project. If these limits are not met, the license may be revoked.⁴⁵² Article 8 spells out the benefits accorded to foreign companies which fulfill the regulatory requirements: "benefits enjoyed by national capital" and, for companies with at least twenty-five percent Saudi participation, a five-year exemption⁴⁵³ from income and company taxes.⁴⁵⁴ The regulation

446. Investment of Foreign Capital Law, Royal Decree No. 35, art. 10.

447. Prior to filing it is advisable to ensure that the application is complete and does not "gloss . . . over [any] aspects of the company's activities." Abrahams, *supra* note 259, at 6.

448. For a helpful "walk-through" of those steps involved in filing and registration, see Nazer, *supra* note 137, at 118-20.

449. Investment of Foreign Capital Law, Royal Decree No. 35, art. 3.

450. *Id.* arts. 3-5. The Bureau also handles inquiries of potential investors. *Id.* art. 7.

451. *Id.* art. 6.

452. PRICE WATERHOUSE, *supra* note 303, at 13.

453. The practitioner should ascertain whether the five-year exemption period has been extended.

454. Investment of Foreign Capital Law, Royal Decree No. 35, art. 8. Article 8 provides:

Foreign capital which fulfills conditions set up according to this Regulation shall have the following benefits:

(1) All benefits enjoyed by national capital according to the Regulation of the Protection exemption.

(2) Exemption of the scheme in which the foreign capital is invested from the income and company taxes for a period of five years as from the date of production. However, it is stipulated to enjoy this exemption that national capital shall participate in the scheme in a proportion not less than twenty-five per cent of the capital and the participation shall remain prevalent for the whole period of the exemption.

The Regulation of the Protection and Encouragement of National Industries referred to in (1) confers "exemption from certain customs duties (in certain

warns against interference "in any way with the country's religious or political affairs or meddl[ing] therewith"⁴⁵⁵ and stipulates that failure to comply with the law may result in liquidation or suspension of corporate license.⁴⁵⁶

Comment. In essence, the Investment of Foreign Capital Law requires governmental licensing for any type of foreign investment activity. For example, a foreign company that wants to operate in Saudi Arabia for servicing or manufacturing purposes must comply with the Foreign Capital Investment Law.⁴⁵⁷ Note that this law specifically excludes commercial enterprises which, according to the Commercial Agencies Law,⁴⁵⁸ may conduct sales activities only through Saudi agents. Although there is no legal requirement for Saudi participation in these investment enterprises, in practice licenses are granted more readily to enterprises with twenty-five percent or greater Saudi participation.⁴⁵⁹ The higher the percentage of Saudi ownership the greater the advantages the company will enjoy. Twenty-five percent participation not only enhances the likelihood that an investment license will be issued, but also guarantees a five-year tax exemption. Fifty percent participation qualifies the company to bid for government contracts and sixty percent participation may confer exemption from some performance bond requirements of the Regulation of Tenders and Auctions Resolutions.⁴⁶⁰ This law is of critical importance to businesses that engage in investment activities in Saudi Arabia. Because of the increasing volume of non-Saudi business entering the Kingdom, the law may undergo significant changes at any time; therefore, the practitioner must be careful to determine whether new decrees or regulations on foreign investment have been issued.

cases); . . . provision of nominal rent of land for factories and industrial housing; and . . . in certain cases, a limitation of prohibition on imports of competitive products." Abrahams, *supra* note 259, at 5. At least one practitioner has pointed to the potential confusion caused by the phrase in article 8, "as of the date of production," because nonproducing companies are also entitled to the exemption. *Id.* In actuality, performance under the license, not necessarily production, begins the running of the five years. Nazer, *supra* note 137, at 119.

455. Investment of Foreign Capital Law, Royal Decree No. 35, art. 9.

456. *Id.* art. 12.

457. Shamma & Morrison, *Representatives*, *supra* note 355, at 455.

458. *See supra* notes 424-30 and accompanying text.

459. Shamma & Morrison, *Representatives*, *supra* note 355, at 456.

460. *Id.* at 464; *see infra* note 461 and accompanying text.

G. Other Laws

Practitioners representing clients doing business in Saudi Arabia will also want to consult the following regulations: (1) the Regulation of Tenders and Auctions Resolutions;⁴⁶¹ (2) the Procurement of Government Purchases and Execution of Its Projects and Works Law, and Implementing Regulations;⁴⁶² (3) the Saudi Industrial Development Fund Law;⁴⁶³ (4) the Saudi Arabian Monetary Agency Law;⁴⁶⁴ (5) the Banks Control Law;⁴⁶⁵ (6) the Regulations for Ownership of Real Estate in the Kingdom by Non-Saudis;⁴⁶⁶ (7) the Saudi Arabian Regulations for Combatting Bribery;⁴⁶⁷ (8) the Labour Law;⁴⁶⁸ (9) the Rules for the Organization of the Labour Force Movement;⁴⁶⁹ (10) the Social Insurance Law;⁴⁷⁰ (11) the Social Insurance Law;⁴⁷¹ (12) the Customs Law;⁴⁷²

461. Royal Decree No. M/6, dated 24 Safar 1386 A.H. (June 13, 1966) (Saudi Arabia). This regulation governs the "purchase of goods and execution of projects for the Ministries and independent departments by tender, operation or direct supply." *Id.* art. 1. For United States businesses considering entering into government contracts, this regulation is of critical importance.

462. Royal Decree No. M/14, dated 7.4.1397 A.H. (Saudi Arabia); Minister of Finance and National Economy, Order No. 2131/17, dated 5.5.1397 A.H. (Saudi Arabia). These statutes are reprinted in N. KARAM, *supra* note 263, at 14-1 to 14-21.

463. N. KARAM, *supra* note 263, at 6-1 to 6-6 (official citation unavailable).

464. *Id.* at 7-1 to 7-5.

465. Promulgated in the Official Gazette No. 2126, dated 5 Rabie I 1386 A.H. (June 24, 1966) reprinted in N. KARAM, *supra* note 263, at 8-1 to 8-11.

466. Royal Decree No. M/22, dated 12.7.1390 (Sept. 13, 1970) (Saudi Arabia).

467. Royal Decree No. 38, dated 22 Shawward 1377 A.H. (May 11, 1958) (Saudi Arabia).

468. Decision of the Council of Ministers, Order No. 745, dated 23-24 Sha'ban 1389 (Nov. 3-4, 1969) (Saudi Arabia); Royal Decree No. M/21, dated 6.9.1389 A.H. (Nov. 15, 1969) (Saudi Arabia).

469. Resolution of the Council of Ministers, No. 826, dated 1975 (Saudi Arabia).

470. Royal Decree No. M/21 dated 6 Ramadan 1389 A.H. (Nov. 15, 1969) (Saudi Arabia); Decision of the Council of Ministers, No. 746, dated 23/24 Sha'ban 1389 A.H. (Nov. 3-4, 1969) (Saudi Arabia). There are two laws with the translated title of "Social Insurance Law"; the second is cited in note 471 *infra*.

471. Published 11 Shawwal 1392 A.H. (1972), amended by Decision of the Minister of Labour and Social Affairs, No. 6, Insurance, dated 24.1.1393 A.H. (1973); Decision of the Minister of Labour and Social Affairs, No. 7, Insurance, dated 24.1.1393 A.H. (1973); No. 8, Insurance, dated 16.6.1393 A.H. (1973); Decision of Director-General of the Organization, No. 252, dated 5.7.1393 A.H. (1973); Decision of the Director-General of the Organization, No. 431, dated

(13) the Registration of Trade Marks Law;⁴⁷³ (14) the Order regarding Regulation of Maritime Ports, Harbours and Lighthouses;⁴⁷⁴ and (15) the various income tax laws.⁴⁷⁵

VI. PRACTICAL CONSIDERATIONS

A. Introduction

This section will apprise Western practitioners of practical considerations and strategies in their dealings in Saudi Arabia. The section discusses several topics: corporate options and strategy, contracts, choice of law, arbitration, knowing the law, personal relationships and honor, and social aspects. This information will help the Western attorney avoid the pitfalls to which foreigners often fall prey and thus will increase the likelihood of successful endeavors in the Kingdom.

B. Corporate Options and Strategy

A foreign company that wishes to acquire a license to transact business in Saudi Arabia will want to examine all of its options, especially the amount of Saudi participation it desires to invite. If the company is involved in manufacturing or economic development activities, for example, it may form a Saudi corporation or partnership with any amount of Saudi participation or it may

10.10.1393 A.H. (1973).

472. No. 425 (1952).

473. High Decree No. 8762, dated 28.7.1358 A.H. pursuant to Royal Irada No. 33/1/4, dated 24.6.1358 A.H., amended by Council of Ministers' Resolution No. 66 (June 4, 1974); Royal Decree No. M/24, dated 23.6.9YAH, reprinted in N. KARAM, *supra* note 259, at 12-1 to 12-10.

474. Ministerial Resolution No. 181 (1975) (Saudi Arabia). The reader should also consult the Ports, Harbours and Lighthouses Law, Royal Decree No. M/27 (1974) (Saudi Arabia), and the Resolution of the Council of Ministers No. 934 (1974) (Saudi Arabia).

475. *E.g.*, Royal Decree No. 17-2-28/3321 (Nov. 2, 1950) (Saudi Arabia); Royal Decree No. 7634 (Dec. 26, 1950) (Saudi Arabia); Royal Decree No. 651 (Feb. 23, 1952) (Saudi Arabia); Royal Decree No. 576 (Oct. 19, 1956) (Saudi Arabia); Royal Decree No. 102 (May 4, 1961) (Saudi Arabia); Royal Decree No. 111 (May 11, 1961) (Saudi Arabia); Royal Decree No. 27 (1962) (Saudi Arabia); Royal Decree 23 (Jan. 25, 1965) (Saudi Arabia); Royal Decree No. M/19 (Sept. 2, 1970) (Saudi Arabia); Royal Decree No. M/28 (Dec. 28, 1970) (Saudi Arabia); Royal Decree No. M/36 (May 23, 1975) (Saudi Arabia). These decrees are reprinted in N. KARAM, *supra* note 279, at 4-2. The resolutions of the Council of Ministers, ministerial resolutions, and circular letters should also be consulted.

simply apply for an operating license.⁴⁷⁶ If the company sells imported goods, however, it must do so exclusively through a Saudi agent. In evaluating its options, the company should bear in mind that the Saudi government's policy is to encourage Saudi participation in all business activities in the Kingdom. This policy effectuates the transfer of technology and know-how into the country⁴⁷⁷ and derives in part from the traditional reluctance of Saudis with private wealth to invest in local business ventures.⁴⁷⁸

As discussed above, the company will have to apply for an investment license with the Foreign Capital Investment Committee⁴⁷⁹ and be properly registered in the Commercial Register.⁴⁸⁰ If it is denied an investment license, the company will be forced to hire a local representative⁴⁸¹ unless the company hires a Saudi sponsor or desires a license solely for the purpose of a specific governmental project.⁴⁸² A sponsor "act[s] as employer of the foreign company's personnel . . . within Saudi Arabia."⁴⁸³ This involves "provid[ing] for the deportation of such persons upon expiration of their residence permits, and justify[ing] the presence of such persons by establishing the need for their services and [the] nonavailability of nationals to do their work."⁴⁸⁴

Under most circumstances, a foreign company conducting business in Saudi Arabia will find it advantageous to employ a local Saudi representative. The importance of ensuring that the Saudi agent is reputable cannot be underestimated.⁴⁸⁵ The agent will be responsible for the foreign company's compliance with the Saudi corporate regulations, violation of which may result in expulsion from the country, heavy fines, or imprisonment.⁴⁸⁶ An established Saudi agent will want to protect its reputation by maintaining

476. Shamma & Morrison, *Foreign Companies*, *supra* note 422, at 693. For a more detailed discussion of the advantages of each option, see *id.* at 695-99.

477. Taylor & Weissman, *supra* note 430, at 350.

478. D. LONG, SAUDI ARABIA 55 (1976).

479. See *supra* note 450 and accompanying text.

480. See *supra* notes 409-23 and accompanying text.

481. Shamma & Morrison, *Representatives*, *supra* note 355, at 456.

482. *Id.*

483. *Id.* (quoting Residence Regulations, Royal Decree No. 17/2/5/1337 dated 11.9.1371 Safar A.H. (Saudia Arabia) art. 43.

484. *Id.*

485. See *id.* at 459-60.

486. See *supra* note 264 and accompanying text.

high standards and adhering strictly to the law.⁴⁸⁷ To be an effective representative, a Saudi agent should be not only reputable but also influential enough "to assist in obtaining visas and residence permits, to act as a distributor of the foreign company's products, . . . to locate residential housing, to make available office space, transportation and communication, and to own land."⁴⁸⁸ In drafting an agreement with a Saudi agent, particular attention should be paid to negative covenants prohibiting questionable activities, provisions defining the representative's services, and the extent of the foreign company's control over payments to the representative.⁴⁸⁹ Because of the advantages accorded to joint ventures with Saudi participation, the joint venture format is recommended as a vehicle for long-term association with a Saudi representative. Such long-term arrangements are advisable, however, only if the American company has great confidence in the Saudi representative.⁴⁹⁰ This format also facilitates monitoring by the foreign company of its Saudi activities.⁴⁹¹ A foreign company can expect to pay its Saudi agent five to ten percent of the value of any contract that it helps to arrange.⁴⁹²

The considerations involved in choosing a Saudi agent are also important in selecting a Saudi business partner. The reputability of the potential partner and the establishment of a friendly business relationship with him are critical. A Westerner may select his Saudi partner because of the degree of local influence which the latter wields.⁴⁹³ For the same reason, however, in case of a disagreement between the partners which is governed by Saudi law, the Saudi may be in the more advantageous position. A dramatic example of this occurred recently when a United States businessman who had an unsettled dispute with his former Saudi partner was forbidden to leave the country until he paid the

487. Shamma & Morrison, *Representatives*, *supra* note 355, at 459.

488. *Id.* at 458.

489. *Id.* at 459-63.

490. *Id.* at 463-65.

491. *Id.* at 465.

492. Letter to Gali Hagel (Mar. 8, 1982) [hereinafter cited as Letter]. The author of this letter is a United States businessman who has extensive experience dealing with the Saudi government, both as an outsider and as a consultant.

It is possible that the agent will split his commission with the other party to the contract, particularly if it is a government agency. *Id.*

493. Wall St. J., Mar. 22, 1982, at 25, col. 1.

claimed debt.⁴⁹⁴ The American had neither investigated his Saudi partner nor consulted an attorney prior to entering into his Saudi partnership agreement.⁴⁹⁵ United States citizens cannot rely on the State Department to exempt them from the full force of Saudi laws.⁴⁹⁶ Similarly, a Saudi sponsor should be carefully investigated before any contractual commitment is made. One good reason for this is that the sponsor, who may also be one's partner, must approve one's departure from the Kingdom.⁴⁹⁷

An alternative to hiring a Saudi agent is to maintain a company employee in Saudi Arabia who is responsible for establishing and maintaining contacts in the country to facilitate business dealings. Although this arrangement does not ensure ready-made contacts, it does mean that the employee can discuss the technicalities of the company's business in a familiar and intelligent fashion.⁴⁹⁸ Communications between the employee and the employer also are facilitated, thus enabling decisions to be made more quickly.⁴⁹⁹ The employee selected for this position ideally should be American or, less preferably, British, because Saudis with the kind of education and experience required to work in this capacity who have not elected to put that background to more lucrative work are extremely rare.⁵⁰⁰

Ideally, inquiries for potential agents or business partners are made in person by the American individual or company in Saudi Arabia.⁵⁰¹ One should be wary, however, of the many fraudulent offers one will probably receive from would-be agents. The most frequent approach is to claim a connection with the royal family, and, hence, with the government ministries.⁵⁰² It is essential that all such claims be confirmed by independent sources.

C. Contracts, Choice of Law, and Arbitration

Although a familiarity with Islamic contract law is helpful in

494. *Id.*

495. *Id.*

496. *Id.* The article notes, however, that "[e]mbassy officials do maintain contact with Americans in trouble and poke into the problem enough to assure themselves that U.S. citizens are being treated fairly under local law. . . ." *Id.*

497. *Id.*

498. Letter, *supra* note 492.

499. *Id.*

500. *Id.*

501. Wall St. J., Mar. 22, 1982, at 25, col. 1.

502. Letter, *supra* note 492.

transacting business with the Saudis, in practice Saudi contracts rarely differ from those drafted elsewhere.⁵⁰³ Contracts are generally enforced as written unless

they later appear too onerous, at which time the Saudis are generally willing to listen to any legitimate complaints and take action to rectify the problem, if this appears proper in their estimation. Any attempt to get them changed purely through influence may well be doomed to failure and even worse, get the company put on the black list.⁵⁰⁴

A Western attorney should not expect to negotiate a contract as he normally would. Until recently, when government agencies have started to organize and structure their negotiating process, one would never negotiate face-to-face across a table. Rather, one would engage in the process obliquely, with considerable contact with second- and third-tier individuals.⁵⁰⁵ American practitioners generally have a great deal of confidence that the Saudis generally honor their contractual obligations.⁵⁰⁶

In case of dispute, contracts in Saudi Arabia are subject to strict construction.⁵⁰⁷ For this reason, the language used in contracts should be as precise as possible.⁵⁰⁸ Practitioners disagree, however, as to the advisability of drafting with an eye to detail. Westerners often prefer to rely insofar as possible on the instrument itself, whereas Middle Eastern lawyers may be more comfortable avoiding such detail given, among other things, the exigencies of the document approval process.⁵⁰⁹

The insertion of choice of law clauses is risky, as enforceability is uncertain. The specified choice of law is likely to be enforced if it has a rational basis unless the terms of the contract contravene

503. *Id.*

504. *Id.*

505. Telephone interview (Mar. 9, 1982) [hereinafter cited Mar. 9, 1982, telephone interview]. The interviewee is counsel for a United States corporation doing extensive business in the Kingdom.

506. *Id.*; Mar. 11, 1982 telephone interview, *supra* note 140. The former stipulated, however, that this assumes that the "right person—a Minister or official government agent"—signed the contract.

507. Hoyt, *supra* note 262, at 12. For a discussion regarding general principles of Islamic contract law, see *supra* notes 202-40 and accompanying text.

508. *Id.*; see also *supra* note 372 (regarding the importance of having a precise Arabic translation of all corporate documents).

509. Compare Hoyt, *supra* note 262, at 12-13 with Mustafa, *supra* note 371, at 129.

public policy.⁵¹⁰ As a rule, however, regardless of the choice of law stipulated, contracts with government entities are governed by Saudi law.⁵¹¹

The freedom of government agencies to enter into contractual agreements concerning both choice of law and arbitration is limited by a 1963 decision of the Council of Ministers.⁵¹² That decision stipulated that Saudi law is the governing law of any such contract, that arbitration is an unacceptable method of contract resolution as a general rule, and that a government agency may not agree to subject itself to the jurisdiction of a foreign court.⁵¹³ With reference to other Middle Eastern countries as well, one practitioner advises that "[a]rbitration can be a time-consuming process and resolution of some disputes in the Middle East has been known to last for a number of years."⁵¹⁴ The primary arbitration bodies in Saudi Arabia for dealing with government contracts are the Council of Disputes and, increasingly, the Grievance Board.⁵¹⁵ In contractual dispute resolutions, there is some evidence that the Saudis are willing to look to the Uniform Commercial Code to determine the rights a purchaser would have in the United States.⁵¹⁶

510. Hoyt, *supra* note 262, at 13.

511. *Id.* For useful information concerning government construction contracts in Saudi Arabia, the advisability of selecting a Saudi sponsor, and the effect of arbitration clauses in both government and nongovernment contracts, see generally Abrahams, *supra* note 259. With regard to the two types of contracts, Abrahams notes:

It is in the government sector that the greatest constraint on free negotiation exists. The contractual concepts recognized in administrative contracts also apply to private contracts, but, in the private sphere, the contractor's possibility of obtaining a favourable contract is less circumscribed by regulations than by his success at the negotiating table.

Id. at 76-77.

512. See Burgoyne, *supra* note 275, at 140.

513. *Id.* For an analysis of whether government-organized companies engaging in commercial activities, such as Petromin, are subject to the 1963 decision, see *id.* at 140-41.

514. Hoyt, *supra* note 262, at 14.

515. *Id.* at 13. The author characterizes the Grievance Board as "more of an administrative proceeding with each side presenting its case for decision by the Saudis." *Id.* at 13-14.

516. Mar. 9, 1982, telephone interview, *supra* note 505. At least one commentator has cited instances of decisions favoring the foreign party. Nazer, *supra* note 137, at 146 (question and answer session; response by Nazer).

D. Knowing the Law

Companies conducting business in Saudi Arabia are subject to few regulations by United States standards but strict adherence to the letter of the law is crucial. For this reason, practitioners retained by United States corporations and individuals who wish to engage in commercial activities in the Kingdom are well advised, regardless of their own expertise in Saudi law, to seek the assistance of Saudi counsel and to do so as early as possible. Different customs and business habits, the language problem, and unfamiliarity with the intricacies of the law combine to make this a particularly advantageous approach to a problem of any magnitude.⁵¹⁷ This step also will avoid problems with interpreting the different translations of each law.⁵¹⁸ The Saudis have neither bar associations nor codes of professional responsibility to impose or enforce standards of competence, however, so an element of risk is inevitable in this approach. In addition, Saudi attorneys generally charge extremely high rates.⁵¹⁹ United States attorneys usually consult with Saudi attorneys and then charge their own billing rates.⁵²⁰

It is critical that practitioners familiarize themselves at least⁵²¹

517. Hoyt, *supra* note 262, at 9. For an excellent discussion of the qualities to look for in a Saudi attorney, how to find competent local counsel, and problems that may arise in this connection, see *id.* at 9-11.

518. Mustafa, *supra* note 371, at 130. Sources in this country, such as the United States Department of Commerce and the American-Arab Association for Commerce and Industry, are available to give helpful advice as well. See Wall St. J., Mar. 22, 1982, at 25, col. 1.

519. Mustafa, *supra* note 371, at 130. Saudi attorneys, however, are obliged to conform to standards of conduct defined by the Ministry of Commerce. *Id.*

520. Mar. 9, 1982 telephone interview, *supra* note 505.

521. Equally important but outside the scope of this Note are the Regulations of Tenders and Auctions Resolution, Royal Decree No. M/6, dated 24 Safar 1386 A.H. (June 13, 1966) (Saudi Arabia); The Procurement of Government Purchases and Execution of Its Projects and Works Law, Royal Decree No. M/14, dated 7.4.1397 A.H. (Saudi Arabia); the Labour Law, Decision of the Council of Ministers, Order No. 745, dated 23/24 Sha'ban 1389 (Nov. 3-4, 1969) (Saudi Arabia); Royal Decree No. M/21, dated 6/9/1389 A.H. (Nov. 15, 1969) (Saudi Arabia); the various social insurance laws, see *supra* notes 470-71; and the various tax laws. Practitioners and businessmen traveling to Saudi Arabia should also be acquainted with the various Saudi laws which may affect them. See M. PENDLETON, D. DAVIES, & F. SNODGRASS, THE GREEN BOOK 111 (1978) [hereinafter cited as M. PENDLETON]. This orientation book for United States citizens moving to Saudi Arabia advises: "It is highly important to be informed of Saudi laws and regulations to which you are subject and to respect them. If

with the Company Law, Commercial Register Law, the Commercial Agencies Law, the New Regulations on Agents' Commissions, and the Investment of Foreign Capital Law. Some foreign businesses have managed to function in the Kingdom despite their failure to comply strictly with the regulations, but because of the potentially devastating legal consequences it is not advisable to follow their example.⁵²²

E. Personal Relationships and Honor

Maintaining a good relationship with the Saudis is critical in determining the outcome of a client's business activities in the Kingdom. As noted, the chances of success will be increased by affiliation with a Saudi agent or partner. One United States businessman with considerable experience in Saudi Arabia advises:

Since the government has become the main buyer of goods and services . . . , understanding its complex tender-bid-contract system . . . generally requires suppliers either to be resident in the country or to have a Saudi agent Close and continuing contacts with senior officials, maintained through frequent visits to relevant ministries, are essential to (a) receive advance notice of prospective contracts, (b) ensure that one is placed on the bidders' list, and (c) explain proposed concepts and techniques that may be difficult for the client to understand.

Within the private sector, too, a much more personal and localized approach is necessary than we demand in the West Just as local representation is essential to marketing, local know-how is needed to cope with innumerable administrative and logistical problems The difficulties of securing access to people who can provide such know-how should not be underestimated More fundamentally, an established network of friendships and business acquaintances is vital to commercial success

[E]ven more important than introductions to decision makers is the role of local partners in evaluating whom one needs to know and in suggesting the best approach to an effective business relationship.⁵²³

charged with a violation you should notify immediately your company sponsor and your country's diplomatic representative who can give you advice and assistance." *Id.*

522. Mustafa, *supra* note 371, at 128.

523. Apgar, *Succeeding in Saudi Arabia*, HARV. BUS. REV., Jan.-Feb. 1977, at 24. This short but extremely informative article provides excellent advice on how to conduct business in Saudi Arabia.

The high value placed on personal honor by the Saudis and the warmth of the people in general, frequently transform business relationships into personal friendships.⁵²⁴ This may subtly alter the nature of the business transaction, so that each man's word is considered as legally reliable as a contract provision.⁵²⁵ Although foreigners are strongly advised to formalize any agreement with a contract, it is rare that "a Saudi businessman [will go] . . . back on his word once given, regardless of the legal arrangements."⁵²⁶

By the very nature of the phenomenon, it is impossible to discover the degree of corruption in Saudi official circles. Reports from Americans on the extent of bribery vary from complete denial of its existence⁵²⁷ to a cautious observation that "it is not necessarily morally reprehensible to accept a payment for service rendered, even in cases which to a Westerner would verge on bribery or graft."⁵²⁸ Everyone agrees, however, that because of the possible consequences, bribery should not be attempted.

The common cry of exasperated Westerners dealing with the Saudis is "Hurry up and wait."⁵²⁹ It is not at all unusual for Saudis to miss appointments altogether or to postpone them literally for weeks.⁵³⁰ Thus, the American traveling to Saudi Arabia must have the flexibility to allot himself several times the number of days or weeks he would normally expect to spend on the project. One should be wary of expressing frustration over postponements, however, for this may alienate the Saudis, who tend to

524. *Id.* at 28.

525. *See, e.g., id.*; *see also* Mustafa, *supra* note 371, at 129.

526. D. LONG, *supra* note 478, at 54.

527. Mar. 9, 1982 telephone interview, *supra* note 505.

528. D. LONG, *supra* note 478, at 54. The author goes on to say:

[A]lthough no payment is expected if no service is rendered, there is no restriction against asking for one. In effect, it is up to the other party to decide whether a request should be met. Moreover this principle has tended to weaken the concept of conflict of interest as it is known in the West. Saudi political figures, therefore, are commonly investors in Saudi commercial enterprises

Id. at 54-55.

529. Telephone interview (Apr. 5, 1982) [hereinafter cited as Apr. 5, 1982 telephone interview]. The interviewee is a United States businessman with considerable business experience in the Middle East.

530. Letter, *supra* note 492. One United States businessman was flown to one continent to meet a high Saudi official; after several days of being told that the official was unavailable, he was asked to fly to another continent, where the meeting was finally held later in the week. *Id.*

view impatience as "a sign of bad manners or a lack of self-confidence."⁵³¹ Patience may be rewarded with a particularly valuable deal.⁵³²

F. Social Aspects

Any foreigner entering Saudi Arabia should familiarize himself with Islam so that he will be able to place his experiences in a recognizable framework, and be able to avoid committing embarrassing social *faux pas*. The better known taboos, such as alcohol, are of course to be respected at risk of severe punishment. There are many cultural taboos, however, with which the foreigner may not be acquainted. For example, one should not inquire about a Saudi's family, except perhaps to ask about the family's health, nor should one ask at all about the female members of the family.⁵³³ Religion and politics also are sensitive topics which one should never broach unless invited to do so.⁵³⁴ During the holy month of *Ramadān*, which falls each year at a different time in the Gregorian calendar, Arabs refrain from eating, drinking, and smoking during the daylight hours. During that time it is impolite to either engage in or talk about those activities in the presence of an Arab.⁵³⁵ Because working hours are extremely restricted during the month of *Ramadān*, it is advisable to avoid conducting business during that month. The importance of observing the social customs cannot be overestimated, as compliance with them literally may determine the success of business negotiations.⁵³⁶

Increased exposure to Western society and social mores is resulting in less strict adherence to Muslim religious requirements.

531. ARAMCO HANDBOOK 266 (1968) [hereinafter cited as ARAMCO].

532. Letter, *supra* note 492.

533. M. PENDLETON, *supra* note 521, at 111-12.

534. ARAMCO, *supra* note 531, at 266.

535. M. PENDLETON, *supra* note 521, at 113. Above all, one should not commiserate with an Arab over these deprivations, which he considers to be a privilege. *Id.*

536. One interesting example of such a custom is the perception that showing the bottom of one's shoes (such as may occur when one crosses one's legs) is an insult. In Saudi Arabia little boys express disdain for each other by revealing the bottoms of their shoes. Letter, *supra* note 511. Two excellent sources for discovering important Saudi social customs are M. PENDLETON, *supra* note 521, which contains advice for United States citizens moving to Saudi Arabia, and ARAMCO, *supra* note 531. In addition, W. PATAI, *THE ARAB MIND* (1973) is an interesting and informative book on Arab society and traditions.

For instance, during *Ramadān* many of the wealthier (and less devout) Saudis travel abroad where they feel less constrained to engage in the requisite fast.⁵³⁷ In addition, women may be more visible in the more enlightened homes.⁵³⁸ One should never assume, however, that the Saudi with whom one is dealing has anything but the greatest respect for traditional Arab customs and mores.

VII. CONCLUSION

It is hoped that the reader will conclude that Saudi law is not, in fact, hopelessly murky or incomprehensible. Obviously, it embodies recognizable rules, principles, and procedures. The principles on which it is based are deeply rooted in the traditions of both Islam and primitive Arab society; the direction in which it is turning, however, indicates a willing trend toward recognition of the exigencies of modern commercial and legal realities. As Saudi Arabia's remarkable economic and social development unfolds at breakneck speed, the Kingdom's increased contacts with the Western world are resulting in an entirely new body of Saudi law which stimulates foreign investment while encouraging Saudi participation in new business ventures. The effect of these events is an unprecedented melding of past and present, faith and secularism, tradition and practicality. This confluence of customary and modern law preserves and promotes the best of both, with a respect for the integrity of the law that may be enviable from the point of view of many Western societies.

Gali Hagel

537. Letter, *supra* note 492.

538. *Id.*

