

**UNDERSTANDING JURISPRUDENTIAL APPROACHES TO ISLAM:  
ASSESSING THE U.S. COURTS APPROACH TO THE CONVERGENCE OF LAW, RELIGION  
AND COMMERCE**

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**SUMMARY**

*The United States recent deal with a United Arab Emirates Company to operate seven U.S. Ports highlights a growing tension in U.S. and Arabic commercial relations. One tension that has remained unnoticed is the role that U.S. Courts play in interpreting Islamic texts when the commercial or legal outcome depends on an understanding of the religious culture. This article describes seven cases that demonstrate various approaches to this problem. This article utilizes an approach by James Boyd White, and suggests that translation or its kin transliteration can help judges in deciding Islamic legal principles.*

**ARTICLE**

Robert Cover in his now famous (and controversial) article *Nomos and Narrative* began by informing us that we “inhabit a *nomos* – a normative universe.”<sup>1</sup> By normative universe, Cover means to tell us that our world is constantly juxtaposed between principles of right and wrong – rights and wrongs that are intrinsically and inseparably connected to the narrative that forms them.<sup>2</sup> That narrative and norms compliment each other is nothing new; that narrative and norms create separate worlds of occupation that collide with one another in concrete and specific ways is another problem all together.

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<sup>1</sup> Robert M. Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1984).

<sup>2</sup> *Id.* at 5.

Our lot in this piece is to illustrate what happens when two nomos engage one another in the specific context of the legal system.

As Perry Crane said in his own grappling of Cover's understanding of a *nomos* – the encounter of one nomos with another is not just a clash of wills, or a test of commitments, but an effort at cognition.<sup>3</sup> Nowhere is law more normative than when it is based on religious expression. (That does not mean that other law is not normative if based on something other than religion; only that religion tends to create a super-normative law – laws that carry eternal consequences so to speak). Thus, when two normative systems that are built around different suppositions meet in judicial process, courts must utilize some tool of cognition and response to adequately address the concerns each norm presents. As the discourse of law is considered across cultural and ethnic boundaries, the analogy of translation becomes a useful tool for navigating that cognition.

James Boyd White, in his work *Justice as Translation*, suggests that translation is ultimately an art of recognition and response, both to another person and another language; that translation transports the translator away from his own language and to a place between languages (and people) where differences are more easily comprehended; and that translation is inherently a self-limiting process.<sup>4</sup> This essay builds on White's analogy, and uses his definitions to consider how United States Courts ruminate about Islamic law when confronted with tensions between Islamic practice and modern commercial practice.

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<sup>3</sup> Perry Dane, *The Public, The Private, and the Sacred: Variations on the Theme of Nomos and Narrative*, 8 *CARDOZO STUD. L. & LITERATURE* 15, 16 (1996).

<sup>4</sup> JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 230 (1990).

Before proceeding to analyze the trends, some general observations are worth noting. First, there is no Islamic law per se that U.S. Courts recognize; rather the laws are tied to specific nation states, such as the law of Saudi Arabia, Iran or Afghanistan.<sup>5</sup> Nevertheless, courts recognize the conceptual links between countries that share in common a system of *Shari'a* and proceed as operating under a generic “Islamic Law.”<sup>6</sup> Thus, the comparison to the “common law” forms an easy conceptual bridge for judges attempting to understand how principles of Islamic law relate to the laws of nations.<sup>7</sup>

Second, the courts treat the application of foreign law as a hybrid question of law and fact; that is, under varying rules of civil procedure, foreign law is a question of law to be determined by the court.<sup>8</sup> However, the “fact” of a foreign law is still up to debate. Therefore, courts will often hold evidentiary hearings, eliciting expert testimony from both sides, and even engaging its own expert to get to the “fact” of the law.<sup>9</sup> This analysis itself can be deceptive. Suggesting that the law is a fact, instead of a norm or a principle suggests that the law itself can be apprehended apart from the culture that the law (or laws) derives from.<sup>10</sup>

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<sup>5</sup> See e.g., *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 897 (Tex. Ct. App. 2000) (Afghani law); *CPS Int'l v. Dresser Industries Inc.*, 911 S.W.2d 18, 21 (Tex. Ct. App. 1995) (Saudi Arabian law); *Saudi Basic Oil Industries Corp. v. Mobil Yanbu Petrochemical*, 866 A.2d 1, 11 (Del. 2005) (Saudi Arabian law); *Blackstone v. Aramco Inc.*, No. 80-44642, 1991 WL 63630 (Tex. Ct. App. 4/25/1991) (Saudi Arabian law); *Chadwick v. Arabian American Oil Co.*, 656 F.Supp. 857 (D. Del. 1987) (Saudi Arabian law); *National Group for Communications and Computers v. Lucent Technologies Int'l Inc.*, 331 F.Supp. 2d 290 (D.N.J. 2004) (Saudi Arabian law).

<sup>6</sup> See *SABIC*, 866 A.2d at 31 (applying “Islamic law”); *Blackstone*, 1991 WL 63630 at \*3 (applying “*Shari'a*”).

<sup>7</sup> See *Chadwick*, 656 F.Supp. at 861 (calling *Shari'a* “the common law of Saudi Arabia.”).

<sup>8</sup> See *Bridas*, 16 S.W.3d at 899.

<sup>9</sup> See *SABIC*, 866 A.2d at 31.

<sup>10</sup> See Cover, *supra* note 1.

Third, there is a certain negotiation that occurs in the American legal system that needs to be reckoned with. The American legal system is a purely adversarial system of law; that is, as litigants prepare their legal arguments, they do so with the aim not of achieving justice but of winning, though I doubt few litigants consider their cases to be unjust.<sup>11</sup> The result is that the expert in opining about the law and attempting to establish “the fact of the law” is doing so to further his client’s economic interests. That experts are paid to give their testimony only complicates this matter. For example, Frank Vogel served as an expert in four of the seven cases reviewed for this article. In two of those four cases, Vogel’s testimony appears to be a conservative reading of Islamic law; by conservative, I mean more literally formalistic. For example, he suggests in *Bridas Corp. v. Unocal Corp.* that Islamic Law would not allow for the tort of Interference with a Contract because of the firm maxim that whoever does an act bears ultimate responsibility.<sup>12</sup> Yet, in *NGCC v. Lucent Technologies*, Vogel is willing to stray from firm maxims towards interpretive results. Though agreeing that traditionally, the principle of *gharar* would disallow future type damages, he opines that “higher valuations of damages are possible as long as the future event is not an explicit condition of the contract, and that uncertainty that is subsumed within a larger entity, such as a corporation, would be upheld, and that it is only when *gharar* inheres within a separate entity is it forbidden.”<sup>13</sup> While there may be no direct contradiction in Vogel’s thought process, there appears to be a conflict between a rigid application of traditional Islamic law concepts and interpretive ones. The deciding factor is whose behalf the expert is

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<sup>11</sup> See Jonathan D. Martin, *Historians at the Gates: Accommodating Expert Historical Testimony in Federal Courts*, 78 NYU L. REV. 1518, 1547 (2003); CITE

<sup>12</sup> *Bridas*, 16 S.W.3d at 905.

<sup>13</sup> *NGCC*, 331 F.Supp.2d at 295.

testifying. Judges, therefore, seeking to find the “fact” of the law, must be leery in accepting the position of experts who have an interest in their testimony.

Finally, the medium in which we receive the translation -- (for the reader this article, and for I the writer, case reporters and Westlaw print outs) inhibits our ability to assess the court’s function. One way of measuring the reaction and the response to foreign words, phrases and language is the use of body language and subtle suggestions.<sup>14</sup> Of course, we (you the reader and I the commentator) sit well away from the Court proceedings that rendered these decisions. We can’t see furrowed brows, judges and juries leaning forward, or court reporters with confused looks attempting to spell words they had never heard before. Sometimes, we sit even further back as the description I reviewed is another court’s (the appellate court’s) perception of what the trial court or magistrate did in a particular case. These limitations are not debilitating. Rather, acknowledging the limitations of our perceptions in these cases actually frees us to acknowledge that this assessment towards translation is, at the very least, incomplete.

Part one of this article sets the stage by describing in detail seven cases as reported by the courts, with limited commentary from outside sources. Part two categorizes the opinions as approaching the issues formalistically, interpretively, or by using something akin to a model of translation. Part three continues the discussion from part two, drawing conclusions about the various approaches and qualities of each. Part four suggests that the role that judges perceive themselves as engaging is quite predictive in how the court will assess Islamic concepts.

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<sup>14</sup> See WHITE, *supra* note \_\_\_\_, at 330-31.

These cases are efforts by the judiciary to come to terms with law that is both culturally and normatively variant from its ordinary course and consideration. This article considers, along the lines of White's discussion, how the court translates Islamic law. In other words, how the court reacts to and responds to Islamic law, in the face of Western commercial conceptions and legal assumptions. Also, it considers how the Court comprehends the differences inherent in the two legal systems and navigates those differences towards judicial resolution. And how the court embraces a self-limiting process.

## **PART ONE**

### **THE CASES**

**1. *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893 (Tex. Ct. App. 2000).**

In April 2000, the Texas State Court of Appeals for the fourteenth district decided *Bridas Corp. v. Unocal Corp.*<sup>15</sup> -- a contentious matter involving two oil companies and their rights to build a natural gas pipeline through Afghanistan. In 1991, the former Soviet Union disbanded leaving several independent nations; one of those nations was Turkmenistan. Turkmenistan is located on the Caspian Sea, bordering Iran to its south, Afghanistan to its east and Uzbekistan and Kazakhstan to its north. Importantly, Turkmenistan is one of the ten most promising countries for extracting hydrocarbons from the earth;<sup>16</sup> hydrocarbons are necessary elements for the production of petroleum and natural gas resources.

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<sup>15</sup> 16 S.W.3d 893 (Tex. Ct. App. 2000).

<sup>16</sup> U.S. Geological Survey 2004 at \_\_\_\_.

In 1991, Turkmenistan began soliciting offers to develop its natural resources.<sup>17</sup> Shortly thereafter, Bidas Corp. (“Bidas”) entered into an agreement with the Turkmenistan Government to develop the nation’s hydrocarbons in certain areas.<sup>18</sup> Bidas is a South American Oil Company that had little to no experience in Asian governmental practices. Their first foray into Asia came in Western Siberia. But as Carlos Bulgheroni told Ahmed Rashid, “there were too many problems [in Siberia] with pipelines and taxes, so we arrived in Turkmenistan when it opened up.”<sup>19</sup> Perhaps a naivety towards Asian relations was to Bulgheroni’s and Bidas’s credit; though western oil companies scoffed at the Bidas/ Turkmenistan contract, because of the politics, geography, or potential loss, Bidas was convinced that it could generate and transport natural resources in the same ways it had done so in South America.<sup>20</sup> Succinctly, lack of experience in governmental affairs did not mean the company could not be successful at

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<sup>17</sup> *Bidas Corp.* 16 S.W.3d at 895.

<sup>18</sup> Bidas Corp was contracted to explore the Keimir block in the western part of the country and the Yashlar Block in the eastern portion of Turkmenistan. *Bidas Corp.*, 16 S.W.3d at 895. *See also* AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA 158 (2000)

<sup>19</sup> RASHID, *supra* note 4, at 158. Rashid sees Bidas Corp. and Bulgheroni’s experience in Turkmenistan as an extension of early twentieth century conflation of oil and foreign policy. His description of Bulgheroni captures the imagination much in the same way that descriptions of John D. Rockefeller of the late nineteenth century impugn images of the pious dictator -- “charming, erudite, a philosopher captain of industry, he could talk for hours about the collapse of Russia, the future of the oil industry, or Islamic fundamentalism.” *Id.*

<sup>20</sup> *Id.* Bhulghani says that “other oil companies shied away from Turkmenistan because they thought it a gas place and had no idea where to market it. Our experience in discovering and transporting it through cross-border pipelines to multiple markets in Latin America convinced me that the same could be done in Turkmenistan.” *Id.* Apparently no other Western oil companies bothered with presenting proposals to the Turkmenistan government. *Id.* The fact that Bidas was the only company to submit offers resulted in Bidas receiving extremely favorable terms for the drilling, namely a 75-25 split in profits in Bidas’s favor in the region of Keimir and a 50-50 split in the region of Yashlar.

excavation as exploratory drilling by Bidas discovered a natural gas reserve holding an estimated twenty-seven trillion cubic feet of gas.<sup>21</sup> Though Turkmenistan had no need for such production, Pakistan did and executed an agreement with Turkmenistan to purchase the gas for a period of thirty years.

Because Pakistan did not border Turkmenistan, international cooperation was imperative to the Pakistani Turkmen deal.<sup>22</sup> The most direct route was through Afghanistan, whose stability was becoming more and more tenuous with the emergence of the Taliban as a controlling government of the region. Bulgheroni opened negotiations with the Afghan warlords that ruled the Afghan territories, and proposed the construction of an 875-mile pipeline from Yashlar, Turkmenistan to Sui in the southern province of Pakistan.<sup>23</sup> The Afghan tribal leaders embraced the Bidas proposal and Bidas prepared to move forward.<sup>24</sup> Bidas contacted Unocal Corp. in 1995 and extended an invitation for Unocal to participate with Bidas in the development of the Turkmenistan hydrocarbon project. Importantly, no agreements were consummated between Unocal and Bidas.<sup>25</sup>

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<sup>21</sup> See *Bidas Corp.*, 16 S.W.3d at 895. Importantly, Bidas Corp. invested more than U.S.\$400 Million in exploring its leases, as Rashid says “a staggering sum in those early days when not even oil majors were involved in Central Asia. Bidas was successful in its overall operations extracting upwards of 16,800 Barrels of Oil per day. But the big discovery was in the Yashlar region and the massive repository of natural gas. RASHID, *supra* note 4, at 158.

<sup>22</sup> See RASHID *supra* note 4, at 895. Interestingly, Bulgheroni saw a pipeline of peace through Afghanistan. With the Afghani turbulence coming to a head with the seizure of Khandahar by the Taliban, Bulgheroni saw his pipeline as “a peace-making business.” *Id.*

<sup>23</sup> *Id.* at 159.

<sup>24</sup> *Id.* One of the appealing aspects of the Bidas proposal was the open-access nature of the pipeline. Afghanistan at one time supplied Uzbekistan with Natural Gas reserves, but had shut them down in the wake of national chaos. *Id.*

<sup>25</sup> *Bidas Corp.*, 16 S.W.3d at 896.

What followed in the summer of 1995 were independent efforts by Bidas and Unocal to secure the pipeline construction contract from Turkmenistan.<sup>26</sup> Turkmenistan rejected several proposals by Bidas before accepting an offer from Unocal to build the pipeline in the Turkmenistan territory.<sup>27</sup> Bidas then turned its attention to Afghanistan and courting certain Afghan officials to an exclusive agreement to build the Afghanistan pipeline.<sup>28</sup> In November 1996, Bidas disclosed that it had signed an agreement with the Taliban, the political party controlling Afghanistan, to construct the pipeline across Afghanistan; despite being untrue (Bidas actually only contracted with one person who claimed to deliver the Taliban)<sup>29</sup> Unocal was nevertheless panicked by the news and attempted to use Pakistani officials to sway the Taliban to their side.<sup>30</sup> Bidas had paid \$1 Million to Barhanuddin Rabboni, who controlled less than half of the Afghanistan

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<sup>26</sup> *Id.* Rashid suggests that Unocal's involvement and eventual success in obtaining the contracts related to two factors. First, Bidas was subject of rumors of ill-gotten gain by the advisors to Turkmenistan President Saparmurad Niyazov. Second, Turkmenistan officials, Niyazov in particular saw the financial possibilities of securing an American oil major to the project. Particularly, Niyazov believed that Unocal's involvement might lure the attention of the Clinton Administration to invest development funds in Turkmenistan. Rashid, *supra* note 4, at 160.

<sup>27</sup> *Bidas Corp*, 16 S.W.3d at 896. The agreement between Unocal and Turkmenistan provided that Unocal would construct the pipeline, purchase natural gas from Turkmenistan at the Afghanistan border, and that Turkmenistan reserved the right to select the natural resources dedicated to the project. *Id.*

Apparently the Unocal contract shocked the Bidas executives that had been working to secure the pipeline deal. "We were shocked and when we spoke to Niyazov, he just turned around and said, 'why don't you build a second pipeline.'" *See* Rashid, *supra* note 4, at 160.

<sup>28</sup> For an enlightening discussion relating to the benefits Bidas offered the Taliban, see Rashid, *supra* note 4 at 166-169.

<sup>29</sup> *Id.* at 169.

<sup>30</sup> What is clear is that the Taliban was able to leverage Bidas and Unocal against one another. Rashid indicates that the Taliban secretly favored Bidas because of their *laissez faire* stance towards the humanitarian issues that were becoming a public issue for the Taliban. However, the Taliban also coveted U.S. recognition -- recognition that would bring money for roads, electricity, and other development. *Id.*

territory, and was losing more territory daily.<sup>31</sup> Subsequently, Rabboni was forced from the capital city of Kabul and into the Northeastern corner of the country. The ending of the story was that neither Bidas nor Unocal completed the project. In 1999, Unocal withdrew from the project after several unsuccessful attempts to court Afghan officials. Bidas, whose assets in Turkmenistan were frozen by the Turkmen government, sought arbitration against Turkmenistan to enforce its earlier agreements. And ultimately, Bidas Corp. brought a \$15 Billion lawsuit against Unocal in the Texas State Court for tortious interference with a contractual relationship.

The Texas State Court conducted a two part analysis: first it decided what laws applied to the matter at hand; and second, whether those laws recognized the tort claim for interference with a contractual relationship.

Regarding the Choice of Law question, the Court used the Restatement (Second) of Conflict of Laws to determine that either Turkmen or Afghan law would apply to this dispute, and not Texas law as urged by Bidas.<sup>32</sup> The Court applied the “most significant

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<sup>31</sup> *Bidas Corp.*, 16 S.W.3d at 896.

<sup>32</sup> *Id.* at 897. The Restatement (Second) identifies seven factors to be considered when a state has no legislative directive towards applying foreign law: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability and uniformity of results; and (7) ease in the determination and application of the law to be applied. *See* Restatement 2d Conflict of Laws § 6. Moreover, section 145 of the restatement identifies several issues to be considered when applying section 6 to a tort matter: (1) the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles state in section 6; and (2) contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation ad place of business of the parties; and (d)

relationship” test to analyze the contacts to the various forums. The Court first determined that the situs of injury occurred in Turkmenistan and in Afghanistan rather than in Texas.<sup>33</sup> Next the Court determined that the conduct causing the injury to Bidas occurred in Turkmenistan or Afghanistan.<sup>34</sup> The third factor relating to the parties respective places of incorporation and principle places of business also weighed in Unocal’s favor, as neither company was incorporated in Texas and neither maintained more than a satellite office in Houston.<sup>35</sup> Fourth, the Court found that there was no business relationship previously existing between Unocal and Bidas Corp. to salvage an application of Texas law.<sup>36</sup> Finally, the court rejected Bidas’s claims that Texas Public Policy warrants application of Texas law to this matter. Claiming that the state of Texas

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the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue. *Id.* § 145. The Court finally applied section 156 to the problem in understanding how section 145 and section 6 comport.

Importantly, the *Bidas* Court followed precedent established by the Texas Supreme Court and another appellant court with similar facts. *See* Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) & CPS Int’l Inc. v. Dresser Indus. Inc., 911 S.W.2d 18 (Tex. Ct. App. 1995). For an expanded discussion of CPS, see *infra* notes \_\_\_\_, and text accompanying.

<sup>33</sup> *Bidas Corp.*, 16 S.W.3d at 897-98.

<sup>34</sup> In making this determination, the Court relied on *CPS Int’l v. Dresser Indus. Inc.*, 911 S.W.2d 18 (Tex. Ct. App. 1995). In *CPS Int’l* the plaintiffs alleged tortious interference with a contract arising in Saudi Arabia. The Court held that the fact that tortious conduct may have been directed from the state of Texas does not alter the reality that the conduct was directed to and carried out in Saudi Arabia, and it was the carrying out of the conduct that was the source of its harmful nature.”

Bidas Corp. argued unsuccessfully that the holding in *CPS Int’l* resulted in an unjust result. The Court additionally cited facts that weighed heavily towards the application of foreign law, including: the acknowledgement by Bidas Chief Operating Officer that the interference occurred in Turkmenistan; and the fact that the gas contracts and protocols were not negotiated in Texas but in Turkmenistan. *See Bidas Corp.*, 16 S.W.3d at 898.

<sup>35</sup> *Id.* at 898-99. Bidas Corp. is incorporated in the British Virgin Islands with a principle place of business in Buenos Aires, Argentina. Unocal is a Delaware Corporation headquartered in California. *Id.*

<sup>36</sup> *Id.*

has an interest in regulating companies doing business in its borders, together with the difficulty in predicting and ascertaining both Turkmen and Afghan law, Bidas urged the rejection of foreign law in favor of Texas state law. The Court rejected both arguments and spent the rest of the opinion explaining the contours of both Turkmen and Afghan law.<sup>37</sup> This summary will exclude the discussion relating to Turkmen law as outside the scope of the greater article.

In summarizing Afghani law, at least five expert witnesses appeared (four testifying on Unocal's behalf) to testify to the sum and substance of the territory's law, its applicability, and understandability.<sup>38</sup> Bidas's expert, Dr. Mark Hoyle,<sup>39</sup> an administrative law judge from London, testified that Afghani law was difficult to apprehend because of the few resources on the matter.<sup>40</sup> Accordingly, Hoyle testified that in his opinion and "based on the Hanafi as it has been codified in the Afghan Civil Code and Commercial Code, a cause of action exists for interference with a contractual relationship."<sup>41</sup> In coming to his conclusion, Hoyle relied on articles from the Afghan Civil Code, and interpretations of Islamic law from Egypt, Jordan, and the United Arab Emirates.<sup>42</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> Rashid reports that at least nine experts testified. However, it appears four of those experts related Turkmen law rather than Afghani law. Rashid, *supra* note 4, at 179.

<sup>39</sup> Hoyle has published one book relating to Islamic Commerce: MARK HOYLE, MIXED COURTS OF EGYPT (1991); he has published other books that address Islamic Legal concerns in the context of International law: THE MAREVA INJUNCTION AND RELATED ORDERS (3d ed. 1997) and THE LAW OF INTERNATIONAL TRADE (2d Ed. 1985). He is also co-founder and editor of the Arab Law Quarterly.

<sup>40</sup> It is important to note that Hoyle's testimony comports with Bidas Corp's overall legal strategy -- that the Conflict of Law analysis should sway towards an application of Texas law because Afghani law was indeterminable. *See Bidas Corp.*, 16 S.W.3d at 899.

<sup>41</sup> *See id.* at 904-05.

<sup>42</sup> *Bidas Corp.*, 16 S.W.3d at 904.

On the other side, Unocal (and its co-defendant Delta -- a Saudi Arabian subsidiary of Unocal) presented four experts that convinced the court that not only was Afghani law ascertainable, but that it did not recognize a tort for interference with contractual relations. Unocal's first expert, Professor Ian Edge,<sup>43</sup> testified that Afghanistan follows a purely non-secular form of Islamic law deriving from the Hanafi school of thought. Edge testified that the sources of decision come from religious scholars not judges who interpret the two sources of Islamic law -- the Qur'an, the Sunna, and the Mejjelle.<sup>44</sup> He further testified that under these sources of law, Afghanistan courts would not recognize a tort for interference with contractual relations.<sup>45</sup> In arriving at this conclusion, Edge noted that the Shari'a provides for recovery only where a physical injury has occurred to person or property. Edge's conclusion that interference with a contractual relationship is not tangible or direct and is therefore uncompensable was based on articles 89 and 1510 of the Mejjelle.<sup>46</sup> Additionally because a harm cannot result from a lawful act, Bridas could have no cause of action in Afghanistan. Unocal's second and third witnesses, Muhammed Rostayee and Abdul Salam Azimi agreed with Edge's conclusion that the Afghan civil code affords no remedy for Bridas's action.<sup>47</sup>

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<sup>43</sup> *Id.* at 903. Edge is a law professor at the University of London specializing in Islamic and Middle Eastern Law.

<sup>44</sup> *Id.* at 903.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* The Court of Appeals also cited in a footnote Civil Code article 787: "Action shall relate to the actor, not the commander, except when the actor is intimidated. In actions, only complete aversion shall be recognized as credible force majeure. The Court further noted that article 551 defined aversion as the "intimidation of a person, unreasonably for executing an action without consent whether it may be material or spiritual." *Id.* at 903 n.6.

<sup>47</sup> The second witness presented by Unocal was Muhammed Roystayee, a lawyer licensed to practice law in Afghanistan. He testified that "there is no mention of the [causes of action pled by Bridas] in the civil code and neither in the Shari'a law. *Id.* at 904.

The fourth expert presented by Unocal was Dr. Frank Vogel.<sup>48</sup> Vogel first testified that Bidas's expert (Hoyle) used an inexact translation of the Afghan Civil Code was inexact. He further stated the following in an effort to contextualize Islamic non-recognition of non-direct torts:

One thinks, when one encounters anything like this, these torts specifically, if you encounter something in the translation that corresponds with these torts, you come up with absolutely nothing, not in any secondary works, not in anything that you have read in original works. So first, there is a presumption against such a tort you must admit.

Then you think, well, might that be, because it is not likely that this situation has never arisen before. And then you think, well, perhaps it contradicts basic principles and there is the principle that springs to mind that does stand in the way of this recognition of these torts that's been often mentioned. It is represented by Article 89 of the Mejlle and article 1510. So this must be some part of the explanation as to why [these] torts are not recognized explicitly and that is, as it reads, article 89, "The judgment for an act is made to fall on the person who does it. And it does not fall on the person who gives the order, as long as he does not compel the doing of the act." This is one in the Mejlle and it appears in several others here, such as article 1510: the order of a person is lawful in respect to his own property only. Therefore, if someone says to another, "throw this property into the sea" and the person who receives the order, throws it, knowing that the property belongs to someone else, the owner can enforce compensation for that property from the person who threw it. Nothing is necessary for the person who gave the order, so far as he has not used force.

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The third witness presented by Unocal was Abdul Salam Azimi, a former law professor at Kabul University Law School. Azimi testified that the Afghani courts are currently operating and that in those courts injuries would only be compensable if direct.

*Id.*

<sup>48</sup> Vogel is a Professor of Law at Harvard University School of Law specializing in Islamic Law, and is director of the Harvard Islamic Studies Center. He has written substantially on the subject of Islamic Commerce, including: *ISLAMIC LAW & LEGAL SYSTEMS: STUDIES OF SAUDI ARABIA* (Boston 2000); *ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN* (1998); and *ISLAMIC GOVERNANCE IN THE GULF: A FRAMEWORK FOR ANALYSIS, COMPARISON AND PREDICTION* (1997).

So the person who has ordered it offers no excuse for the person who does it. The person who it is going to be held liable. This law is religious law, and they feel that the person who makes the fateful step to do the wrongful thing had a point of decision, and he should have withheld the act.

We may make a moral judgment somewhat differently. But they have felt to accentuate the moral responsibility of the individual, this ought to be the rule.<sup>49</sup>

In receiving this testimony (particularly the testimony by Vogel and Edge), the Court decided that Afghanistan law was “readily and reliably ascertainable” and that the Afghan courts would not enforce a tort for tortious interference with a contract.<sup>50</sup>

**2. *CPS International Inc. v. Dresser Industries Inc.*, 911 S.W.2d 18 (Tex. Ct. App. 1995).**

In 1978, CPS International (a Delaware Corporation) and a Saudi Arabian national named Abdullah Rushaid Al-Rushaid formed a Saudi Arabian Company named Creole Al-Rushaid, Ltd., with the purpose of conducting business in Saudi Arabia. CPS International was a wholly owned subsidiary of Creole Production Services, a Delaware Corporation whose principle place of business is in Houston, Texas. Creole Al-Rushaid was formed under Saudi Arabian law for the purpose of conducting operations in Saudi Arabia. In 1983, CPS International and Al-Rushaid instituted an action in the Saudi courts to dissolve the corporation.<sup>51</sup> However, after the process proved cumbersome, CPS International alleged that Al-Rushaid deliberately attempted to slow the process of dissolving the corporation. CPS International further alleged that Al-Rushaid conspired with Dresser Industries to drive CPS International out of the Saudi Arabian market.<sup>52</sup>

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<sup>49</sup> *Bridas Corp.*, 16 S.W.3d at 905.

<sup>50</sup> *Id.* at 906.

<sup>51</sup> *Id.* at 21.

<sup>52</sup> *Id.*

A number of different suits in federal and Saudi Arabian courts finally culminated in a settlement between the parties.<sup>53</sup> Nevertheless, CPS International and Creole brought suit in Texas State Court against Al-Rushaid and Dresser Industries alleging the same claims urged to the Saudi Arabian Courts. The District court granted summary judgment against CPS and Creole finding that Saudi Arabian Law applied and did not recognize the plaintiffs' claims.

The appellate court reviewed the decision according to the standards accorded to summary judgment decisions.<sup>54</sup> The Court faced the mixed question of addressing a foreign law as a mixture of fact and law.<sup>55</sup> The Appellate Court's decision treated the

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<sup>53</sup> In 1985, CPS brought a Federal Antitrust action against Dresser Industries and Al-Rushaid asserting that the defendants were engaged in a conspiracy to drive CPS out of the Saudi Arabian market. The Court eventually dismissed the matter holding that there was an insufficient impact on the U.S. Market to proceed as a Federal Antitrust matter. *CPS*, 911 S.W.2d at 21. Before the court dismissed the matter, the CPS and Creole filed a second action in the same court alleging similar facts, and claiming that the effects were anti-competitive. The Court again dismissed CPS's action stating: "if there are any anticompetitive effects, surely they are in Saudi Arabia, where CARL (Creole Al-Rushaid Ltd.) was eliminated as a competitor. *Id.* Concurrently with the filing of its original suit, CPS also filed a matter in Saudi Arabian Court against Al-Rushaid for breach of contract, breach of fiduciary duty, misappropriation of confidential information, and conspiracy. The claims were heard by a three judge panel that held that these matters were non-justicible under Saudi Arabian law, but, which went on to investigate alternative means to resolve the parties' disputes. *Id.* Both sides agreed to settle the disputes with Al-Rushaid agreeing to cooperate in the Creole-Al Rushaid dissolution, and CPS agreeing to drop the aforementioned federal suits. CPS then brought the action currently under discussion in the Texas State District Court.

<sup>54</sup> The standard of review considers whether the movant successfully carried his burden of proof at the trial level -- showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law. *See id. citing* Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991).

<sup>55</sup> The court said that intuitively "the task of determining foreign law strikes us as a factual inquiry into the content or text of foreign rules of law." However, Texas Rules of Evidence art. 203 makes clear that the determination of the content of foreign law is a question of law for the court. *CPS*, 911 S.W.2d at 21. Thus, the Court rephrased its assessment as one not to determine whether the trial court properly found no factual

application of Saudi Arabian law as a question of law, rather than a contestable issue of fact. The Court accordingly considered the issues on two discreet planes: first, whether the manner in which the Al-Rushaid defendants competed with Creole-Al Rushaid could have been determined by contract;<sup>56</sup> and second, whether Saudi Arabian law would

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matter at issue, as whether the court reached a proper legal conclusion regarding its content. *Id.*

<sup>56</sup> Regarding the first issue, the court reviewed four different agreements executed between Al-Rushaid and Creole in the context of their business relationship. Al-Rushaid and Dresser relied upon three writings which allude both directly and indirectly to Saudi Arabian law being applicable to any dispute. The first such agreement relied upon by Al-Rushaid and Dresser, what the Court describes as the Kriol Contract, included a provision that states: “if arbitration fails to settle the dispute the case will be taken to the committee of settling the Commercial disputes at Dammam; the contract continued stating that the company shall abide by all the rules and regulations existing in force in the kingdom of Saudi Arabia. All provisions not stated in this contract will be governed by the code of the Companies Act.

The Second agreement appeared in the By-laws of Creole-Al Rushaid. It provided that “if any difference or dispute shall arise between the parties as to the interpretation of the by-laws, or any other matter or thing arising therefrom or in connection therewith, then, upon either parties giving notice of difference or dispute to the other, the same shall be referred to arbitration the venue for which shall be the Committee for Settlement of Commercial disputes, Dhaharan, Saudi Arabia.

The third contractual provision relied upon by the Al-Rushaid/ Dresser defendants appeared in the working agreement between the parties. It stated that “Each director of [Creole Al-Rushaid Ltd.] will meet the responsibilities imposed on him by the laws of Saudi Arabia. Creole agrees to manage the joint venture company in accordance with Saudi Arabian laws. ... Any controversy or claim among the parties to this agreement arising out of or relating to this agreement shall be settled in accordance with the provision in the bylaws of [CARL] for the settlement of disputes. *Id.*

On the other hand, the CPS and Creole parties claimed that these expressions cited by Al-Rushaid and Dresser were mere agreements to abide by Saudi Arabian law, not binding choice of law clauses. CPS and Creole point to a fourth expression by the parties in the Technical Assistance Agreement, which provides: “Any controversy, dispute, or question arising out of, or in connection with, or in relation to this Agreement or its interpretation, performance, or nonperformance or any breach thereof shall be determined in accordance with the Laws of the United States of America.

The court ultimately agreed with the CPS Creole parties that the choice of law provision in the Technical Assistance Contract was the only genuine choice of law provision. In doing so the court allowed the contract claims to proceed under U.S. law.

recognize a tort for interference with a contract. We will turn attention only to the second as relevant to our discussion, as only the later addresses the application of Islamic law.

The Court's assessment of which law governs the tort claims brought by CPS and Creole centered around the Restatement (Second) on Conflicts of Laws. After outlining the pertinent sections of the Restatement, the Court turned to its analysis. First, the court found that the alleged injury occurred in Saudi Arabia: the Court noted that at the bottom of Plaintiffs' claims were the actions by Dresser to "wrest field servicing business in Saudi Arabia' away from Creole-Al Rushaid. The Court pertinently determined that the financial harm done to Creole-Al Rushaid, though felt in Texas, originated from actions occurring in Saudi Arabia. Next, the Court found that the injury situs was in Saudi Arabia stating that though directed from Texas, the actions occurred in Saudi Arabia. Third, the Court noted that none of the nine litigants were Texas Corporations with only two even holding offices in Texas; the court noted that the fact that five of the nine litigants were Saudi Arabian, that this factor weighed against the application of Texas law. A final review of the relationships of the parties also pointed to the application of Saudi Arabian law.<sup>57</sup>

Thus, the court came to consider whether Saudi Arabia would allow for the tort of interference with a contractual relationship. CPS International and Creole produced William Van Orden Gnichtel,<sup>58</sup> who testified that Saudi Arabia would recognize a claim for tortious interference with a contract. He said: "I would set aside or disregard the nomenclature and get to the essence, and the essence is basically that if one does a wrong

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<sup>57</sup> *Id.* at 29-30.

<sup>58</sup> Apparently, Van Orden Gnichtel's testimony regarding Saudi Arabian law was based on conversations with a colleague, who unlike Gnichtel, is licensed as a Saudi Arabian lawyer.

to another he will be required to compensate the wronged party.”<sup>59</sup> The court found Van Orden Gnichtel’s testimony to be fatal because it only considered a general principle instead of the actual conduct in the case.<sup>60</sup>

Al-Rushaid and Dresser presented expert testimony from Joseph Saba, who besides being more precise about Saudi Arabian Law, addressed the specifics of the matter. He testified:

“The American concept of Tortious interference with a contract is not among the acts giving rise to a cause of action in Saudi Arabia. The nonexistence of such a cause of action is consistent, *inter alia*, with the Hanbali School’s emphasis on individual free will and responsibility. If a person does not perform his contractual obligations or does not enter into a contract or breaches his duties to another, such conduct is his own responsibility, not that of anyone else. Even if another person persuades, requests or otherwise influences such conduct, that other person is not liable in a civil action for monetary payments to the plaintiff, in the absence of direct contractual obligation running from that other person to the plaintiff.”<sup>61</sup>

Saba continued by addressing a statement by Van Orden Gnichtel that the “Shari’a” recognizes civil liability for wrongful acts resulting in damages... and is not dependant on specific contractual arrangements or specific regulations promulgated by government.”<sup>62</sup> Saba said that though Van Orden Gnichtel’s interpretation is correct when applied to Saudi Arabian law, it would be incorrect to apply this premise across the gamit of American Tort claims. He said:

The Saudi scope of liability of one private party to another does not encompass all acts which American law might consider to be wrongful.... Finally, while the existence of

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<sup>59</sup> *Id.* at 31.

<sup>60</sup> *Id.* at 31.

<sup>61</sup> *Id.* at 32.

<sup>62</sup> *Id.*

liability is not necessarily dependent upon "specific contractual arrangements or specific regulations," the conduct in question still must lie within an appropriate category of actionable conduct under Saudi Arabia's strict construction of the Shari'a. As stated above, based upon my review of the pleadings in this case, the claims against Dresser in this suit do not fit within such a category. There is no nexus under Saudi law between Dresser and the plaintiffs giving the plaintiffs the cause of action they assert.<sup>63</sup>

On subsequent cross examination, CPS and Creole's expert admitted that as applied, Saudi Arabian law would not recognize a claim against a third party for tortious interference with a contract.

The court subsequently addressed other issues of fiduciary duty, misappropriation of trade secrets, and conspiracy. However, CPS and Creole failed to posit arguments to the court specifically relating to these claims. Accordingly, their tort claims were dismissed.

3. ***Saudi Basic Oil Industries Corp. v. Mobil Yanbu Petrochemical*, 866 A.2d 1 (Del. 2005).**

In 2004, the Delaware Supreme Court heard the matter of *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co. Inc.*<sup>64</sup> In *Saudi Basic*, a Saudi Arabian partner (Saudi Basic Industries Corp. ("SABIC")) in a joint venture with Mobil Yanbu

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<sup>63</sup> *Id.* at 32.

<sup>64</sup> 866 A.2d 1 (Del. 2005). This matter actually maintains two underlying cases as its procedural history. In 2002, SABIC brought an action against ExxonMobil in the U.S. District Court for the District of New Jersey seeking a declaratory judgment that ExxonMobil had used technology previously developed for the Joint ventures to obtain proprietary information from SABIC. They further sought a judgment declaring that the Exxon/SABIC venture owned the patents and seeking an injunction requiring ExxonMobil to transfer them to the venture. During the discovery phase of the trial, SABIC agreed to a consent order that would have required SABIC to respond to the overcharge allegations. *See Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F.Supp. 2d 378, 384 (D.N.J. 2002). Instead of responding, SABIC filed the Delaware Superior Court matter. 866 A.2d at 10 n.7.

Petrochemical Co. Inc. (“Mobil”) and Exxon Chemical Arabia, Inc. (“Exxon”) sought to overturn a Superior Court order denying SABIC’s request for judgment that it did not overcharge Mobil and Exxon for technologies licensed from a third party. Mobil and Exxon countersued SABIC, and was awarded US\$220,238,108 and US\$196,642,656 respectively.<sup>65</sup>

In 1980, SABIC, a Saudi Arabian Corporation, created joint ventures with Mobil and Exxon to manufacture polyethylene in Saudi Arabia. The Joint ventures carefully negotiated their contract agreements, and as the Court says included a requirement that the profits enjoyed by each joint venture partner would be limited to the profits earned by the joint venture -- a provision the court deemed critical to its analysis.<sup>66</sup> In particular, the joint venture agreement provided: “To the extent either Partner, or any affiliate thereof, procures patents, processes, and other licensing rights of third parties, and sublicenses such rights to the partnership, it shall not receive any remuneration other than actual cost incurred in acquiring and sublicensing such right.”<sup>67</sup>

In order to produce Polyethylene, Mobil and SABIC had to license technology it did not own.<sup>68</sup> In Spring 1980, SABIC informed Mobil that it would license the technology directly from Union Carbide Corporation (“UCC”) and then sublicense the

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<sup>65</sup> *Id.* at 7.

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *Id.* at 8. The text of the Exxon venture differed slightly, reading: “Patents, Processes, and other licensing rights of third parties which require the payment of royalties, rentals and other remuneration to such third parties shall be paid by the partnership against appropriate invoices. To the extent either partner or any Affiliate thereof procure such rights and sublicenses for the Partnership, it shall not receive any remuneration other than actual cost disbursed in acquiring such license.” *Id.*

<sup>68</sup> *Id.* at 8.

technology to the joint venture;<sup>69</sup> in making this overture, SABIC assured Mobil that it would comply with the contractual requirements of passing on costs “dollar for dollar.”<sup>70</sup> Nevertheless, over the following two decades SABIC marked up the costs before passing them on to the joint venture for payment -- with Mobil and Exxon oblivious to the mark-up in costs.<sup>71</sup>

In June 1987, spurred by poor conditions in the polyethylene market, UCC agreed to reduce its licensing royalties due, including the amount due from SABIC. At the same time, Exxon and Mobil amended their joint ventures with SABIC to account for the adjusted royalty fees. However, unbeknownst to Mobil or Exxon, SABIC had negotiated for itself a royalty reduction rate that was significantly larger than the reductions in either the Mobil or Exxon contracts.<sup>72</sup>

In 2000, ExxonMobil, now merged, discovered the overcharges.<sup>73</sup> SABIC and the Saudi Taxing Authority came into dispute about the royalties paid by SABIC to UCC under the SABIC/UCC agreement; the Saudi Government determined that those payments were taxable. The decision prompted SABIC to send letters to the joint ventures explaining the tax dispute and demanding their contribution to the tax. While

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<sup>69</sup> In 1980, UCC and SABIC executed a agreement granting SABIC an exclusive license to the Unipol Technology within the Kingdom of Saudi Arabia. Mobil and Exxon were not permitted to attend the meeting between UCC and SABIC. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> The Court noted that SABIC’s motives appear related to insuring any losses the joint venture may suffer, as they accounted for the increase in the profit margin of the corporation. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

verifying the accuracy of the SABIC indemnification demand, ExxonMobil discovered for the first time that SABIC had been overcharging the ventures.<sup>74</sup>

In the trial court, both sides agreed that Saudi Arabian substantive law applied to the dispute. Specifically, the Court found that SABIC was liable for the Saudi tort of *ghasb* or usurpation.<sup>75</sup> SABIC argued that the conclusion that *ghasb* had been committed was inappropriate because SABIC did not act forcefully and with the victim's knowledge. Concretely, SABIC's argument was that because it had acted surreptitiously and without the victim's knowledge, then *Ghasb* is simply inapplicable to the current dispute. Indeed, SABIC stated that all ExxonMobil proved was that SABIC had engaged in "secret conduct based on the color of right."<sup>76</sup> SABIC's claims can be reduced to three discreet questions by the Court: first that to commit *ghasb* under Saudi Arabian law, ExxonMobil was required to establish, but failed to establish "an open and obvious taking that is intentional and without any color of right;" second, that no Saudi Court would have awarded enhanced damages in a contract case such as this one; and third that the trial court, though purporting to employ the methodology that a Saudi Judge would employ (*Ijtihad*) in fact only employed *ijtihad* as a post hoc rationalization for foreign law rulings that were "arbitrary and unprincipled."<sup>77</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> Other issues were presented for review, including whether the trial court's evidentiary rulings were accurate, whether the Delaware borrowing statute applied, and the contractual construction of claims. This analysis only focuses on the *Ghasb* claims as relevant to Islamic law. *Id.* at 11-30.

<sup>76</sup> *Id.* at 29.

<sup>77</sup> *Id.*

Addressing the question of *ijtihad* first, the Delaware Supreme Court affirmed the Trial Court’s reasoning and method.<sup>78</sup> The Court began by defining the religious aspects of Saudi Arabian law, flowing from the Hanbali school. Dr. Vogel testified that Saudi Judges “hew conservatively to the Hanbali school.”<sup>79</sup> The Court also noted the differences between Saudi Arabian law and that of Common Law countries, specifically, that Islamic countries do not embrace precedent or *stare decisis* in the same way as western courts do; and the relative unavailability of law reports to the public.<sup>80</sup> From this beginning the Supreme Court cited the trial judge’s rationale in applying Islamic law:

SABIC’s arguments ignore the simple truth that the circumstances under which Ghasb damages are available under Saudi law are not well known, much less defined, because Saudi law is not based on precedent or *stare decisis*. Contrary to the implication of SABIC’s briefing on this issue, the reality is that one cannot simply consult a statute book or a case reporter to find the elements of, or damages available for the Saudi law tort of Ghasb. Nor can one point to one definition of, or a given set of circumstances giving rise to, Ghasb. To illustrate the extreme difficulty of discerning and interpreting Saudi law, the Court notes that none of the Saudi law experts who testified agreed on the proper elements of Ghasb... Finally, because Saudi law decisions are not published, even if the decisions had precedential value (which all the experts agree they do not) the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.<sup>81</sup>

The Supreme Court in affirming this reasoning by the Superior Court Judge, noted that judges in Saudi Arabia must “first and last navigate within the boundaries” of the Hanbali School’s authoritative works, including works by Mansur-al-Bahuti, a 17<sup>th</sup> century

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<sup>78</sup> *Id.* at 30

<sup>79</sup> *Id.* at 30 n. 72.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 31.

scholar, as well as the works of Ibn Qudama and Al Maqdisi.<sup>82</sup> The Court, noting testimony from Professor Hallaq that each time a Saudi law Judge exercises Ijtihad, “it is basically his best ... effort to find what is the right thing to do,”<sup>83</sup> affirmed the trial judge’s rationale as “doing the best it could to reach the right result.”

In coming to its conclusions, the trial judge heard evidence from four Saudi law experts retained by the parties, as well as its own expert when conflict between the expert opinions was apparent. The Court particularly noted the contradiction between the position submitted by SABIC expert Dr. Vogel that the Court could not credibly engage in the *ijtihad* process. The court said in response:

According to Dr. Vogel, *ijtihad* requires for its credibility qualification which on the very face of things, neither Professor Hallaq, myself or, with respect, any U.S. Court possesses. If Dr. Vogel is correct, then why did SABIC choose to file this dispute in a United States Court. If Dr. Vogel is correct that neither he, nor Dr. Hallaq possess the qualifications to engage in the *ijtihad* process, then what Saudi law “expert” would be able to assist this United States court in determining the applicable Saudi law.<sup>84</sup>

On this view, the Supreme Court affirmed the trial court’s determinations under *ijtihad*.

Turning to the specific issue of *Ghasb*, the Court determined that “in order to establish a claim for usurpation, ExxonMobil must show, by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessor rights over the property of another without consent, “which means with blatant or reckless disregard for those property rights. The conduct need not be intentional.”<sup>85</sup> In coming to this

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<sup>82</sup> *Id.* at 31.

<sup>83</sup> Saudi Basic Industries Corp., 2003 WL 22016843, at \*2 n. 8.

<sup>84</sup> *Id.* The Court also noted the contradiction of SABIC posing this argument only after receiving a unfavorable judgment.

<sup>85</sup> *Id.* at 33.

definition, the trial court rejected SABIC's argument that *Ghasb* must include elements of being open and notorious as well as intentional without color of right. The court relied upon experts that said the Hanbali's school requires no such elements for the tort. For example Dr. Wolfson testified that there is "no single binding definition of *Ghasb*, but rather a range of possibilities."<sup>86</sup> The Court specifically rejected Dr. Vogel's definition of *Ghasb*, who suggested that openness and intentional conduct were required.<sup>87</sup> Instead, the court embraced the testimony of Dr. Wolfson, who testified that the most revered Hanbali scholars do not include openness or intention in their definition of *Ghasb*.<sup>88</sup> In turn, Hallaq testified that the victim does not need to know he was a victim to be considered a victim of *Ghasb*. On this basis, the Supreme Court of Delaware affirmed the lower court ruling.

Regarding the practice (or non-practice) of awarding enhanced damages by Saudi Courts, the trial judge said:

[S]imply because SABIC's expert is unable to name a case in which a Saudi judge awarded damages for usurpation is of little import to this Court considering that Saudi law does not recognize *stare decisis* and Saudi law opinions are not published. To say that usurpation damages are "highly unusual" presumes that there are Saudi law cases where judges refuse to award damages for usurpation even when the elements have been clearly established. No such case law was provided to the Court, nor could it be, given the nuances of the Saudi law system. Moreover, whether a

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<sup>86</sup> *Id.* at 33.

<sup>87</sup> *Id.* The Court does not find Dr. Vogel's latest definition of *ghasb* persuasive. Having had the opportunity to watch Dr. Vogel testify, observe his demeanor on the witness stand when his interpretation of Saudi law was challenged, and review his latest affidavit as well as his prior affidavits and deposition testimony, the Court finds he has become (or been exposed as) more of an advocate than an objective scholar of Islamic law. His relentless attacks on Dr. Hallaq's qualifications and expertise further undermine his credibility in the Court's eye. The Court is concerned about Dr. Vogel's objectivity.

<sup>88</sup> *Id.* at 33-34.

form of damages is "unprecedented" is also irrelevant if such damages are available according to the authoritative Hanbali texts which are the primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case.<sup>89</sup>

The Court also noted that Dr. Wolfson testified that in tort actions in the Hanbali school, damages, such as those awarded in this case, are not so irregular as to be incorrect.<sup>90</sup>

**4. *Blackstone v. Aramco Services Co.*, No. 80-44642, 1991 WL 63630 (Tex. Ct. App. 4/25/1991).**

In 1964 Arabian American Oil Co. ("ARAMCO") hired Robert E. Blackstone to work in Saudi Arabia as a waterwell maintenance manager. In 1979, ARAMCO conducted an internal investigation to determine the validity of allegations that five senior managers, including Blackstone, received favors from contractors or had improperly approved invoices for subcontractors.<sup>91</sup> Blackstone claimed that ARAMCO investigators were threatening him, and he returned to Texas. Blackstone was allegedly forced to take early retirement, and suffered from severe mental and emotional injuries.<sup>92</sup>

Blackstone in 1980 filed suit against ARAMCO alleging improper termination, slander, negligence, false imprisonment, assault, and infliction of emotional distress. Among the remedies sought by Blackstone included that of *taz'ir* - a lashing of the tortfeasor by the state. After deciding whether Saudi law applied, the Court turned to whether Saudi law recognized the torts Blackstone alleged.

The Court initially noted that:

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<sup>89</sup> *Id.* at 35.

<sup>90</sup> *Id.*

<sup>91</sup> *Blackstone*, 1991 WL 63630, at \*1.

<sup>92</sup> *Id.* at \*2.

the Shari'a does not permit actions for damages of a moral or emotional nature. Serious bodily injury, short of death gives the victim the right to recover money damages determined according to the importance of the injured organ or the seriousness of the wound inflicted. Anything short of physical injury or damage to a specific part of the body that is inflicted by some form of physical contact does not give rise to compensable claims for damages under Shari'a, but may subject the tortfeasor to the criminal sanction of Ta'zir.<sup>93</sup>

Finding that Blackstone exhibited no physical injuries, the court denied his contention that Saudi Law would afford a remedy for his claims.<sup>94</sup> Finally the court noted that Blackstone's claim for imprisonment or lashings are outside the jurisdictional scope of the Courts. The Court noted that Taz'ir is a penal claim and therefore outside the boundaries of the district civil court.<sup>95</sup>

**5. *Rhodes v. ITT Sheraton Corp*, No. Civ. A. 97-4530-B, 1999 WL 26874; 9 Mass. L. Rptr. 355 (Mass. Super. Ct. 1/15/1999).**

In 1994, Emma Louise Rhodes was injured while a guest at the Sheraton Jeddah Hotel and Villas ("Jeddah") in Saudi Arabia.<sup>96</sup> Rhodes was a British national; the defendants, all Massachusetts citizens, were ITT Sheraton Corp ("ITT"), Sheraton International Inc., ("International"), Sheraton Overseas Management Corporation ("Overseas"), Sheraton Middle East Management Corp. ("Middle East"), and John Veelenturf, Vice President of ITT and director of fire, life safety and environment. Rhodes did not name as defendants Jeddah nor its Saudi Arabian owner Saudi Brothers

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<sup>93</sup> *Id.* at \*3.

<sup>94</sup> Blackstone claimed that his injuries included "depression, anxiety, tension, insomnia, anorexia, nervous eating, and seclusiveness." *Id.*

<sup>95</sup> *Id.* at \*5.

<sup>96</sup> *Rhodes*, 1999 WL 26874, at \*1.

Commercial Company (“Saudi Brothers”).<sup>97</sup> Under a contractual arrangement between Saudi Brothers and Middle East Management Corp. (“Middle East”) Middle East operates the Sheraton Jeddah for Saudi Brothers.<sup>98</sup> Middle East is a wholly owned subsidiary of ITT.<sup>99</sup> ITT also owns International, which granted Saudi Brothers a license to use Sheraton trademarks.<sup>100</sup> ITT also owns Overseas.<sup>101</sup>

Rhodes, while staying at Jeddah injured her spinal cord while diving into the water.<sup>102</sup> The resort complex encompassed a beach, a large concrete wharf, a wooden platform or jetty and a lagoon.<sup>103</sup> Coral reef stretched underneath the jetty and around the edge of the lagoon.<sup>104</sup> Rhodes struck her head on the Coral when she dove into the lagoon from the Jetty.<sup>105</sup> She lay in the water, face down and unable to move until she was pulled out and taken to a nearby hospital.<sup>106</sup> Rhodes suffered a high level spinal injury and spent three months in a Saudi Hospital where she underwent surgery to fuse her spine.<sup>107</sup> As a result of her injuries, Rhodes is a tetraplegic, unable to move her left arm, either of her legs, and has limited function of the right arm.<sup>108</sup>

The Massachusetts Superior Court reviewed whether an adequate alternative forum existed for Ms. Rhodes claims and whether the matter should be transferred. On the first issue, the court considered whether the Saudi Arabian Courts were adequate alternative

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<sup>97</sup> *Id.* at \*1 & 1 n. 2.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*1.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

forums. The court noted that the plaintiff would encounter significant “procedural disadvantages” if the matter was to proceed in Saudi Arabian courts.<sup>109</sup> On the testimony of Frank Vogel,<sup>110</sup> the court noted that the Plaintiff would not be entitled to testify herself.<sup>111</sup> Vogel testified that “all parties are presumed to be prejudiced in favor of themselves and therefore are not considered to be reliable witnesses.”<sup>112</sup> Vogel noted that the plaintiff would be entitled to submit written assertions;<sup>113</sup> but on the commentary of Peter Sloane, the court concluded that this testimony is somewhat disfavored to oral testimony.<sup>114</sup> The court also noted the lack of pre-trial discovery procedures, the lack of non-uniform rules of procedure in Saudi Courts, no jurisprudential precedent, and the biases against women as substantial procedural hurdles presented to the plaintiff.<sup>115</sup>

Then, the Court noted that the public policy factors recommended trying the case in Massachusetts. Among the rationale used was that Massachusetts law seemed to be more “equitable” to the claims of the plaintiff. The Court said:

For example, the better rule of law in a tort case probably would be that of Massachusetts. Saudi tort law is "subsumed under private actions and do[es] not exist as a distinct and highly developed field of law." Brand, *supra* at 28. Given the theory of liability in this case, it also is significant that Saudi law does not recognize agency within the concept of torts. *Id.* (general Islamic philosophy is that one is always responsible for one's own acts). Moreover, consequential, indirect, and speculative damages generally are viewed as nonrecoverable through a Saudi court. Turck, *supra* at 441. If she establishes defendants' liability,

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<sup>109</sup> *Id.* at \*2.

<sup>110</sup> *See supra* note \_\_\_\_.

<sup>111</sup> *Rhodes*, 1999 WL 26874 at \*2.

<sup>112</sup> *Id.* at \*2.

<sup>113</sup> *Id.* at \*2.

<sup>114</sup> *Id.* citing Peter B. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 INT'L L. 743, 751 (1988).

<sup>115</sup> *Id.*

plaintiff could only expect to recover actual medical expenses and a fraction of her "*diyah*," which is a fixed amount of compensation for personal injury.<sup>116</sup>

On the basis of this discussion, the trial court ruled that the Saudi forum was not appropriate for plaintiff's claims.<sup>117</sup>

**6. *Chadwick v. Arabian American Oil Co.*, 656 F.Supp. 857 (D. Del. 1987).**

In 1987, the U.S. District Court for the District of Delaware heard claims by Reed Chadwick, an employee of an independent contractor hired to do work in Saudi Arabia.<sup>118</sup> Chadwick claimed that while working in Saudi Arabia, he sought medical attention from a doctor retained by the Arabian American Oil Co. ("Arabia Oil"), the employer of Chadwick's independent contractor.<sup>119</sup> The doctor originally diagnosed Chadwick's problem as gas, and provided him with Antacid treatments.<sup>120</sup> A year later, Chadwick, still complaining of the same stomach pains, had an upper GI done by a different doctor retained by Arabia Oil who diagnosed the problem as a duodenal ulcer.<sup>121</sup> Later, after returning to the United States, Chadwick was diagnosed by a U.S. doctor as having a malignant stomach tumor.<sup>122</sup> As a result, his entire stomach, spleen, and a portion of his liver and pancreas were removed; he was unable to return to work.<sup>123</sup>

After deciding that Saudi Arabian law should apply to this dispute, the Court held that Chadwick could not state a claim for relief against Arabian Oil. The Court held that

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<sup>116</sup> *Id.* at \*5.

<sup>117</sup> *Id.*

<sup>118</sup> *Chadwick*, 956 F. Supp. At 809.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 859.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

Saudi law does not recognize vicarious liability.<sup>124</sup> The Court stated that under Saudi Arabian law, “vicarious liability is not recognized unless it is proven that an actor’s free will is obliterated by the person directing the actor to act.”<sup>125</sup> The Court continued, “The Shari’a, the common law of Saudi Arabia, ‘has a strict rule that responsibility for human action is individual and not vicarious.’”<sup>126</sup> Thus the court held that Chadwick, to the extent that he had a claim, had to proceed against the Saudi doctors, not Arabian Oil.

**7. *National Group for Communications and Computers v. Lucent Technologies International, Inc.*, 331 F. Supp. 2d 290 (D.N.J. 2004).**

In 2004, the U.S. District Court for the District of New Jersey heard claims for breach of contract by the National Group for Communications and Computers Ltd. (“NGCC”) against Lucent Technologies Inc. (“Lucent”).<sup>127</sup> The magistrate ordered the parties to submit evidence relating to Saudi Arabian law, as both parties agreed that Saudi Arabian law governed the dispute. NGCC sued Lucent for breach of contract relating to the installation of pay phone and emergency phone stations along highways in Saudi Arabia. The total amount of the contract was \$75,460,902. NGCC sought damages in excess of \$92,319,579, which included claims for future loss and unearned profits.<sup>128</sup>

The Court began its analysis of Saudi law by noting the differences between it and U.S. law. The Court came to the conclusion that the religious practices of Islam permeates every aspect of life in Saudi Arabia, most pertinently Contract disputes. The

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<sup>124</sup> *Id.* at 861.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *NGCC*, 331 F. Supp. 2d at 290.

<sup>128</sup> *Id.*

Court, relying on Frank Vogel,<sup>129</sup> noted that the Saudi Arabia legal system is governed exclusively by Shari'a.<sup>130</sup> The Court then said "in fact, there are not "laws" in Saudi Arabia other than Islamic law, and any supplemental rules promulgated by the Saudi government are actually considered regulations known as "Nizam."<sup>131</sup> The Court noted that these regulations are valid only to the extent that they are consistent with Shari'a. The Court then went on to define the sources of Shari'a:

The Shari'a is the product of several interrelated sources of religious authority. (Frank E. Vogel Tr. 143: 21-22; William M. Ballntyne Tr. 228:18- 19; Mujahid M. Al-Sawwaf Tr. 418: 17-21). The doctrines comprising Shari'a are derived primarily from the Qur'an, the "Book of God." The Qur'an is considered the word of God as received by the Prophet Muhammed. Because the Qur'an commands adherents of Islam to obey the Prophet, the recorded examples of the acts and words of Muhammed, known as the "Sunnah," constitute an additional integral part of the Shari'a. (Vogel Tr. 143-44: 20-1). In the centuries since the founding of Islam, Islamic religious-legal scholars qualified to interpret the scriptural sources have produced opinions known as "fiqh." A complete understanding of the Shari'a in Saudi Arabia today also requires reference to any relevant fiqh for guidance. There are four schools of Shari'a law, each of which interprets Islamic doctrine somewhat differently. The predominant school followed in the courts of Saudi Arabia is known as the "Hanbali" school.<sup>132</sup>

When a Saudi Arabian judge, known as a "qadi," attempts to resolve disputes, his decision must be in accordance with the Shari'a. Therefore, he will turn to the aforementioned Qur'an, the Sunnah, and fiqh to guide his legal determination. Saudi Arabian judges are not bound by judicial precedent (in fact, Saudi Arabian judicial opinions are not published) and the concept of stare decisis does not exist. (Vogel Tr. 143:2-4; Ballantyne Tr. 260-61:25- 1).

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<sup>129</sup> *See supra* note \_\_\_\_.

<sup>130</sup> *Id.* at 294.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 295 *citing* FRANK VOGEL, ISLAMIC LAW & LEGAL SYSTEM 5 (2000); FRANK VOGEL & SAMUEL HAYES, ISLAMIC LAW AND FINANCE 50-51 (1991).

Instead, judges "must strive for the divine truth for each case that confronts him, without being bound by past opinions, even his own. Truth is the ultimate precedent, to which one must return once it is revealed."<sup>133</sup>

Generally speaking, the Saudi Arabian legal structure is highly traditional and judges strictly apply classical Islamic law. In contrast to other Islamic countries that have adapted religious tenets to meet modern demands, in Saudi Arabia, Shari'a remains free of compromising reforms. (Vogel Tr. 166:14-25). The Board of Grievances too is very conservative in its interpretation of commercial and contract law. (Vogel Tr. 163:10-11). As one author noted, "commercial jurisprudence in Saudi Arabia remains marked by a conservative fiqh orientation, reflecting the shari'a educations of the judges.... [W]henver the expectations of international commerce conflict with fixed standards of the old Hanbali law, it is the former that gives way."<sup>134</sup>

A key doctrine within the Shari'a is the prohibition on "gharar," meaning risk or uncertainty. Gharar is absolutely repugnant to Islamic law. (Vogel Tr. 154-55:16-9). Future activity is deemed gharar because it is uncertain to anyone except for God. One of the consequences of this categorical rejection of gharar is that Saudi Arabian courts will not enforce the sale of anything uncertain or unknown. The object of a contract must be certain and defined and in existence. Several historical accounts of the acts and statements of the Prophet Muhammed, known as "hadith," are instructive on this issue:

*Do not buy fish in the sea, for it is gharar. The Prophet forbade sale of what is in the wombs, sale of the contents of the udders, sale of a slave when he is runaway ... The Messenger of God forbade the [sale of] the copulation of the stallion. He who purchases food shall not sell it until he weighs it.*<sup>135</sup>

One scholar expounded upon the implications that the prohibition of gharar has in producing differing

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<sup>133</sup> *Id. citing* VOGEL, ISLAMIC LAW AND FINANCE at 15.

<sup>134</sup> *Id. citing* VOGEL, ISLAMIC LAW AND LEGAL SYSTEMS at 305.

<sup>135</sup> *Id. citing* Frank E. Vogel, *The Contract Law of Islam and of the Arab Middle East*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 52 (Draft September 1, 2003).

understandings of contractual obligations under Western and Islamic law: In English law the sanctity of contract means that the promise endures despite the normal vicissitudes of fortune. It is right that the promise should be kept 'for better or for worse', 'through thick and thin', because this in line with the popular belief that tenacity of purpose to some degree controls events and that the human will determines the future. The promise must dominate the circumstances. For Islam precisely the converse is true. Circumstances dominate the promise. Future circumstances are neither predictable nor controllable but lie entirely in the hands of the Almighty.... If the tide of affairs turns then the promise naturally floats out with it.<sup>136</sup>

After this extensive discussion of Islamic law, the court then proceeded to the questions underlying this dispute. The Court noted that under Saudi Arabian law, damages available for breach of contract are generally limited to those losses which are actual and direct.<sup>137</sup> Further, “Saudi law will not allow damages which are ascertainable only means involving speculation, contingencies, uncertainties or indeterminacy.”<sup>138</sup> Thus, under the prohibition against *Gharar*, the Court will not allow expectation damages to be heard.<sup>139</sup> Additionally, under the same prohibition, Saudi law would not allow damages for lost profits, unrealized gains or future profits.

Plaintiff, whose expert was Frank Vogel, presented evidence that “higher valuations of damages are possible as long as the future event is not an explicit condition of the contract, and that uncertainty that is subsumed within a larger entity, such as a corporation, would be upheld, and that it is only when *gharar* inheres within a separate entity is it forbidden.”<sup>140</sup> The court simply rejected this line of argument. Accordingly,

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<sup>136</sup> *Id. citing* BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAWS 274.

<sup>137</sup> *Id.* at 298.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 298.

the Court limited the potential claims of the plaintiff to those damages actually suffered by NGCC, exclusive of any future or uncertain amounts.<sup>141</sup>

## **PART TWO CATEGORIZING JUDICIAL APPROACHES**

As described above, American Courts reach questions of Islamic substance through three cognitive stages: (1) recognition; (2) assimilation; and (3) response. Courts first attempt to recognize the issues that are involved, the law applicable and the appropriate basis to determine the issues. Next, the courts begin to assimilate the matters to determine what response they should make. Finally, they formulate their response, either in terms of their own jurisprudence or in terms of a compromised understanding. This part categorizes the seven courts described in part one as responding to the propositions presented by Islamic law with either procedural distance (formalism), interpretive bias, or transliteration.

### *a. Formalistic Responses to Islam*

Formalism is a posture of the court to divorce itself from the facts and deal strictly with the law.<sup>142</sup> Thus, the court, coldly and without regard to emerging patterns simply applies the law. The formalistic court does not see itself making policy; rather, its foremost goal is to “apply” the law to the cold set of facts before it.

*Bridas Corp. v. Unocal Corp.* provides a nice illustration.<sup>143</sup> The *Bridas* litigation resulted from contracts between Bridas Corp. and the governments of Afghanistan and Turkmenistan, and Bridas’s allegations that Unocal Corp. tortiously

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<sup>141</sup> *Id.*

<sup>142</sup> Anthony J. Sebok, *Misunderstanding Positivism* 93 MICH. L. REV. 2054, 2069-70 (1995).

<sup>143</sup> 16 S.W.3d 893 (Tex. Ct. App. 2000).

interfered with those agreements.<sup>144</sup> The Texas Appellate court reviewed the question whether the tort interference with a contractual relationship would be allowed under Afghani law.<sup>145</sup> Recall the Court's citation of Frank Vogel's testimony, which it found most persuasive:

One thinks, when one encounters anything like this, these torts specifically, if you encounter something in the translation that corresponds with these torts, you come up with absolutely nothing, not in any secondary works, not in anything that you have read in original works. So first, there is a presumption against such a tort you must admit. Then you think, well, might that be, because it is not likely that this situation has never arisen before. And then you think, well, perhaps it contradicts basic principles and there is the principle that springs to mind that does stand in the way of this recognition of these torts that's been often mentioned. It is represented by Article 89 of the Mejlle and article 1510. So this must be some part of the explanation as to why [these] torts are not recognized explicitly and that is, as it reads, article 89, "The judgment for an act is made to fall on the person who does it. And it does not fall on the person who gives the order, as long as he does not compel the doing of the act."<sup>146</sup>

In receiving this testimony, the Court decided that Afghanistan law was "readily and reliably ascertainable" and that the Afghan courts would not enforce a tort for tortious interference with a contract.<sup>147</sup> The Court's approach was to use law and law alone to come to this result -- a benchmark of formalism. Succinctly, the Court's analysis proceeded: (1) Afghani law is readily ascertainable to conclude this result; (2) there is no tort concept of interference with a contract within Afghani law; and (3) principles derived

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<sup>144</sup> *Bridas*, 16 S.W.3d at 905. For further detail in understanding the *Bridas* case, see AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA 158 (2000)

<sup>145</sup> *Id.*

<sup>146</sup> *Bridas Corp.*, 16 S.W.3d at 905.

<sup>147</sup> *Id.* at 906.

from Afghani law would suggest that there is no similar cause of action. The process is of survey, elimination, and distinction, without much regard to assimilating concepts or even understanding differences. Notably, the Court only considered Islamic law to the extent necessary to determine whether the issue was justiciable in its own forum.

***b. Interpretive Approach***

A second approach by the courts surveyed is an interpretive approach. This approach is characterized by the opinion in *Rhodes v. ITT Sheraton Corp.*<sup>148</sup> Recall the threshold question as framed by the Massachusetts Superior Court -- whether an adequate alternative forum existed for Ms. Rhodes claims and whether the matter should be transferred. On the first issue, the court considered whether the Saudi Arabian Courts were adequate alternative forums. The court noted that the plaintiff would encounter significant “procedural disadvantages” if the matter was to proceed in Saudi Arabian courts.<sup>149</sup> On the testimony of Frank Vogel,<sup>150</sup> the court noted that the Plaintiff would not be entitled to testify herself.<sup>151</sup> Vogel testified that “all parties are presumed to be prejudiced in favor of themselves and therefore are not considered to be reliable witnesses.”<sup>152</sup> Vogel noted that the plaintiff would be entitled to submit written assertions,<sup>153</sup> but on the commentary of Peter Sloane, the court concluded that this testimony is somewhat disfavored to oral testimony.<sup>154</sup> From this, the court perceived a lack of pre-trial discovery procedures, the lack of non-uniform rules of procedure in

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<sup>148</sup> *Rhodes*, 1999 WL 26874, at \*1.

<sup>149</sup> *Id.* at \*2.

<sup>150</sup> *See supra* note \_\_\_\_.

<sup>151</sup> *Rhodes*, 1999 WL 26874 at \*2.

<sup>152</sup> *Id.* at \*2.

<sup>153</sup> *Id.* at \*2.

<sup>154</sup> *Id.* citing Peter B. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 INT’L L. 743, 751 (1988).

Saudi Courts, no jurisprudential precedent, and the biases against women as substantial procedural hurdles presented to the plaintiff.<sup>155</sup>

Then, the Court noted that the public policy factors recommended trying the case in Massachusetts. Among the rationale used was that Massachusetts law seemed to be more “equitable” to the claims of the plaintiff. The Court said:

For example, the better rule of law in a tort case probably would be that of Massachusetts. Saudi tort law is "subsumed under private actions and do[es] not exist as a distinct and highly developed field of law." Brand, *supra* at 28. Given the theory of liability in this case, it also is significant that Saudi law does not recognize agency within the concept of torts. *Id.* (general Islamic philosophy is that one is always responsible for one's own acts). Moreover, consequential, indirect, and speculative damages generally are viewed as nonrecoverable through a Saudi court. Turck, *supra* at 441. If she establishes defendants' liability, plaintiff could only expect to recover actual medical expenses and a fraction of her "*diyah*," which is a fixed amount of compensation for personal injury.<sup>156</sup>

On the basis of this discussion, the trial court ruled that the Saudi forum was not appropriate for plaintiff's claims.<sup>157</sup>

The Court's analysis is directly in contradistinction to the formalistic approach of *Bridas*. *Rhodes* addresses the law first and foremost in relation to the plaintiff's injuries. That Saudi Law makes the most sense given the approximation of the Plaintiff's injuries is not the primary cause for the Court's consideration. Rather, the Court in reviewing the law of Saudi Arabia made a character judgment that Saudi Arabian law was inadequate for the court's conception of justice. In this sense, *Rhodes* is a good example of courts

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*5.

<sup>157</sup> *Id.*

that interpret Islamic law in terms of their own conceptions, rather than the unique postulations on which the system of law was built.

*c. Translitative Approach*

A third approach used by courts surveyed is a translative approach; that is, one takes concepts of Islamic law, finds parallels in American law, and then meets out the distinctions. So, for example, when the Delaware Supreme Court heard the matter *Saudi Basic Oil Industries v. Mobil Yanbu Petrochemical*,<sup>158</sup> the court attempted to understand the Islamic principle of *Ghasb* in light of the word Usurpation.<sup>159</sup> The Court's approach could have been problematic had it confused the vernacular "usurpation" and the term of art "usurpation."<sup>160</sup> Indeed, Islamic scholars suggest that *Ghasb* means an unjustified taking -- the vernacular meaning of Usurpation, tied to specific property. An action for *Ghasb* would pit the property claimant against the property holder. If the person who allegedly dispossessed the plaintiff of his property proved that he had a better right to the property, then the claim for *Ghasb* failed.

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<sup>158</sup> 866 A.2d 1 (Del. 2005). In *Saudi Basic*, SABIC, a Saudi Arabian Corporation, created joint ventures with Mobil and Exxon to manufacture polyethylene in Saudi Arabia. The Joint Ventures specifically contracted to exclude the opportunity for the joint partners to gain a profit at each other's expense.

<sup>159</sup> Other issues were presented for review, including whether the trial court's evidentiary rulings were accurate, whether the Delaware borrowing statute applied, and the contractual construction of claims. This analysis only focuses on the *Ghasb* claims as relevant to Islamic law. *Id.* at 11-30.

<sup>160</sup> *Guth v. Loft Inc.*, 5 A.2d 503, 509 (Del. 1939). The artistic meaning is more refined. Usurpation, as used by U.S. Courts is a specific tort relating to fiduciaries that seize unfairly upon an opportunity that either is to be shared between the fiduciary and his principle or (in the case of a corporate officer) to be executed by the executive exclusively.<sup>160</sup> Specifically, a Corporate officer or director may not take an opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the project; and (4) by taking this opportunity for his own, the corporate fiduciary will be placed in a position inimicable to his duties to the corporation.

The Court in weighing the expert testimony regarding *Ghasb* concluded that “ExxonMobil [Plaintiff] must show by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessory rights over the property of another without consent, “which means with blatant or reckless disregard for those property rights. The Conduct need not be intentional.” The Court effectively used a vernacular concept (Usurpation) and then was able to narrow its wide definition, resist the temptation to mold the term towards its American meaning, and thereby render a just result.<sup>161</sup>

Importantly, the Court in *SABIC* saw itself performing the function of a Saudi Arabian judge. Addressing the question of *ijtihad* first, the Delaware Supreme Court affirmed the Trial Court’s reasoning and method.<sup>162</sup> The Court began by defining the religious aspects of Saudi Arabian law, flowing from the Hanbali school. Dr. Vogel testified that Saudi Judges “hew conservatively to the Hanbali school.”<sup>163</sup> The Court also noted the differences between Saudi Arabian law and that of Common Law countries, specifically, that Islamic countries do not embrace precedent or *stare decisis* in the same way as western courts do; and the relative unavailability of law reports to the public.<sup>164</sup> From this beginning the Supreme Court cited the trial judge’s rationale in applying Islamic law:

SABIC’s arguments ignore the simple truth that the circumstances under which *Ghasb* damages are available under Saudi law are not well known, much less defined, because Saudi law is not based on precedent or *stare*

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<sup>161</sup> The Court’s conclusion may also be seen as interpretive, as it was able to move beyond the concept of tangible physical or real property and allow usurpation over financial interests -- a result not addressed in Islamic literature, but appropriate nonetheless.

<sup>162</sup> *Id.* at 30

<sup>163</sup> *Id.* at 30 n. 72.

<sup>164</sup> *Id.*

decisis. Contrary to the implication of SABIC's briefing on this issue, the reality is that one cannot simply consult a statute book or a case reporter to find the elements of, or damages available for the Saudi law tort of Ghasb. Nor can one point to one definition of, or a given set of circumstances giving rise to, Ghasb. To illustrate the extreme difficulty of discerning and interpreting Saudi law, the Court notes that none of the Saudi law experts who testified agreed on the proper elements of Ghasb... Finally, because Saudi law decisions are not published, even if the decisions had precedential value (which all the experts agree they do not) the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.<sup>165</sup>

The Supreme Court in affirming this reasoning by the Superior Court Judge, noted that judges in Saudi Arabia must "first and last navigate within the boundaries" of the Hanbali School's authoritative works, including works by Mansur-al-Bahuti, a 17<sup>th</sup> century scholar, as well as the works of Ibn Qudama and Al Maqdisi.<sup>166</sup> The Court, noting testimony from Professor Hallaq that each time a Saudi law Judge exercises Ijtihad, "it is basically his best ... effort to find what is the right thing to do,"<sup>167</sup> affirmed the trial judge's rationale as "doing the best it could to reach the right result."

A second example of a court using a transliterative approach to Islamic law is in *NGCC v. Lucent Technologies International, Inc.*<sup>168</sup> *NGCC* revolved around a contractual dispute relating to the installation of certain payphone and emergency phone stations in Saudi Arabia. *NGCC* sued Lucent Technologies for failure to perform, and sought damages not only for the amounts injured, but for lost profits, future loss, and lost opportunity. The central Islamic concept considered was that of *Gharar*.

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<sup>165</sup> *Id.* at 31.

<sup>166</sup> *Id.* at 31.

<sup>167</sup> Saudi Basic Industries Corp., 2003 WL 22016843, at \*2 n. 8.

<sup>168</sup> 331 F.Supp.2d 290 (D.N.J.2004).

The Court's analysis proceeded by explaining the context of Islamic law,<sup>169</sup> the role of Islamic law judges within the legal system,<sup>170</sup> and then the relation of the current dispute to the English vernacular. The Court addressing *Gharar* said:

A key doctrine within the Shari'a is the prohibition on "gharar," meaning risk or uncertainty. Gharar is absolutely repugnant to Islamic law. (Vogel Tr. 154-55:16-9). Future activity is deemed gharar because it is uncertain to anyone except for God. One of the consequences of this categorical rejection of gharar is that Saudi Arabian courts will not enforce the sale of anything uncertain or unknown. The object of a contract must be certain and defined and in existence.<sup>171</sup>

One scholar expounded upon the implications that the prohibition of gharar has in producing differing understandings of contractual obligations under Western and Islamic law: In English law the sanctity of contract means that the promise endures despite the normal vicissitudes of fortune. It is right that the promise should be kept 'for better or for worse', 'through thick and thin',

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<sup>169</sup> *Id.* The Shari'a is the product of several interrelated sources of religious authority. The doctrines comprising Shari'a are derived primarily from the Qur'an, the "Book of God." The Qur'an is considered the word of God as received by the Prophet Muhammed. Because the Qur'an commands adherents of Islam to obey the Prophet, the recorded examples of the acts and words of Muhammed, known as the "Sunnah," constitute an additional integral part of the Shari'a. In the centuries since the founding of Islam, Islamic religious-legal scholars qualified to interpret the scriptural sources have produced opinions known as "fiqh." A complete understanding of the Shari'a in Saudi Arabia today also requires reference to any relevant fiqh for guidance. There are four schools of Shari'a law, each of which interprets Islamic doctrine somewhat differently. The predominant school followed in the courts of Saudi Arabia is known as the "Hanbali" school. *Id.* (Citations omitted).

<sup>170</sup> When a Saudi Arabian judge, known as a "qadi," attempts to resolve disputes, his decision must be in accordance with the Shari'a. Therefore, he will turn to the aforementioned Qur'an, the Sunnah, and fiqh to guide his legal determination. Saudi Arabian judges are not bound by judicial precedent (in fact, Saudi Arabian judicial opinions are not published) and the concept of stare decisis does not exist. Instead, judges "must strive for the divine truth for each case that confronts him, without being bound by past opinions, even his own. Truth is the ultimate precedent, to which one must return once it is revealed. *Id.* (citations omitted).

<sup>171</sup> *Id.* citing Frank E. Vogel, *The Contract Law of Islam and of the Arab Middle East*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 52 (Draft September 1, 2003).

because this in line with the popular belief that tenacity of purpose to some degree controls events and that the human will determines the future. The promise must dominate the circumstances. For Islam precisely the converse is true. Circumstances dominate the promise. Future circumstances are neither predictable nor controllable but lie entirely in the hands of the Almighty.... If the tide of affairs turns then the promise naturally floats out with it.<sup>172</sup>

Turning then to the facts of the case, the court noted that under Islamic law, damages available for breach of contract are generally limited to those losses which are actual and direct.<sup>173</sup> The Court further noted that “Saudi law will not allow damages which are ascertainable only by means involving speculation, contingencies, uncertainties or indeterminacy.”<sup>174</sup> Thus, under the prohibition against *Gharar*, the Court will not allow expectation damages to be heard.<sup>175</sup> Additionally, under the same prohibition, Saudi law would not allow damages for lost profits, unrealized gains or future profits. The court’s assessment in NGCC is transliterative, as it approached a western concept -- expectation damages -- classified under an Islamic term, and then ruled according to the Islamic principles. Like *SABIC*, the Court in NGCC saw itself assuming the same role as an Islamic jurist, a point discussed in section three below.

### **PART THREE**

#### **Navigating Differences**

The ways that courts approach the initial conflict of western and Islamic law determines to a great extent how they navigate the differences between the two. As a general proposition, the courts that engage in formalistic approaches never navigate the

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<sup>172</sup> *Id. citing* BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAWS 274.

<sup>173</sup> *Id.* at 298.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

differences as their function is a mere rote application of principles without much reflection towards the issues. Similarly, the interpretive approach exemplified by *Rhodes* tends to superficially highlight differences towards the specific agenda set forth by the court. The transliterative approach tends to seek understanding of the differences and makes a conscious effort to navigate those differences to reach judicious results.

The formalistic approach does not appear interested in the differences between Islamic law and Western law. For example the primary corpus of the formalistic opinions is a conflicts of laws analysis that seems to govern the outcome of the cases more so than any applicable law.<sup>176</sup> So, when the Court in *Bridas* decides that Afghani law will apply over Texas law, the application of Afghani law is secondary to the primary decision that determines the party's liability. Said another way, the conflicts of laws analysis enables formalistic application of law to the disputes, allowing courts to insulate themselves against the need to critically consider whether differences exist, whether those differences are just, and whether the court's interpretation of those differences is correct.

Similarly, when the Court engages in an interpretive methodology, the Court highlights the differences towards the result it wants to achieve. Thus, in *Rhodes*, the court's assessment that "Saudi law" would not protect the plaintiff's interests in the same way as "Massachusetts law" may be correct on the surface level.<sup>177</sup> Yet without any sort of meaningful exchange of concepts, the Court's opinion seems less than unbiased. The Court chose not to move beyond the surface, but was content to mind its useful premise and build the opinion around differences that it sees as inconsistent with notions of justice. So for *Rhodes*, the unavailability of speculative, indirect, or consequential

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<sup>177</sup> *Id.*

damages, an agency theory of tort, or certain trial procedures recommended the Court's assumption of the matter regardless of the minimal contacts the plaintiff maintained with the court; indeed, the court does not even address this fact, but rather places the impetus of its decision on the unjust results that could result should Islamic law apply.

Finally, unlike the formalistic or interpretive approaches, the transliterative approach confronts the differences inherent in the legal systems, finds the principles applicable to the matter, and applies those principles to the case facts. Thus in *SABIC*, the court is able to distinguish between western conceptions of Ghasb to reach a just solution to the dispute. Similarly, the NGCC court navigates the western concepts of damages and aligns that concept with the principles of Islamic law that would mitigate against their application. In both scenarios the court confronts the differences in the legal systems before moving towards application.

#### **PART FOUR**

##### **Judicial Self-Limitation.**

A final aspect of this translation process is one of self-limitation. Again the ways the courts address the cases dictate the extent that they limit their function. Neither the formalistic courts nor the interpretive courts embrace self-limitation; rather the two methodologies on opposite ends of the spectrum tend to insulate themselves against Islamic law, but in different ways. For the formalistic court the law (or procedure) itself provides an insulation away from the differences in the legal system. For the interpretive court, the perception that policy is more important than judicial procedure serves as an equal disservice -- it limits the court's analysis to matters that don't offend its policy

consideration. Only the courts that embrace a transliterative perspective truly become self-limiting in their function and thereby translate Islamic law appropriately.

Analyzing the transliterative courts (SABIC and NGCC) two characteristics are apparent. First, both courts appear to take the initiative of their own to understand the Islamic principles being described. The SABIC judge retained a separate expert from the parties in an attempt to understand the contours of Islamic law. The court of appeals commented on the *SABIC* judge's approach:

Mindful of how daunting would be the task of determining the Saudi law principles applicable to this case, the trial judge made exceptional efforts to ensure that she was fully informed of the Hanbali teachings upon which to ground her legal rulings....After reviewing a total of over one thousand pages of deposition testimony, the trial judge then held a day long pre-trial hearing, to permit the parties to present live testimony [from their experts].

Similarly, the NGCC judge accepted not only the testimony presented by expert witnesses of the parties, but went outside their testimony to conduct research and cited that research in its opinion. These Courts clearly saw themselves as doing more than arbitrating the parties' disputes; rather they perceived their function as navigating the differences between Islamic and Western legal systems to arrive at a close approximation of justice.

A second characteristic of both transliterative opinions is the threshold desire to understand their roles not from the traditional standpoint of western jurisprudence, but a willingness to embrace an Islamic approach to the law. Notably the court in *SABIC* even addressed the methodology of using *Ijtihad* in coming to the best result: "when faced with the daunting task of determining the elements of Ghasb and the damages available for this tort, the Court weighing the credibility of each Saudi law expert, exercised, as

best it could under the circumstances *ijtihad*, to reach the “right result.” Similarly, the court in *NGCC* began its analysis by describing the function of a Saudi law judge:

When a Saudi Arabian judge, known as a "qadi," attempts to resolve disputes, his decision must be in accordance with the Shari'a. Therefore, he will turn to the aforementioned Qur'an, the Sunnah, and fiqh to guide his legal determination. Saudi Arabian judges are not bound by judicial precedent (in fact, Saudi Arabian judicial opinions are not published) and the concept of *stare decisis* does not exist. (Vogel Tr. 143:2-4; Ballantyne Tr. 260-61:25- 1). Instead, judges "must strive for the divine truth for each case that confronts him, without being bound by past opinions, even his own. Truth is the ultimate precedent, to which one must return once it is revealed."<sup>178</sup>

The approach is more than just semantics. It represents conscience efforts by the judiciary to embrace a different kind of role than it typically assumes -- a role as an Islamic jurist, rather than as a law judge.

#### EPILOGUE

Approaching Islamic law is a daunting task, particularly for judges not trained in its philosophical underpinnings. When western judges engage in applying Islamic principles in cases, there is a natural translation process. The judge reacts to not only the Islamic principles he is engaging but his own environment as well. In doing so, he reveals differences that are only revealed when the two sets of law collide. As Judge, the way he approaches the case, whether he self-limits or self-aggrandizes, determines whether differences in Islamic law will be fruitfully understood or irrationally meted out. In *Rhodes*, the court did not attempt to understand the Islamic principles, and was content to brush over them, so as to render them meaningless to the court's decision. Similarly,

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<sup>178</sup> *Id citing* VOGEL, ISLAMIC LAW AND FINANCE at 15.

formalistic opinions allow the court to safeguard itself by not delving into the differences, and rather remaining on the surface.

Only the transliterative approach offers constructive methods for understanding Islamic law in the face of Western commerce. In transliterating the law, the court redefines itself away from a role its most comfortable with towards areas of judicial uncertainty. It is in that uncertainty that the Judge is able to confront the differences on an open plane, and truly seek just results.