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Doing Business in Saudi Arabia

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The International Monetary Fund has noted that the outlook for the Saudi economy, which grew at 7.1 percent in 2011, remains buoyant. On current trends, real GDP was projected to grow by 6 percent in 2012. The private sector is again expected to lead the way, reflecting the increased role of the private sector in the economy, a clear break from the past.¹ In this context, Saudi Arabia remains an enticing market for foreign investment.

Doing business in Saudi Arabia, however, carries particular challenges, many of which derive from Saudi Arabia's unique legal system. In this article, we will provide a brief and general overview of five particular factors to keep in mind when doing business in Saudi Arabia.

Islamic Law

Islamic law as enforced in Saudi Arabia is the paramount body of law in Saudi Arabia to which all other law is subject.² As a result, if a Saudi court determines that a piece of Saudi legislation, a government

policy or practice, a provision in a contract, or a provision in a foreign judgment or foreign arbitral award is inconsistent with Islamic law as enforced in Saudi Arabia, such legislation, policy or practice, provision or award will be unenforceable in Saudi Arabia. Accordingly, when doing business in Saudi Arabia, one cannot avoid and one cannot afford to ignore Islamic law as enforced in Saudi Arabia.

In this regard, it is important to note that Islamic law as enforced in Saudi Arabia is not necessarily the same in all respects as Islamic law as enforced in other jurisdictions. There are four orthodox Sunni schools of Islamic jurisprudence: Hanafi, Hanbali, Maliki, and Shafi'i. While these four schools of jurisprudence have much in common, they also have their differences. As a result, the same principle of Islamic law can be interpreted and applied differently depending on the particular school of Islamic jurisprudence that the court follows. In Saudi Arabia, the courts generally follow the Hanbali school of Islamic jurisprudence.

Legislative Reform

Since 2000, Saudi Arabia has been engaged in an aggressive and sustained legislative reform program designed to amend, update, and develop Saudi Arabian



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legislation, at all times within the context of Islamic law as enforced in Saudi Arabia. Originally undertaken in support of Saudi Arabia's drive to secure membership in the World Trade Organization (WTO), Saudi Arabia's legislative reform program survived Saudi Arabia's accession to the WTO in December 2005 and remains active today, with no indication as to when or if the legislative reform program might wind down. As regards Saudi Arabia's ongoing legislative reform program, two points in particular bear note.

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First, Saudi Arabia's legislative reform program is a genuine effort designed to create a modern framework of legislation that will support the modern industrialized economy that the Saudis are working to create.

Second, as admirable and desirable as Saudi Arabia's legislative reform program is, such reform program nonetheless introduces an element of uncertainty into the Saudi regulatory environment. Because of Saudi Arabia's ongoing legislative reform program, foreign investors doing business in Saudi Arabia face the risk that the legislation on which they based (in part) their decision to invest in Saudi Arabia might subsequently be amended, repealed, or superseded. Of course, such a risk exists in every jurisdiction in the world. However, because of the ongoing legislative reform program in Saudi Arabia, the risk of changes to legislation is perhaps higher there than in jurisdictions where no such program is under way.

Precedent and Regulators

Saudi Arabia has a unique legal system designed to address the concerns and needs of Saudi society. As a result, there are many differences—both practical and legal—between the Saudi legal system and common law legal systems. By way of examples: (a) the Saudi legal system does not follow the principle of binding precedent. This means that a decision by a Saudi court in one case is not in any way binding upon another Saudi court faced with a similar case; and (b) not all legislation in Saudi Arabia is published for public cognizance or otherwise made available to the public.

In this context, the various Saudi regulators play an indispensable role, both as a source of formal and informal guidance about Saudi legislation and as a repository for legislation relevant to the regulator's responsibilities. Many Saudi regulators are easily accessible to the public, although the fact that the Saudi government operates almost exclusively in the Arabic language can (not unexpectedly) pose a challenge for foreign investors.

The Courts and Arbitration

Saudi Arabia's court system is centered on the General Islamic Court, which is the court of general jurisdiction with jurisdic-

tion over all disputes except for those disputes that are assigned by legislation to the jurisdiction of a specialist tribunal.³ There are a variety of specialist tribunals in Saudi Arabia, including specialist tribunals to resolve labor disputes,⁴ banking disputes,⁵ insurance disputes,⁶ and more. However, the most important specialist tribunal is the Grievances Board. The Grievances Board began as an administrative tribunal with jurisdiction over claims against the Saudi government. From its creation, the Grievances Board was an enormous success, being both professional and efficient. Perhaps as a result, over the years it inherited more and more jurisdiction until it reached the point where the Grievances Board was no longer simply an administrative tribunal, but also had jurisdiction over most types of commercial disputes.

Because of Saudi Arabia's ongoing legislative reform program, foreign investors doing business in Saudi Arabia face the risk that the legislation on which they based (in part) their decision to invest in Saudi Arabia might subsequently be amended, repealed, or superseded.

In 2007, new Judiciary Regulations and new Grievances Board Regulations⁷ were issued that called for the restructuring of both the General Islamic Court and the Grievances Board. Among other things, the jurisdiction over labor disputes was to be transferred from a specialist labor tribunal to a new Labor Division of the General Islamic Court, the Grievances Board's jurisdiction over commercial disputes was to be transferred to a new Commercial Division of the General Islamic Court, and the Grievances Board was to return to its roots as an administrative tribunal. However, the infrastructure necessary to implement in practice this restructuring is still not yet in place. Accordingly, notwithstanding the dictates of the new Judiciary Regulations

and the new Grievances Board Regulations, very little has yet changed in practice with the General Islamic Court and the Grievances Board. Nonetheless, the contemplated restructuring should eventually occur, if perhaps a little later than expected.

As an alternative to submitting a dispute to the Saudi courts, parties to a dispute usually have the option to submit their dispute to Saudi arbitration. New Saudi Arabian Arbitration Regulations⁸ came into force in June 2012 and, on paper, the new Arbitration Regulations are a vast improvement over the old Arbitration Regulations. Under the new Arbitration Regulations, the seat of the arbitration can be inside or outside of Saudi Arabia,⁹ the parties can conduct the arbitration in whatever language they want,¹⁰ and the parties can choose whatever rules of procedure they wish for the arbitration provided that such rules are consistent with Islamic law as enforced in Saudi Arabia.¹¹ But most significantly, under the new Arbitration Regulations, subject to a limited number of specific exceptions,¹² the arbitral award is final and binding.¹³ This stands in contrast to the old Arbitration Regulations,¹⁴ under which the arbitral award had to be reviewed by, and could be amended or replaced by, the Saudi courts.¹⁵

The new Arbitration Regulations are still very new and their implementing regulations have not been issued. As a result, there are still many questions surrounding the new Arbitration Regulations. However, preliminary expectations are that the new regulations will make Saudi arbitration much more attractive.

Due Diligence, Compliance

Doing business in Saudi Arabia requires navigating a compliance landscape where, despite steps by the Saudi government,¹⁶ corruption is perceived to be high,¹⁷ and where international companies continue to get caught up in high-profile investigations and prosecutions for violations of the U.S. Foreign Corrupt Practices Act (FCPA) and the United Kingdom Bribery Act (UKBA). The FCPA prohibits making corrupt payments to "foreign officials" to obtain or retain business,¹⁸ and the UKBA prohibits both public- and private-sector bribery and imposes corporate liability for failing to prevent bribery.¹⁹

In September 2012, Tyco International reached criminal and civil resolutions with the Department of Justice and the Securities and Exchange Commission (SEC) of long-running probes into illegal conduct that included corrupt payments to employees of Saudi Aramco, and to Saudi doctors and hospitals.²⁰ Other investigations reportedly underway involve allegations that Barclays paid bribes to obtain a Saudi banking license,²¹ and that a subsidiary of European defense contractor EADS made illegal payments linked to a lucrative defense communications contract.²²

The prevalence and prominence of Saudi royal family members,²³ not only in government but in the Saudi business community, means that both public and private sector transactions often involve individuals that U.S. authorities will likely consider to be “foreign officials” under the FCPA, which is all the more reason for companies to tread carefully.²⁴

Prudent U.S. businesses operating in the Saudi market, therefore, should think strategically and take proactive steps to mitigate corruption risk, including:

- Critically review and update existing anti-corruption and AML compliance programs, which should emphasize top management’s commitment to corruption-free business dealings,
- Carefully vet and conduct due diligence on local partners;
- Build anti-corruption compliance into transactional agreements with local partners, insisting that they adopt the same commitment to compliance (examples include incorporating representations that local partners or agents are not foreign officials, and agreeing to abide by the FCPA and all relevant anti-bribery and anti-corruption laws);
- Establish record-keeping and transparency requirements with local partners (including training, written compliance, and, when available, audit rights);
- Ensure that compensation for third party agents is proportional to the value of services provided and consistent with the going fair market rates for similar services.

An effective compliance program is not static, but rather is dynamic, self-critical, and marked by “continuous improvement

and sustainability.”²⁵



1. “IMF Survey: Strong Saudi Economy Gives Fillip to Region, Advances Social Agenda,” IMF Survey Magazine, 18 Sept. 2012.
2. See the Saudi Arabian Basic Law of Government, as enacted by Royal Order No. A/90 dated 27/8/1412 H / 2 March 1992.
3. See Article 26 of the Saudi Arabian Judiciary Regulations, as enacted by Royal Decree No. M/64 dated 14/7/1395 H / 23 July 1975.
4. See Chapter 14 of the Saudi Arabian Labor regulations, as enacted by Royal Decree No. M/51 dated 23/8/1426 H / 27 Sept. 2005.
5. See Article 25 of the Saudi Arabian Banking Control Regulations, as enacted by Royal Decree No. M/5 dated 22/2/1386 H / 12 June 1966.
6. See Article 20 of the Saudi Arabian Cooperative Insurance Company Control Regulations, as enacted by Royal Decree No. M/32 dated 2/6/1424 H / 31 July 2003.
7. The Saudi Arabian Judiciary regulations and the Saudi Arabian Grievances Board Regulations, both as enacted by Royal Decree No. M/78 dated 19/9/1428 H / 1 Oct. 2007.
8. The Saudi Arabian Arbitration Regulations, as enacted by Royal Decree No. M/34 dated 24/5/1433 H / 16 April 2012 (the new Arbitration Regulations).
9. See Article 28 of the new Arbitration Regulations.
10. See Article 29(1) of the new Arbitration Regulations.
11. See Article 25(1) of the new Arbitration Regulations.
12. See Articles 50(1) and 50(2) of the new Arbitration Regulations.
13. See Article 49 of the new Arbitration Regulations.
14. The Saudi Arabian Arbitration regulations, as enacted by Royal Decree No. M/46 dated 12/07/1403 H / 24 April 1983 (the old Arbitration Regulations).
15. See Article 18 of the old Arbitration Regulations.
16. In 2011, King Abdullah Bin Abdulaziz established by royal decree a National Anti-Corruption Commission (Nazaha) aimed at fighting “administrative and financial corruption” in the Kingdom; see, “New Saudi National Anti-Corruption Commission to Report Directly to King,” Asharq Alawsat, March 19, 2011, available at <http://www.asharq-e.com/news.asp?id=24563>.
17. Transparency International (TI), a non-profit organization, publishes an annual Corruption Perceptions Index, which scores countries on a scale of 0 (highly corrupt) to 100 (very clean). Saudi Arabia scored a 44 in the 2012 TI Index and ranked 66th among 176 countries. By comparison, Denmark scored 90 and ranked 1st, the United States scored 73, and ranked 19th, Egypt scored 32 and ranked 118th, and Iraq scored 18 and ranked 169th. The TI Corruption Perceptions Index is available at <http://cpi.transparency.org/cpi2012/results/>.
18. See 15 U.S.C. 78dd-2(a)(1). In addition to the anti-bribery provisions in the act, the FCPA also includes provisions requiring issuers of securities and companies registered with the SEC to maintain accurate books and records and to design a system of internal controls reasonably calculated to ensure that financial statements are fairly and accurately stated. 15 U.S.C. §78m(2).
19. See, e.g., The Bribery Act 2010 Guidance, Ministry of Justice (UK) publication, March 2011, available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>
20. “Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act,” Department of Justice News Release, Sept. 24, 2012, available at <http://www.justice.gov/opa/pr/2012/September/12-crm-1149.html>.
21. “Barclays in US Probe Over Saudi Licence,” *Financial Times*, Nov. 9, 2012, available at <http://www.ft.com/intl/cms/s/0/f3ebb04a-2aa8-11e2-99bb-00144feabd0.html#axzz2EwzNjzha>;
22. “Britain Investigates Bribery Charges Against EADS Unit in Saudi Deal,” *The New York Times*, May 31, 2011,

available at <http://www.nytimes.com/2011/06/01/business/global/01leads.html> ; “SFO Launches Criminal Probe into GPT,” *Financial Times*, Aug. 9, 2012, available at <http://www.ft.com/intl/cms/s/0/d02c6fb0-e24f-11e1-8e9d-00144feab49a.html#axzz2EwzNjzha>.

23. It is estimated that there are about 5,000 members of the Saudi royal family. See “The Saudi Succession: When Kings and Princes Grow Old,” *The Economist*, 15 July 2010, available at <http://www.economist.com/node/16588422>

24. U.S. authorities interpret the term “foreign official” broadly, as the Department of Justice and the Securities and Exchange Commission (SEC) recently affirmed in their publication titled *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (FCPA Resource Guide), released on Nov. 14, 2012, at pp. 19-21, available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/>. In a recent FCPA Opinion Release, the Justice Department stated that although “mere membership” in a royal family, by itself, does not automatically qualify that person as a “foreign official,” the question requires a fact-intensive analysis of factors aimed at determining two fundamental questions: (1) whether a royal family member has “power to affect [a foreign] government’s award” of business; and (2) whether compensating a royal family member “would corruptly influence other members of the [country’s] royal family, or officials of the [foreign country], to award business improperly.” See FCPA Opinion Release 12-01 (Sept. 18, 2012) at 7, available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf>.

25. FCPA Resource Guide at 62.