

# Arab Commercial Laws—Into the Future

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Abdel-Razzaq Al-Sanhouri had reason to be pleased. He had just traveled to The Hague to participate in what was billed as the First International Conference for Comparative Law. After deliberations, the participants decided to give greater attention to Islamic law in their future comparative studies. Two broad themes seem reflected in that decision and, perhaps more importantly, in Dr. Al-Sanhouri's own philosophy: revitalization of Islamic law and globalization of our societies.<sup>1</sup>

Those two themes are constant features of the Arab legal landscape today—which is remarkable given that Dr. Al-Sanhouri's trip to The Hague occurred almost seventy years ago, in 1932. In retrospect, that conference was a defining moment for Western awareness of law in the Arab world. As international trade has expanded in recent decades, the twin themes of revitalization and globalization have become even more relevant in assessing Arab commercial laws.

## I. Revitalization of Islamic Law

As a group, lawyers may not be considered dynamic public speakers, but experience suggests that the number of glazed eyes and drooping heads at a business conference increases exponentially when a speech turns to matters of Islamic law. There seems to be a myth that Islamic law just does not apply to modern commercial transactions, often accompanied by a grudging recognition that payment of interest runs afoul of some relatively obscure Islamic rule. Although lawyers may not always be inspiring speakers, the fact remains that Islamic law is relevant to modern-day business throughout the Arab Middle East, and its importance is increasing.

### A. MARRIAGE OF LAWS

In some countries, Islamic law principles dominate the country's legal system—as is the case in Saudi Arabia, the region's commercial powerhouse. There is no Saudi Arabian "law"

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1. See generally Enid Hill, *Al-Sanhouri and Islamic Law*, 10 *CAIRO PAPERS IN SOC. SCI.* 42, 86–87 (1987); FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT* 118 (1968), (referring to 2 *AL-QANOON WA AL-IQTISAAD* 289–312 (1932)).

other than Islamic law; supplemental Saudi laws are formally called regulations. Although applicable, with the binding force of law, to various aspects of modern life, these regulations are intended to remain consistent with, and subservient to, Islamic principles. Under Islamic law principles, the ruler is acknowledged to have authority to enact regulations for the best interests and welfare of the people.

For example, Saudi Arabian Royal Decree No. A/90 (1992) codifies the "Basic Regulation" for government in the Kingdom. Article 44 confirms that the government is comprised of three branches: the judicial, the executive, and the regulatory authorities, and that "[t]hese authorities shall cooperate in carrying out their functions, in accordance with the provisions of this and other regulations; the King is the source of these authorities."<sup>2</sup>

In many other Arab countries, the Islamic law influence is more subtle, and often best revealed in civil codes.<sup>3</sup> These civil codes contain the basic building blocks for commercial law, addressing a wide range of contract rules: the elements and formation of contract (including offer and acceptance); contractual defects such as duress, mistake, and misrepresentation; interpretive rules for contracts; discharge, excuse (force majeure and changed circumstances), and breach; and contractual damages.

Dr. Al-Sanhouri, who was Egypt's foremost modern jurist, played a central role in drafting the 1948 Egyptian Civil Code, which directly influenced the development of similar codes in Syria, Iraq, Libya, Kuwait, and Qatar. To some observers, the most attractive feature of these codes is the blending of continental civil law rules with Islamic law principles, indigenous customs, and commercial practice, which Dr. Al-Sanhouri thought would best conform with local culture and society.<sup>4</sup>

Commercial lawyers generally prefer evolution to revolution, and consequently should be comforted by the incremental manner in which Islamic law has continued to be revitalized in the Arab world—notably in the civil codes of Jordan (1976), the United Arab Emirates (1985), and Yemen (1992).<sup>5</sup> Kuwait has also recently revised a number of provisions in its existing civil code to more closely reflect specific Islamic law rules.<sup>6</sup> This type of fine-tuning is likely to become more common in the future throughout the Arab world, both in civil codes and in other laws.

## B. IRRECONCILABLE DIFFERENCES?

The myth of Islamic law's irrelevance has a sister myth that states Islamic law is inherently unsuitable for modern commercial transactions. Over the centuries, Islamic law has generally provided a stable foundation for nearly all types of business transactions. The exceptions are a few things that are absolutely repugnant to Islamic law, notably *riba* (types of

2. Although Islamic law is the paramount source of "law" in Saudi Arabia, many aspects of modern commercial activity in Saudi Arabia are more frequently subject to the provisions of government regulations. As for the "legality of legislation emanating from the sovereign," see SOBHI MAHMASSANI, *THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM* 126-27 (Farhat J. Ziadeh trans., 1961).

3. See generally Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 INT'L & COMP. L. Q. 761 (1989).

4. For example, in the early 1970s, Dr. Al-Sanhouri "was asked to go to the UAE to draft their federal legislation but ill health prevented him from traveling to observe local circumstances, something he considered necessary for the drafting of legislation." Hill, *supra* note 1, at 106.

5. Jordanian Law No. 43 (1976); UAE Federal Law No. 5 (1985), as amended by Law No. 1 (1987); and Yemeni Law No. 19 (1992).

6. Kuwaiti Law No. 15 (1996), amending Law No. 67 (1980).

unearned advantage, a common example of which is interest on monies lent), and *gharar* (types of risk or uncertainty, such as impermissible contracts of insurance).

In Saudi Arabia, for example, the Supreme Council of the Senior Ulama (a government body of religious scholars) issued Decision Number 51 over twenty-three years ago, in March 1977, that cooperative/mutual insurance is a form of donation contract and, because cooperative insurance transactions do not generate "profits," the Senior Ulama considered such insurance to be acceptable under Islamic law. In that context, in the summer of 1999, Saudi Arabian Council of Ministers Resolution Number 71 established the Cooperative Health Insurance Regulation, requiring employers to arrange private medical insurance for their foreign employees and their dependents. Resolution Number 71 requires insurers providing coverage under this medical scheme to be Saudi-registered cooperative insurance companies.<sup>7</sup>

Of course, the Islamic precepts of *riba* and *gharar* are not easily swept under the carpet. Most significantly, in the face of a world banking system essentially based on interest, and a divine immutable Islamic law rule against *riba*, the potential for impasse is obvious. Elsewhere in the Islamic world, for example, Pakistani laws seem destined for significant change following a Supreme Court ruling in December 1999 that interest-based banking is contrary to Islamic law and, consequently, that provisions relating to interest in twenty-two Pakistani statutes are void.<sup>8</sup>

Twenty years ago, Professor William Ballantyne (School of Oriental and African Studies, London) described this impasse as the classical situation of an irresistible force meeting an irremovable object:

The problem is that the Arabs have, to greater or less degree, in wishing to adopt the existing international world of commerce, come face to face with the classic situation: an irresistible force against an irremovable object. As is not uncommon in these circumstances (not by any means only in the Arab world) the question has been begged on all sides. It will be, to say the least, interesting to see for how long and to what extent this apparent anomaly can continue.<sup>9</sup>

In most cases, practical minds have developed expedients to overcome the difficulties. Despite the prohibition against *riba*, most Arab legal systems draw a distinction that permits interest charges in commercial (but not civil) transactions, at least under specified ceilings.<sup>10</sup> Despite the prohibition against *gharar*, which Abu Dhabi courts have cited in nullifying derivatives contracts,<sup>11</sup> the Abu Dhabi government is establishing the Saadiyat

7. This information was contributed by Andreas Haberbeck, *The Alliance of Ghazzawi and Al-Mehdar* (Jeddah). See generally NABIL A. SALEH, *UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW* (1986).

8. See, e.g., *Islamic Banking Ruling Sparks Concerns*, MIDDLE E. ECON. DIG., Jan. 14, 2000, at 21; MONTHLY NEWSLETTER (Dec. 1999). Among recent examples in the Arab world, in September 1999, the Egyptian newspaper Al-Akhbar published an interview with Sheikh Mohamed Sayed Tantawi (head of Al-Azhar, the renowned school of Islamic learning in Cairo), in which he was reported to have said that personal interest-bearing loans, if not used for investment in businesses, were prohibited as *riba*. The statement provoked some strong debate, coming at a time in which the Egyptian parliament was considering enactment of a much-needed mortgage law. See, e.g., *Editor's Note*, BUS. TODAY EGYPT, Nov. 1999, at 7.

9. W. M. BALLANTYNE, *LEGAL DEVELOPMENT IN ARABIA* 121 (1980).

10. See, e.g., Habachy, *Commentary on the Decision of the Supreme Court of Egypt, given on May 4, 1985 Concerning the Legitimacy of Interest and the Constitutionality of Article 226 of the New Egyptian Civil Code of 1948*, ARAB LAW Q. 239 (1986).

11. See, e.g., RICHARD PRICE & ESSAN AL TAMIMI, *UNITED ARAB EMIRATES COURT OF CASSATION JUDGMENTS 1989-1997* 23 (1998); Amjud Ali Khan & Charles S. Laubach, *Currency Futures Trading Held Contrary to Shari'a*, MIDDLE E. EXECUTIVE REP., July 1995, at 9.

Island Free Zone as a center for financial futures and options trading, albeit “off-shore” of that emirate.<sup>12</sup>

An expedient might be viewed as a practical solution or an unprincipled shortcut, depending upon one’s opinion of the underlying impasse. As such, expedients might not offer permanent solutions. The future is likely to bring these issues more frequently into view in the Arab Middle East.

## II. Globalization and Law

In the legal context, globalization is pushy and intrusive and demands an active re-examination of one’s own laws and regulations. Arab countries are being driven by pressures from a variety of sources, such as Gulf Cooperation Council (GCC) initiatives<sup>13</sup> and the World Trade Organization (WTO) accession process,<sup>14</sup> to review and revise laws governing a wide range of economic activity. The issues are numerous, many of which were exposed to the spotlight in 1999, including:

- *Differential treatment of local and foreign businesses.* For example, Saudi Arabian Crown Prince Abdallah announced in October 1999 that the Kingdom will be reducing the discrepancy in rules governing local and foreign investors, for example, by allowing foreigners to own real estate, raising the percentage ceiling on foreign shareholding in Saudi Arabian companies, permitting foreigners to make portfolio investments in the Saudi stock market (through various mutual funds), and by seeking to eliminate the unequal income tax treatment of local and foreign businesses.<sup>15</sup>
- *Direct investment and management in local companies.* In 1999, for example, the United States signed a Bilateral Investment Treaty (BIT) with Bahrain—the first between the United States and an Arab Gulf country—as well as a Trade and Investment Framework Agreement with Egypt.<sup>16</sup>

12. There were a plethora of Saadiy at Free Zone regulations enacted in 1999, including companies regulations, commercial business regulations, financial and commodities trading regulations, a code of market conduct, insurance regulations, as well as brokerage and service provider (e.g., legal, accounting, auditing) regulations. See Ramsey Taylor, *Getting the Saadiyat Zone Ready to Do Business*, MIDDLE E. EXECUTIVE REP., July 1999, at 10; Anthony Watson, *Getting the Saadiyat Zone Ready to Do Business*, MIDDLE E. EXECUTIVE REP., Aug. 1999, at 9.

13. On November 29, 1999, GCC leaders concluded three days of deliberations with an agreement to adopt a customs union by March 2005. The GCC countries—Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE—have the option to adjust their current customs rates gradually or in one stroke; a 5.5 percent duty is to be imposed on basic commodities, and a 7.5 percent duty on other goods. See *GCC Finally Agrees on Customs Union*, MIDDLE E. ECON. DIG., Dec. 10, 1999, at 8; *Gulf Cooperation Council (GCC) Leaders to Enforce Customs Union in March 2005*, SAUDI ECON. SURV., Dec. 1, 1999.

14. In April 1999, the WTO granted observer status to Lebanon. In December 1999, members of the WTO approved Jordan’s application for accession, and Jordan’s schedule of market access commitments for goods and services. For a list of the Jordanian laws to be revised as part of this process, see Dabit, *Legislation Effort for Accession to WTO*, ARAB REGION NEWSLETTER, Apr. 2000, at 9.

15. See *Foreign Direct Investment in Saudi Arabia: Stimulating Structural Changes and Global Integration*, SAUDI ECON. SURV., Oct. 13, 1999. This information was provided by Maren Hanson, Law Offices of Dr. Mohamed H. Hoshan (Riyadh).

16. See United States Trade Representative, Press Release 99-80 (Sept. 29, 1999), at <http://www.ustr.gov/releases/1999/09/99-80.html>; and United States Trade Representative, Press Release 99-96 (Nov. 18, 1999), at <http://www.ustr.gov/releases/1999/09/99-96.html>. Also in 1999, the Lebanese Parliament ratified several BITs that had been signed with, *inter alia*, Canada, Greece, Italy, France, Finland, and the Czech Republic. See LEBANESE OFFICIAL GAZETTE No. 18, Apr. 13, 1999; and LEBANESE OFFICIAL GAZETTE No. 28, June 17, 1999.

- *Portfolio investment and stock market participation.* For example, to encourage trading on the Bahraini Stock Exchange (BSE), the Amir issued a decree in March 1999 relaxing the limits on share ownership by foreign investors. The new limits on foreign ownership of Bahraini companies listed on the BSE are 100 percent for GCC nationals and forty-nine percent for investors from other foreign countries.<sup>17</sup>
- *Use of intellectual property and protection thereof.* In the 1999 Special 301 Annual Review by the United States Trade Representative (USTR) of listing countries that are perceived to lack appropriate protection of intellectual property rights, Egypt and Kuwait remained on the “priority watch list”; Jordan, Lebanon, Oman, Qatar, Saudi Arabia, and the UAE appeared on the “watch list.” In December 1999, however, the USTR removed Jordan from its watch list, citing Jordan’s “impressive level and strength of commitment towards providing effective protection for all forms of intellectual property.”<sup>18</sup>
- *Taxation of income arising from these commercial endeavors.* For example, the Egyptian capital market experienced increased activity in 1999, attributed at least in part to a Cabinet decision repealing the two percent capital gains tax on the sale of shares, and exempting mutual funds from a forty percent income tax; in Oman, Sultani Decree No. 26 (1999) introduced amendments to business income tax, beginning with the 1999 tax year; the main impact of the amendments was to increase the rate of income tax payable by wholly Omani-owned businesses and to equalize the tax rates applicable to majority Omani-owned businesses.<sup>19</sup>

In trying to assess the overall impact of globalization on so many different laws, the palm grove is quickly hidden by all the trees. However, some of the more significant legal issues can be placed under three general headings: transparency, open markets, and the legal process.

#### A. TRANSPARENCY

Many of the leading businesses in the region are closely held (often family-run) enterprises,<sup>20</sup> and there is considerable reluctance to disclose publicly the type of financial and commercial information customarily required under Western securities laws. UAE Minister of Planning Shaikh Humaid Bin Ahmed Al-Mualla recently called for UAE companies to “commit themselves to issuing regular financial reports to ensure transparency, and these should be per the highest international accounting standards.”<sup>21</sup> However, according to the Director General of the Arab Monetary Fund:

17. See International Bureau of Fiscal Documentation, *ANNUAL REPORT 1999–2000*, 118 (2000).

18. United States Trade Representative, Press Release 99–98 (Dec. 10, 1999), at <http://www.ustr.gov/releases/1999/09/99–98.html>. See generally *United States: Section 301*, MONTHLY NEWSLETTER, May 1999, at 16. Kuwait’s new copyright law was enacted in late December 1999; in April 1999, the new Lebanese copyright law, Law No. 75 (1999), was published in the official gazette. Lebanon’s new copyright law replaces a law that was initially enacted in 1924, during the French Mandate in Lebanon. This latter information was provided by Edouard Hanna and Cyrille-Serge Naffah, Law Offices of Edouard E. Hanna & Associates (Beirut).

19. See Nadoury, *Role of the Private Sector*, ARAB REG. NEWSLETTER, April 2000, at 6; MIDDLE E. BUS. L. REV., May 1999, at 1.

20. For some time the Saudi Ministry of Commerce has been concerned about the vast number of family-owned limited liability companies in Saudi Arabia and the orderly succession of ownership from one generation to the next. See Kritzalis, *Development of a Capital Market in Saudi Arabia*, THE GULF STATES LEGAL Y.B., 1999, at 39.

21. See also Hassan, *Big by All Accounts*, BUS. TODAY EGYPT, Mar. 2000, at 49:

[A]ccounting standards were just formally issued in late 1997. . . . [U]ntil that time, the Egyptian affiliates of major accounting firms took on the burden of being the enforcing body, refusing to take on clients

It looks as though the incentives and privileges given to companies to register in [GCC] markets were not sufficient to convince the owners of closed companies to open and offer their shares for public subscription. Their desire to have full control over the management and avoid the need to comply with supervisory controls, commitments to transparency and disclosure and international accounting standards and dissemination of periodic data, are the overriding reasons why the status of such companies remain generally closed.<sup>22</sup>

As Middle Eastern markets open to greater foreign participation, the demands for greater transparency increase. Nonetheless, many financial experts believe that more energy has been expended liberalizing Middle Eastern capital markets than in ensuring their integrity—although new securities regulations have been enacted recently in Bahrain, Egypt, and Jordan, and are being finalized in Kuwait, to combat insider trading and other activities harmful to market integrity.<sup>23</sup> In the short term, however, the effectiveness of these regulations is open to question, particularly given deeply entrenched prior practices.

Over the years, foreign contractors have also expressed concern about the lack of transparency in some Middle Eastern government tenders and contract negotiations. Mistrust is inevitable where government procurement involves mixed signals, changing policies, and unwritten conditions. For example, in the context of the new Egyptian government's wholesale re-evaluation (some might say second guessing) of projects already launched under the former government of Kamal El-Ganzouri,<sup>24</sup> one lawyer was prompted to advise: "Anyone who isn't confused doesn't understand the situation."

Arab countries might achieve greater transparency through reduction in the broad discretionary authority customarily held by government officials, whether in awarding contracts, issuing licenses, or approving foreign investment. In other cases, the lack of transparency springs from political and government practices that are currently beyond any likely attempt at legal reform.

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who did not abide by international accounting practices, or refusing to grant clear audits unless accounts complied to such standards.

This quandary was finally rectified when the Minister of Economy . . . issued a decree in late 1997 imposing the newly formulated Egyptian accounting standards on all companies.

*Id.*

22. Jassim Al-Mannai, *Banks Outwit Stock Markets*, BUS. TODAY EGYPT, 1999, at 51–52. Dr. Al-Mannai goes on to say that "most GCC capital markets still lag behind other emerging markets particularly with regard to the implementation of international accounting standards, and the regulations related to curbing inside trading." *Id.* at 52.

23. Bahraini Ministerial Order No. 1 (1998) requires disclosure of various information concerning trading of shares of companies listed on the Bahraini Stock Exchange. Egyptian Capital Markets Law No. 95 (1992) was significantly amended in 1998 to strengthen stock market regulations against fraud, price manipulation, and insider trading. See TRADE COMPLIANCE CENTER, U.S. DEP'T OF COMMERCE, EGYPT, COUNTRY COMMERCIAL GUIDE—1999, Chapter VII, <http://mac.doc.gov/tcc/data/> (last visited Aug. 22, 2000). Jordan's 1997 Securities Law established a Securities Commission to license and monitor brokers, investors, issuers, and other market participants; in 1998, that Commission enacted additional regulations on disclosure, accounting, and auditing standards. *In Brief: Jordan*, MIDDLE E. ECON. DIG., Apr. 17, 1998, at 13. The Kuwaiti draft regulations are briefly discussed in *Law Drafted to Criminalize Insider Trading*, MIDDLE E. ECON. DIG., Jan. 14, 2000, at 19.

24. See, e.g., *Aswan Steel Investors Battle Against Smear Campaign*, MIDDLE E. ECON. DIG., Feb. 11, 2000, at 12.

## B. OPEN MARKETS

Various obstacles may prevent a market from opening to the global economy. One such obstacle that has drawn the ire of Western businessmen for many years is the multitude of rules in the Middle East requiring local sales agents, distributors, and sponsors.<sup>25</sup> In many Arab countries, for example, government procurement laws require foreign contractors to have local agents before participating in tenders. This requirement, taken together with the lack of transparency in some such procurement, can create an incentive for influence peddling that is difficult to resist. With enactment of the OECD Convention to Prevent Bribery, European businessmen must now grapple with some of the same legal strictures that have long faced their U.S. counterparts under domestic Foreign Corrupt Practices Act rules.

Trading is at the core of the Arab world's commercial heritage, and consequently every Arab country has special laws and practices encouraging foreign suppliers to use local sales agents and distributors. Most of these laws contain so-called "dealer protections," notably entitling the local sales agent to claim compensation if the foreign party fails to provide adequate justification for termination or nonrenewal of the relationship.

This statutory right parallels, and in fact is derived from, European laws. However, in other respects, the protections available in many Middle Eastern countries exceed those available in Europe. In some Middle Eastern laws, for example, a sales agent is given the exclusive right to import the relevant product, to receive compensation for any parallel import of the product by others, and to block the foreign supplier's direct import of the product into the sales agent's territory. Many of these Middle Eastern dealer protection laws grant exclusive jurisdiction to local courts, that is, in the place where the commercial agent conducts its activity, to hear all disputes arising from the commercial agency contract.<sup>26</sup>

Arab government officials are becoming increasingly sensitive to the disadvantages of these more extreme protections that impede the free market, in essence allowing a sales agent to hold the supplier and consumers hostage, even in minor commercial disputes. In recent years, both Oman and Bahrain amended their laws to abolish the statutory requirement of exclusivity for local sales agents. Other Middle Eastern countries are likely to follow suit. Interestingly, the UAE (with its strong reputation for free trade) currently has the most onerous dealer protection law in the region.<sup>27</sup>

25. See, e.g., Samir Saleh, *Commercial Agency and Distributorship in the Arab Middle East* (1996).

26. See, e.g., Lebanese Legislative Decree No. 34, art. 5, (1967), as amended. Foreign arbitration clauses and other contractual provisions that conflict with such "protections" are generally deemed invalid under local law. In a February 2, 1999 decision, however, the Beirut Court of Appeal distinguished between an arbitration clause in a commercial agency contract and an arbitration agreement made subsequent to a commercial agency dispute having arisen. In the latter instance, the court held, arbitration should be permitted notwithstanding article 5 of the Lebanese dealer protection law. Portions of this information were contributed by Ibrahim Y. Sattout, Raphaël, Ziadé, Abirached & Rifaat (Beirut). See also 10 LEBANESE REV. OF ARAB & INT'L ARB. 65 (1999).

27. The Bahraini amendments are discussed in E. Hugh Stokes & Howard L. Stovall, *Bahrain Liberalizes Commercial Agency Law*, MIDDLE E. EXECUTIVE REP., Apr. 1998, at 9. The Omani amendments are discussed in Richie Adler, *Oman Commercial Agency Law Amendments: Effects on Future Agreements, Dispute Resolution*, MIDDLE E. EXECUTIVE REP., Jan. 1997, at 8. The most significant "dealer protection" rules in the UAE are contained in Federal Law No. 18 (1981), as amended by Federal Law No. 14 (1988). See generally Mallat, *Comparative Models of Freedom of Trade: The Hurdle of Lebanese Sole Agency*, in PATHWAYS TO INTEGRATION: LEBANON AND THE EURO-MEDITERRANEAN PARTNERSHIP (Wasin N. Shahin & Kamal S. Shehadi eds., 1997), at 209.

## C. LEGAL PROCESS

"The antithesis of good rules is not bad rules, but rather no rules," a businessman once told his lawyer. While ideas exchanged between businessmen and lawyers often amount to the proverbial ships passing in the night, the lawyer in this case thought he understood what the businessman meant: financial calculations can be made for known risks, and prices can then be adjusted accordingly. Among the necessary elements of the equation, however, is a reliable legal system.

One important component of a legal system is reliable lawmaking. In this regard, shortcomings abound in the Middle East. Even in Egypt, which has otherwise basked in much recent success, there have been setbacks: for example, ill-timed policies on duty-free stores soon after their privatization,<sup>28</sup> and ill-conceived regulations for certificates of origin on imported goods. In that latter regard, Egyptian Ministry of Economy Decree No. 619 (November 21, 1998) required imported goods to be shipped directly from their country of origin to Egypt, accompanied by a certificate of origin authenticated by the competent authorities in the country of export. This requirement created substantial problems importing goods into Egypt from regional warehouses and distribution centers and/or goods that contained parts from more than one country. Decree No. 619 (1998) was widely viewed as a crude technique for controlling the rise of imports into Egypt. Subsequently, in 1998 and 1999, the Egyptian government issued a series of "clarifications" in an effort to stem at least some of the controversy.<sup>29</sup>

The new Egyptian Commercial Code contains another troubling example: technology transfer requirements that seem like a heavy-handed throwback to Egypt's command-economy days. For example, the new Egyptian Commercial Code broadly defines "technology transfer contracts" and lists a number of contractual provisions that may be deemed contrary to Egyptian public order (and thus void and unenforceable), unless such a provision is deemed necessary to protect end-users or to protect "a serious and legitimate interest" of the owner of the technology. The Egyptian courts are given exclusive jurisdiction over any dispute concerning technology transfer contracts, and any arbitration must be in Egypt under Egyptian law.<sup>30</sup> The more onerous of these technology transfer rules have been described as "regressive," "disturbing," and "in direct contradiction with" the WTO's TRIPS (Trade Related Aspects of Intellectual Property Rights Agreement).<sup>31</sup>

Some legal observers believe that such legislative and administrative missteps are inevitable, given the insular fashion in which regulations are usually prepared in the Middle East. As one commentator in Egypt noted: "The idea the problems will go away if they

28. After privatizing Egypt's duty-free outlets, the Egyptian government subsequently enacted decrees, which substantially restricted the market for sales by those duty-free shops. For criticism of this action, see *Editor's Note*, *BUS. TODAY EGYPT*, July 1999, at 7, and *Confidence Game*, *BUS. MONTHLY*, July 1999, at 10.

29. See *Certificate-of-Origin Requirements: Egypt's Recent Ministerial Decree and a Series of Clarifications*, *MIDDLE E. EXECUTIVE REP.*, Apr. 1999, at 8; *Foreign Trade in Egypt: Unwelcome Barriers*, *EIU BUS. MIDDLE E.*, Apr. 16, 1999; and *Decree 619 Amended*, *MIDDLE E. BUS. L. REV.* (Nov. 1999), at 2.

30. See Egyptian Commercial Code, Law No. 17, arts. 72-87 (1999).

31. See Sara Hinton & Karim Azmi, *Egypt's New Commercial Code: Changes Foreign Investors Need to Know About*, *MIDDLE E. EXECUTIVE REP.*, July 1999, at 10; McKinney, *Egypt Trade Legislation; New Commercial Code*, 1999 *INT'L COM. & CONT. L. REV.* N-51; Niall Kishtainy, *Not Enough Protection?*, *BUS. TODAY EGYPT*, Dec. 1999, at 15.



aren't spoken about still appears to have a wide following in certain branches of government."<sup>32</sup>

Another important component of a legal system is reliable dispute resolution. In this regard, some Middle Eastern countries fall short in even basic measurements, such as the publication of court decisions. Less frequently, a country's entire court system has been subject to criticism. For example, the chairman of the Yemeni Judicial Inspection Board described as "deplorable" the condition of the local judiciary, including disorganized administration, lack of due process, and corruption.<sup>33</sup>

More frequently, complaints are heard—as Moody's Investor Services warned in the context of Arabian Gulf lawsuits to collect bad loans—that "major political figures are often effectively above the law." Some improvements are being made. In late 1999, for example, the Omani judicial system underwent significant restructuring, integrating the *sharia*, criminal, and commercial courts, and establishing an administrative court for cases in which the government is a party.<sup>34</sup> Similarly, the Saudi Arabian government in recent years has strengthened the authority and operation of the Board of Grievances.<sup>35</sup> Nonetheless, the courts in many Arab countries remain works in progress.

### III. Into the Future

Like most things, commercial laws are influenced by environment. The economic environment in many Arab countries has been changing: governments are no longer trying to protect their economies from the rest of the world, but rather seeking the advantages of participation in the global economy. As a result, Arab legal systems are facing new challenges, and at an ever-increasing pace.

Will the Arab world be able to match that pace? As Middle East commercial lawyers caution in their legal opinions, the outcome "is not entirely free from doubt." Most Arab governments have expressed strong support for membership in the WTO, although some Arab members benefit from lengthy grace periods before domestic preferences and protections must be lifted. The future will tell whether the Arab world's commitment to globalization is sound, or mere sound.

It seems, however, that Arab and Western nations increasingly recognize that their best interests are served through mutual understanding, accommodating each other's peculiarities, and continuing to expand their interaction—objectives that build upon the legacy of Dr. Al-Sanhouri's trip to The Hague many years ago.

32. Dowell, *Law 5, Square 1*, BUS. MONTHLY, Aug. 1998, at 6.

33. Najeeb Al-Shameeri, being interviewed by M. Bin Sallam in the English-language newspaper, YEMEN TIMES, Nov. 17–23, 1997.

34. See Alastair Hirst, *Restructuring Oman's Court System and Judiciary: Five Sultani Decrees*, MIDDLE E. EXECUTIVE REP., Sept. 1999, at 11.

35. The Board of Grievances was established in 1955, as an independent tribunal with jurisdiction over disputes to which the Saudi Arabian government is a party. In 1988, the Board of Grievances was also given general jurisdiction over commercial disputes between private sector parties. When the Board of Grievances was first established, Board decisions were usually viewed as mere proposals, because those Board decisions were not enforceable until signed by the Prime Minister. As a result of Royal Decree No. M/51 (1982), the Board's decisions now constitute final and binding judgments. Thus, Board decisions need not be approved by any higher authority—rather, those decisions are directly sent to the relevant ministry or department for enforcement. See generally Najjar, *An Overview of the Saudi Legal System*, XI MIDDLE E. INSIGHT No. 6 (1995).

