

LEGAL ADVISORS

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Introduction to the Saudi Legal and Court Systems

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I. Legal System

Shariah, or traditional Islamic Law, forms the basis of the Saudi legal system. The *Shariah* is derived from the Holy Quran and the Sunna (words and deeds) of the Prophet Mohammed, as interpreted by influential scholars of Islamic jurisprudence. The *Shariah* consists of precepts that are often expressed as general principles. There are various schools of Islamic Law that interpret such precepts. The Hanbali school of Islamic jurisprudence is the most influential in Saudi Arabia, and within the Hanbali school there are majority and minority views on various issues, any of which may be applied in any particular case. In addition, we are aware of certain instances in which precepts of other schools of Islamic jurisprudence have been applied by the courts where such application was deemed by such courts to be appropriate in the interests of justice and fairness with respect to the particular matter in question. Moreover, the relevant views may be expressed in general terms, which may leave a court or other adjudicatory body like an arbitral panel with a good deal of discretion as to how to apply them to specific circumstances. *Shariah* is to a large extent an adaptable system of law, as evidenced by the fact that it has covered transactions from ancient times through the present

The Saudi Government supplements the *Shariah* through the issuance of statutes, regulations, decrees and circulars and the adoption of policy positions, all of which can be, and frequently are, changed from time to time to adapt to changed circumstances or to take into account other considerations. Examples of these enactments include the Companies Law, the Foreign Investment Law, the Capital Market Law, and the Labor Law, to name only a few examples. However, there is no civil or commercial code or other comprehensive statement of basic contractual principles. These matters are left to *Shariah*. Statutory enactments are subject to interpretation by the courts and by regulatory agencies, on the basis of *Shariah* and sometimes on the basis of internal circulars and policy statements that are not made available to the public.

Additionally, Saudi courts and other adjudicatory authorities do not, in general, report their decisions and previous decisions of the courts and other adjudicatory authorities of Saudi Arabia are not considered to establish a binding precedent for the decision of later cases. The Saudi system of law, while seemingly restrictive in many respects from a foreigner's viewpoint, has nevertheless permitted a banking system to grow and flourish, local business to develop to the point where fairly complex commercial transactions are now daily events and foreign investment in a number of key sectors to grow steadily over the course of the last two decades.

The foregoing factors make for a fairly flexible system, but it is important to keep in mind, however, that such flexibility, combined with the absence of any established system of legal precedent and the great degree of discretion government officials can exercise in construing and applying regulations, oftentimes makes it rather difficult to apply clearly established rules to a particular situation or to predict an outcome with the degree of certainty which one might expect (although not always with justification) under other legal systems.

There are various points on which *Shariah* differs from Western legal systems. The following are illustrative:

1. Interest: One of the more fundamental *Shariah* commercial principles as applied in the Kingdom is that obligations to pay interest are not enforceable. As such, Saudi courts would not uphold a contractual term that would result in the payment of interest or any obligation of a similar nature such as a late payment penalty.

2. **Liability Caps and Exclusions:** Contractual limitations on or exclusions of liability generally may not be enforceable under *Shariah*. Such limitations are considered to be in the nature of waivers of rights that have not yet accrued. Such waivers may not be enforced under *Shariah*, on the basis that the waiver is insufficiently informed unless the waiving party has a very clear idea of the specific nature and value of the right he is waiving.
3. **Scope of Liability for Damages:** Although liability limitations may not be enforceable, the range of damages recoverable for breach of contract or tort is more limited than in many other legal systems. In general, only damages and losses that are actual, quantifiable and direct are compensable. Indirect or consequential damages, such as loss of anticipated profits are not ordinarily recoverable under *Shariah*. While liquidated damages clauses may be enforced, a court would have discretion not to do so if it were convinced that the liquidated damages were substantially out of line with the direct damages likely to have been suffered by the beneficiary of the clause.
4. **Personal Injury.** Compensation for wrongful death is ordinarily limited to pre-set amounts of up to US\$27,000 per person and damages for personal injury are subject to similar limitations in most cases.
5. **Intellectual Property.** Although trade secrets and other intellectual property rights are protected by statute, the enforcement of contractual protections of intellectual property rights and confidential information involves certain practical challenges. In particular: 1) there is no system for mandatory discovery of evidence enforced by Saudi courts and therefore, a plaintiff must rely only on his own ability to produce evidence to prove his claim including matters related to damages and breach of contractual terms; 2) it can be difficult to obtain effective injunctive relief from Saudi courts, which makes it difficult to prevent continued breaches; and 3) the types of damages typically suffered as a result of infringement of intellectual property rights tend to be indirect or consequential in nature. As discussed above, such damages are not ordinarily recoverable under *Shariah*. However, additional remedies (such as seizure) may be available by statute in the case of copyrighted materials and registered patents and trademarks.

II. The Court System

The court system consists of two main branches, Shariah courts and the Board of Grievances. These are complemented by several special adjudicative committees which have been established by ministerial or royal decrees.

1. General (“Shariah”) Courts:

Shariah courts are the courts of general jurisdiction and deal predominately with criminal, civil and family matters.

(a) Division:

The Shariah courts can be divided generally into four categories: (i) courts having jurisdiction in civil cases involving small claims where the amount in dispute does not exceed SR 8,000; (ii) courts of first instance presided over by one judge, having jurisdiction over all civil and criminal cases; and (iii) appellate courts consisting of three judges. These appellate courts hear appeals from judgments rendered by courts of first instance; (iv) The Supreme Judicial Council hears petitions from appellate court judgments, but only on legal rather than factual grounds. The Supreme Judicial Council only reviews cases on legal grounds if one of the two parties rejects the decision of the appeal court. Facts regarding the case are not discussed by the Council. The Council has two committees: (i) a permanent committee which has jurisdiction to review all capital punishments and issues referred by His Majesty, the King or the Ministry of Justice; and (ii) a general committee that has jurisdiction to review appellate judgments that constitute a deviation from long established rulings. The Council also has supervisory powers over the judiciary and acts as a disciplinary board on actions brought against judges.

(b) Parties:

Parties to an action are the plaintiff and defendant. Either party may bring in a third party, such as a guarantor.

(c) Trial Procedure:

Legal proceedings depend mainly on evidence to support the claim under consideration. If the plaintiff cannot produce supporting evidence for the claim he may ask the defendant to take an oath to establish the contrary position. The defendant has the right to take the oath, or to decline it. The court gives judgment after considering all the evidence, but the plaintiff may waive his claim at any time before the judgment is rendered. The execution of a judgment rendered by a Shariah court is done through the police department, following referral of the judgment to the Governor’s office of the relevant locality.

(d) Appeal:

Appeals are available only for judgments subject to appeal as discussed above. However, a party aggrieved by the rulings of the highest court may, file an appeal before His Majesty, the King to review the matter.

2. The Board of Grievances:

(a) General:

The Board of Grievances was first established as an independent tribunal pursuant to Royal Decree No.7/138759 dated 1374H. Its Chairman was given, and still holds today, the rank of Minister. In 1982, the present Board of Grievances Regulations (the “Regulations”) was promulgated pursuant to Royal Decree M/51 dated 17/7/1402H and superseded the prior regulations.

The Regulations establish both the jurisdiction and the structure of the Board. Rules of Procedure for administrative, criminal and disciplinary proceedings (the “Rules”) were promulgated under Council of Ministers Decision No. 190 dated 16/11/1409H.

(b) Jurisdiction:

The Regulations grant the Board broad general jurisdiction over all disputes to which the Government is a party, whether such disputes arise in connection with an administrative ruling, a Government contract, or other administrative acts and various other matters. The jurisdiction of the Board includes:

- (i) Suits brought by governmental and independent public legal entities, officials, and employees, or their heirs and legal successors, with respect to rights arising under the Civil Service Regulations and the Retirement Regulations;
- (ii) Challenges to administrative decisions based on: lack of jurisdiction, formal defects, error in the application or interpretation of the administrative decision or abuse of rights;
- (iii) Claims for compensation arising under contracts to which the Government or one of its agencies is a party;
- (iv) Disputes relating to contracts to which the Government or one of its agencies is a party;
- (v) Disciplinary cases brought by the Supervision and Investigation Authority;
- (vi) Bribery and forgery crimes which are investigated, as well as other regulatory criminal offences and violations by order of the President of the Council of Ministers;
- (vii) Enforcement of foreign judgments;
- (viii) Any and all other cases conveyed to it pursuant to ad hoc regulations; and
- (ix) General jurisdiction to hear matters referred to it by the Council of Ministers.

The Council of Ministers, as of 1 January 1988, conferred upon the Board jurisdiction over commercial disputes involving private sector parties. Such disputes previously fell within the jurisdiction of the Committee for the

Settlement of Commercial Disputes, which was abolished once jurisdiction was transferred to the Board.

If the Board decides that a dispute submitted to it falls outside its jurisdiction, the Board refers the matter to the Shariah courts.

(c) Structure:

The Board is composed of a Chairman, a Vice-Chairman, an Assistant Vice-Chairman, judges trained in commercial law, and the Shariah and administrative staff. It is within the Chairman's discretion to establish as many tribunals as he thinks necessary and to determine the composition and jurisdiction of a tribunal. The Chairman may review the Board's needs each year and rearrange its structure.

At the present time, there are four tribunals in each of the cities of Riyadh, Jeddah, Al-Khobar, and Abha: one handling criminal cases related to public funds and certain other crimes, one handling administrative cases, one handling disciplinary cases, and one handling commercial disputes involving private parties. There is also a tribunal in Abha handling criminal cases.

(d) Procedures:

The rules of the Board of Grievances establish procedures for the administrative, criminal and disciplinary tribunals of the Board which procedures are generally followed, as applicable, in relation to commercial disputes between private parties.

The losing party may appeal a Board decision within 30 days of receiving notice of the decision. If no appeal is filed within this period, the decision becomes final and subject to enforcement.

Appeals are heard by \ special "examination tribunals" appointed by the Chairman of the Board of Grievances, which usually consist of three members. The examination tribunal may (a) uphold the decision originally issued, which is then enforceable, or (b) overturn the decision and issue its own judgment, or (c) refer the case back with comments to the tribunal that issued the original decision. In the latter case, the lower tribunal may decide to modify its decision or to insist on its original decision, in which event the case goes back to the examination tribunal for a final ruling.

Once a final decision is reached in a case, the Board will institute proceedings to enforce its decision.

The Board's decisions constitute final and binding judgments, and decisions issued by the Board need not be approved by any higher authority and are sent to the relevant Ministry or department for automatic and immediate enforcement. In the case of judgments issued against private parties, the judgment is supposed to be enforced by special enforcement tribunals established pursuant to the Enforcement Law issued under Royal Decree No. M/53 dated 13/08/1433H (corresponding to 03/07/2012G). .

In theory, any decision of the Board may be appealed directly to His Majesty, the King, but this is rarely done.

3. Special Committees:

Besides the courts, there are various special committees with limited adjudicatory or quasi adjudicatory jurisdiction. The most important are the following:

- (a) The Committee for Negotiable Instruments;
- (b) The Commercial Agency Commission;
- (c) The Committee for Combating Commercial Fraud;
- (d) The Committee for Combating Cover-Up activities;
- (e) The Customs Committee;
- (f) The Committee for the Resolution of Securities Disputes (“CRSD”);
- (g) The Committee for the Settlement of Banking Disputes (the “SAMA Committee”), and
- (h) The Labor Disputes Committees.

The SAMA Committee is a special committee which was established in 1987 at the Saudi Arabian Monetary Agency to look into banking disputes between banks and their customers and to mediate a settlement between the parties. The Royal Order establishing the SAMA Committee provides that the Shariah courts and the Board of Grievances do not have jurisdiction over the claims brought by or against the banks. Although the SAMA Committee is not strictly speaking a court it is able to issue enforceable judgments.

4. General

(a) Depositions

Saudi Arabian courts recognize testimony as evidentiary for both civil and commercial purposes. Testimony is taken before the judge at the request of the parties concerned.

Any party to an action may file a document attesting certain facts ascribed to the person testifying to them. Documents are admissible provided the proof of execution is made. The court may require that testimony be authenticated by a Notary Public or Chamber of Commerce which will certify that the signatory of the document has appeared before the competent official and signed it. Official documents must be executed in accordance with the procedural formalities and signed by a competent official. Foreign documents are admissible when attested by a Saudi consulate or Embassy in that country and the Saudi Ministry of Foreign Affairs. If the documents appear suspect on its face the court may return the copy for authentication to the issuing source.

Powers of attorney must be certified by the Notary under the Ministry of Justice. Testimony of expert witnesses is admissible to prove technical points being asserted.

(b) Writs of Execution

Only final judgments are subject to writs of execution. However, judgments delivered by courts of first instance may be executed in commercial cases if the case in question is supported by uncontested documents. In some commercial matters judgments may be executed under bond. The judgment and execution order is presented to the regional Emirate, which issues instructions to relevant authorities, usually the police, in the relevant jurisdiction to enforce the judgments.

Writs of execution may be affected against the person on all his property, personal or real, as well as income of any kind, with a few limitations pertaining to wages and households.

(c) Attachment

The Commercial Court Regulations (which date back to 1930) outline procedures for implementing provisional attachments. A court of competent jurisdiction would usually handle such attachments, but in urgent cases the Minister of Interior may issue an attachment order. In order to apply for a provisional attachment, the following criteria must be satisfied:

- (i) The amount claimed must be due;
- (ii) The amount due must be known or at least capable of being accurately estimated by the court or Ministry of Interior;
- (iii) Payment of the claimed amount must not be subject to any condition which is not yet fulfilled;
- (iv) The defendant must owe the debt directly to the claimant;
- (v) The claimant must produce sufficient documentary evidence of the underlying debt and the amount claimed; and
- (vi) A foreign person or entity may be a claimant without the need for any special governmental consent.

The claimant may only seek to attach assets sufficient to cover the amount claimed, and must submit a bank guarantee or contractual guarantee from an acceptable third party to cover the potential losses which might be incurred by the defendant if its assets are attached, but the claim is subsequently deemed to be without merit. If an attachment order is issued the claimant must file a case within eight days if the attachment order is issued by a court and 20 days if the Minister of Interior issues the order.

In addition, a defendant may successfully challenge an attachment order if he can show that he has sufficient assets within the Kingdom to cover the claim and there is no significant risk of its imminent insolvency or if it provides an alternative satisfactory form of security.

An attachment may be enforced on any property belonging to the debtor both personal and corporate subject to certain exceptions, including those set forth below:

- (i) Where the debtor's property is divisible his creditor may only attach such part of the property as is sufficient to repay his claim and its accessory costs.
- (ii) Where the debtor has passed away and a Shariah court has either attached his estate or begun to verify it, such estate may not be attached and the creditor must then refer to the Shariah court and submit his claim.
- (iii) The following may not be attached:
 - Items essential for the sustenance of the debtor, as well as household items;
 - The tools of the debtor's trade; and
 - The dwelling-house in which the debtor and his family reside.

Upon attachment, the court writes to the Governor requesting that the matter be referred to the police. Attachment is effected by placing the articles to be attached under the seal of the court and the officer involved shall afterwards submit to the court a report on the process. After attachment, the court summons both parties to trial and examines the claimant's demands. If it ascertains the liability of the debtor it enters a judgment confirming the attachment and maintaining it until the creditor collects the amount due to him and its relative costs. However, if the creditor fails to prove his claim, the court will decide to lift the attachment.

The owner of the attached property may keep his control over it, but he then holds the property as a trustee for his creditor. Although there are no specific provisions dealing with the sale of attached assets, the ability to do so does appear to be implied, but only with the prior permission of the court.

Foreign judgments, if enforceable in Saudi Arabia, may serve as the basis for attachment.

(d) Garnishment

The Commercial Court has the jurisdiction to issue orders for the attachment of the assets of the debtor whether such property is held by the latter or by a third party.

(e) Enforcement of Foreign Judgments

Saudi Arabia is not a party to any treaties for the reciprocal enforcement of judgments apart from one among the Gulf Cooperation Council States and an old Arab League Treaty which has only six signatories. Past attempts to enforce foreign judgments from countries with which Saudi Arabia does not have a treaty have, so far as we are aware, generally been unsuccessful. That said, a US judgment was enforced in the Kingdom in 2010 by the Board of Grievances (which had jurisdiction over such matters prior to the enactment of the Enforcement Law), the first instance of which we are aware in which a foreign judgment from a state not having a treaty with the Kingdom was enforced. Since then, however, the Enforcement Law has been issued, which regulates enforcement procedures generally, including those involving

foreign judgments. The Enforcement Law sets out various requirements for foreign judgments to be enforced in Saudi Arabia, including the following:

- the courts of the foreign country would grant reciprocal treatment to a Saudi judgment;
- the courts of the Kingdom of Saudi Arabia are not competent to hear the litigation (as opposed to the issuing foreign court) based on international guidelines for determining competent court jurisdiction;
- the judgment does not relate to a matter for which the courts of the Kingdom of Saudi Arabia have exclusive jurisdiction (e.g. matters pertaining to real estate located in the Kingdom);
- the parties were properly represented and permitted to defend themselves;
- the judgment or order is final from the issuing court;
- the judgment or order does not conflict with a judgment or order from another judicial body within the Kingdom of Saudi Arabia in relation to the same subject and there are no existing proceedings in the Kingdom of Saudi Arabia which commenced prior to the foreign proceedings; and
- the judgment or order does not contradict the provisions of public law (including Shariah) in the Kingdom of Saudi Arabia.

Historically the first of these requirements has been the most difficult to establish. In the US case referred to above, the Board reached its own decision regarding reciprocity. In contrast, the Enforcement Law contemplates that reciprocity will be established based on a written confirmation from the Ministry of Justice. There is to our knowledge no experience available as yet as to the willingness of the Ministry of Justice to grant such confirmation in respect of specific countries.

The extent of the review to determine the applicability of the last of the requirements is particularly difficult to predict. It may be limited to obvious matters such as stripping out any interest element that forms a part of the foreign judgment or it may involve a broader inquiry. For example, it is possible that indirect or consequential damages included in the foreign judgment that would not be awarded under Shariah might not be enforced.

Saudi Arabia is a party to the New York Convention and is thus bound to enforce foreign arbitration awards rendered in signatory states. The Enforcement Law contemplates the same procedures for enforcing foreign awards as foreign judgments. Presumably, however, proof of reciprocity should not be an issue in case of an arbitration award issued in another signatory state of the New York Convention.

III. Judicial Reform Process

A Royal Decree was issued on 2 April 2005 endorsing a broad reaching judicial reform plan proposed by the Ministerial Committee for Administrative Reforms. Under this plan the commercial section of the Board of Grievances and certain specialized tribunals such as the labor courts are to be eliminated and their jurisdiction (and personnel) transferred to new commercial and labor courts operating under the auspices of the Ministry of Justice and a new Supreme Court, which will be the highest judicial body in the country.

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