

**READING MOHAMMED IN CHARLESTON:
ASSESSING THE U.S. COURTS' APPROACH TO THE
CONVERGENCE OF LAW, LANGUAGE, AND NORMS**

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Normative collisions are inevitable when contrasting normative visions are placed side by side. Each system has an idea of how the world should look, smell, taste, and move which confirms the normative view that system supports.¹ As the systems confront each other, the awkward sorting out of similarities and dissimilarities leads to each system defining the other based on distinctions rather than similarities.² Those of us in the middle find ourselves in awkward places, seeing the ways that cultures interact and disapprove of one another—sometimes justly, sometimes because the stories require such disapproval, and sometimes arbitrarily. We are, in a sense, *Reading Mohammed in Charleston*, or *Reading Lolita in Tehran*.³

So what does *Reading Mohammed in Charleston* look like? This article attempts to describe that effort through a quite limited culture—American Courts. That is, this article considers how we can describe the different approaches that a handful of courts (both state and federal) have attempted when applying

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1. Normative systems tell stories that describe the shrubbery around their norms; said slightly more eruditely, “there is no *nomos* without narrative.” Paul W. Kahn, *Judicial Ethos and the Autonomy of Law*, 110 PENN. ST. L. REV. 933, 936 (2006) (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983)). See also Marc L. Roark, “Opening the Barbarians’ Gate” or *Watching the Barbarians from the Coliseum: A Requiem on the Nomos of the Louisiana Civil Law*, 67 LA. L. REV. 451 (2007) (arguing that *nomos* of Louisiana civil law is described by stories told in its institutions).

2. Consider the general field of Comparative Law—a discipline about comparisons. See Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1027 (1999) (“The key to comparative studies is the comparison of comparisons.”) (quoting Alasdair MacIntyre, *Incommensurability, Truth, and the Conversation Between Confucians and Aristotelians About the Virtues*, in *CULTURE AND MODERNITY: EAST-WEST PHILOSOPHIC PERSPECTIVES* 121 (Eliot Deutsch ed., 1991)); Frank Munger, *Introduction: Comparative Research: Progress and Problems*, 24 LAW & SOC’Y REV. 547, 547 (1990) (“Longitudinal research on courts has its roots in comparative research.”). As Munger points out, cultural distinctions make a comparative assessment of courts difficult, if not impossible. *Id.* Notably, what this article purports to do is not a comparison of courts, but an assessment of courts as they do comparison.

3. AZAR NAFISI, *READING LOLITA IN TEHRAN: A MEMOIR IN BOOKS* (2003). The title of this article is taken from Nafisi’s memoir of a reading group of girls in Tehran, who read works such as Vladimir Nabokov’s *Lolita* and *Invitation to a Beheading*, F. Scott Fitzgerald’s *The Great Gatsby*, Jane Austen’s *Pride and Prejudice* and *Mansfield Park*, and Gustave Flaubert’s *Madame Bovary*, amongst others. *Id.* at 5-6, 267. Amongst the overwhelming images that Nafisi’s memoir provides to us is the scene of girls taking off their black abayas, their headscarves and veils, and revealing western clothing underneath. *Id.* at 5-6. In a sense, that metaphor is germane to the way we approach cultural writings: we at some point must remove our outer cultural wear and dawn the clothing of the writer—whatever clothing that might be. See *infra* note 6.

Islamic law to the matters before them. It is a task of considering two normative systems that are built around different suppositions meeting in the judicial process. This article argues that courts utilize tools of cognition and response to adequately address the concerns each normative system presents.⁴ The methods and mannerisms of that cognition and response are the subject of this article.

Part I sets the stage by describing certain complications in approaching different normative systems and complications that arise from this analysis. Part II details seven American cases, with limited commentary from outside sources, and analyzes their parts against the backdrop of a normative construction. Part III then categorizes the opinions as approaching the issues formalistically, interpretively, or by applying a model akin to translation, and draws conclusions about the various approaches. Part IV suggests that the role that judges perceive themselves as engaging in often proves quite predictive of how a court will assess Islamic concepts.

Notably, these cases are efforts by the American judiciary to come to terms with law that is both culturally and normatively variant from its ordinary course and consideration. This article considers how well courts approach normative constructions—how courts react to and respond to Islamic law in the face of Western commercial conceptions and legal assumptions. In addition, it considers how courts comprehend the differences inherent in the two legal systems and navigate those differences towards judicial resolution.

I. THE DIFFICULTIES OF READING IN CHARLESTON/TEHRAN

Azar Nafisi comments early on in her memoir *Reading Lolita in Tebran* that “the desire for beauty, the instinctive urge to struggle with the ‘wrong shape of things,’ . . . drove many from various ideological poles to what we generally label as culture.”⁵ What Nafisi means is that we often use the parts of our surroundings that we disagree with to help shape our normative base. For

4. Consider the following from James Boyd White’s *Justice as Translation*:

In every opinion a court not only resolves a particular dispute one way or another, it validates or authorizes one form of life—one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority—or another. Whether or not the process is conscious, the judge seeks to persuade her reader not only to the rightness of the result reached and the propriety of the analysis used, but to her understanding of what the judge—and the law, the lawyer, and the citizen—are and should be, in short, to her conception of the kind of conversation that does and should constitute us.

JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 101-02 (1990).

5. NAFISI, *supra* note 3, at 39.

Nafisi and her class, the strict laws governing dress, the prohibitions on Western music and television, and the perpetual fear of state interference shaped the way they read *Pride and Prejudice*, *Lolita*, *Madame Bovary*, etc.

In law, we also use our surroundings and the distinctive aspects of our culture as a means of describing our legal ideology.⁶ Comparative law, as a discipline, considers one legal culture against the another, attempting to discern the differences, the source of their differences, and the way each system functions in light of those differences. That we often compare the different shapes of laws in the light of moral assumptions confirms that law is ultimately a culturally normative activity. Here, the shapes that we have in mind are primarily language, process, and medium.

A. *The Ordinary Objects of Language*

Nafisi notes Vladimir Nabokov's self-description of his writing as "painterly."⁷ Ordinary objects become "destabilized by emotions, revealing [the character's] guilty secret."⁸ Drawing upon Nabokov for illustrations,

6. Our shapes are usually described in our tales. Consider the following from Richard M. Cover's *Nomos and Narrative*:

The great legal civilizations have, therefore, been marked by more than technical virtuosity in their treatment of practical affairs, by more than elegance or rhetorical power in the composition of their texts, by more, even, than genius in the invention of new forms for new problems. A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute. The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it.

Cover, *supra* note 1, at 6 (footnotes omitted). Moreover, as Cover goes on to explain,

the concept of a *nomos* is not exhausted by its "alterity"; it is neither utopia nor pure vision. A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.

Id. at 9.

7. NAFISI, *supra* note 3, at 35.

8. *Id.* at 36. Consider Nafisi's comment later regarding the villain in *Lolita*:

Humbert makes fullest use of his art and guile in setting the reader up for his most heinous crime: his first attempt at possessing Lolita. . . . He tries to win us to his side by placing us in the same category as himself: as ardent critics of consumer culture. . . .

Like the best defense attorneys, who dazzle with their rhetoric and appeal to our higher sense of morality, Humbert exonerates himself by implicating his victim

Nafisi points to the way language becomes deceptive to the emotions of the reader.

That same difficulty—becoming entranced by the emotions or colors that are created by the words we use—is present when American courts embark on the task one of applying Islamic law. The first obstacle is the encounter the courts (and the court’s readers) have in their use of definitions and terms. For example, some courts might be seduced into making categorical assumptions to facilitate their own understanding. A court might suggest that Shari’a is the common law of Islamic countries.⁹ The fact that there is no Islamic law *per se* does not change the metaphor’s power in understanding or misunderstanding the cultural distinctions.¹⁰

That courts recognize the conceptual links between countries that share in a common system of Shari’a and proceed as operating under a generic “Islamic law” is recognition of a shared cultural value.¹¹ That recognition, however, becomes dangerous when this normative vision of law is emboldened by the comparison to the “common law.”¹² Though the metaphor forms an easy conceptual bridge for judges attempting to understand how principles of Islamic law relate to the laws of nations, it can become a dualistic irony. It might actually neuter the normative power of Shari’a in the same way that the concept of the common law has lost some of its influence in American jurisdictions.¹³ That the concept of Shari’a is as elusive in definition as the

Id. at 42.

9. See *Chadwick v. Arabian Am. Oil Co.*, 656 F. Supp. 857, 861 (D. Del. 1987) (calling Shari’a “the common law of Saudi Arabia.”).

10. See, e.g., *Nat’l Group for Commc’ns & Computers Ltd. v. Lucent Techs. Int’l Inc.*, 331 F. Supp. 2d 290, 293 (D.N.J. 2004) (applying Saudi Arabian law); *Chadwick*, 656 F. Supp. at 858 (Saudi Arabian law); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.* (*Saudi Basic III*), 866 A.2d 1, 30 (Del. 2005) (Saudi Arabian law); *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 894 (Tex. App. 2000) (Afghan law); *CPS Int’l, Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 31 (Tex. App. 1995) (Saudi Arabian law); *Blackstone v. Aramco Servs. Co.*, No. 01-89-00203-CV, 1991 WL 63630, at *1 (Tex. App. April 25, 1991) (Saudi Arabian law);

11. See *Saudi Basic III*, 866 A.2d at 30-31 (applying “Islamic law ([S]hari’a)”) (alteration in original); *Blackstone*, 1991 WL 63630, at *3 (applying “Shari’a”).

12. See *Chadwick*, 656 F. Supp. at 861.

13. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (“In this time we have gone from a legal system dominated by the common law . . . to one in which statutes . . . have become the primary source of law.”); Ruggero J. Aldisert, *The Nature of the Judicial Process: Revisited*, 49 U. CIN. L. REV. 1, 48 (1980) (“The common law is no longer the major source of legal precepts . . .”); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 875 (1991) (“There is nothing new about change in the common law. But in an era of statutes, the role of the common law in formulating social policy has become problematic.”); Donald H. Gjerdingen, *The Future of Our Past: The Legal Mind and the Legacy of Classical Common-Law Thought*, 68 IND. L.J. 743, 743 (1993) (“Fifty years ago, Classical common-law thought was all but dead.”); but see Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 18-19 (1995) (arguing that the common law remains “vital” through statutory interpretation, while noting that the common law has been surpassed in usefulness by statutes).

common law may spark a comparison, but perhaps the similarity should not be raised to the level of metaphor.¹⁴

Another obstacle a court might face is the temptation to assign commercial terms as they appear in the Islamic context the same meaning as if they appeared in the American context.¹⁵ This is ultimately a problem of translation between cultures. 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 to 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.¹⁶ Ultimately, when attempting to assimilate between cultural norms encapsulated in terms such as

14. See, e.g., WAEL B. HALLAQ, *AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW* ix (2001).

To say that authority is the centerpiece of law is merely to state the obvious. Equally obvious therefore is the proposition that Islamic law—or any other law, for that matter—cannot be properly understood without an adequate awareness of the structure of authority that underlies it. . . . In Islamic law, authority—which is at once religious and moral but mostly epistemic in nature—has always encompassed the *power* to set in motion the inherent processes of continuity and change. Continuity here, in the form of *taqlid*, is hardly seen as “blind” or mindless acquiescence to the opinions of others, but rather as the reasoned and highly calculated insistence on abiding by a particular authoritative legal doctrine. In this general sense, *taqlid* can be said to characterize all the major legal traditions, which are regarded as inherently disposed to accommodating change even as they are deemed, by their very nature, to be conservative; it is in fact *taqlid* that makes these seemingly contradictory states of affairs possible. For in law both continuity and change are two sides of the same coin, both involving the reasoned defense of a doctrine, with the difference that continuity requires the sustained defense of an established doctrine while change demands the defense of a new or, more often, a less authoritative one. Reasoned defense therefore is no more required in stimulating change than it is in preserving continuity.

Id. (footnote omitted).

At the same time, the notion of Shari’a is a fixed principle of normative construction. It is a “totality of norms—legal, moral and ritual.” BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 8 (2006). Thus, “since *Shari’a* includes norms beyond those that constitute law in the strictest sense, it is incorrect to equal *Shari’a* and law simpliciter as is often done.” *Id.* On the other hand, law is consumed into *Shari’a*. One example is the inclusion in the thirteenth century of prayer and fasting into *Shari’a*. There is a legal component—the act of doing—and a normative component—the spiritual. See WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* 13 (1997).

15. For example, consider the distinctions between usurpation in American contracts and Islamic contracts. See *infra* note 174.

16 WHITE, *supra* note 4, at 230.

“common law” or “Shari’a,” one must cautiously approach the problem, not as one of exact comparison, but rather as a matter of detailed translation.

B. *The Process of Reading*

Just as the shedding of traditional Islamic wear in favor of Western clothes seems to be a necessity for reading *Lolita* while in Tehran, the “clothing” of normative bases before the American courts impacts the way they are read. One such example is the way courts recognize the “fact” of a norm. This complication is recognized in the various rules of civil procedure, which instruct courts to treat the application of foreign law as a hybrid question of law and fact.

While the application of foreign law is a question of law to be determined by the court,¹⁷ the “fact” of a foreign law may still be considered. Thus, courts may attempt to get to the “fact” of the law through a strange amalgamation of evidentiary hearings eliciting expert testimony from both sides and even engaging their own experts.¹⁸ The dangers present in such analysis are obvious. No one, for example, would suggest that American law is susceptible to one discreet norm isolatable from American culture.¹⁹ Rather, the norms themselves are a part of a massive fabric of narratives and maneuvers that relate not only to the facts of the normative system, but to the system’s underlying descriptors.

Consider the tension that comes from attempting to isolate the normative values of a legal system in a contractual dispute. The American court has its own values and norms, one of which is the value of the adversarial system of litigation.²⁰ The fact of the normative system of law is subject to the ability of the litigants to convince the court that their vision of the law is correct, a vision which need not be consistent with other approaches. Such a fact is complicated by an expert’s own interests in opining about the law and attempting to establish “the fact of the law.”

Consider, for example, testimony offered by Islamic legal scholar Frank Vogel in four cases. In two of those four cases, Vogel’s testimony appears to be a conservative reading of Islamic law—that is, literally formalistic.²¹

17. See *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 896-906 (Tex. App. 2000).

18. See *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. (Saudi Basic III)*, 866 A.2d 1, 31-32 (Del. 2005).

19. See Cover, *supra* note 1, at 5.

20. See Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1547 (2003); see also Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359, 394 (2001) (arguing that adversarial system’s democratic roots urge normative externality); but see Robert S. Thompson, *Decision, Disciplined Inferences and the Adversary Process*, 13 CARDOZO L. REV. 725, 729 (1991) (challenging perception that normative externalities of adversarial systems are beneficial to American legal system).

21. For a description of formalism, see *infra* Part III.

Formalism, in theory, suggests that texts succumb to rules of construction which should not be transcended, despite the reality such constructions present.²² For example, in *Bridas Corp. v. Unocal Corp.*, Vogel suggests that Islamic law would not allow for the tort of interference with a contract because of its firm maxim that whoever does an act bears ultimate responsibility for its consequences.²³ Yet, in *National Group for Communications and Computers v. Lucent Technologies International, Inc.*, Vogel is willing to stray from firm maxims towards interpretive results.²⁴ Though agreeing that, traditionally, the principle of *gharar* would disallow future type damages, he opines that “higher valuations [of damages] are possible . . . only when *gharar* inheres within a separate entity is it forbidden.”²⁵ While there may be no direct contradiction in Vogel’s thought process, there appears to be a conflict between rigid applications of traditional Islamic law concepts and interpretive ones. Whether a rigid or interpretive approach is taken depends upon the party for whom the expert is testifying. All of this shows the complicated nature of deciding the fact of the normative system, which may not be a fact at all. Thus, the way we clothe ourselves in deciding the fact has something to say about its nature.

C. The Medium of Communication

Finally, a third complication is the medium in which we (those who critique) receive the translation (for the reader of this article, and for its writer, case reporters and Westlaw print outs). We are, alas, second-hand witnesses to what actually happened, which 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.²⁶ Of course, we 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 have never heard before. Sometimes, we sit even further back, as the description we review is another court’s perception of what the trial court or magistrate did in a particular case.

Consider Nafisi’s explanation of the word *upsilamba*: “*upsilamba* was one of Nabokov’s fanciful creations, possibly a word he invented out of *upsilon*, the twentieth letter in the Greek alphabet, and *lambda*, the eleventh.”²⁷ In *Invitation to a Beheading*, Nabokov uses the word to describe the difference between the

22 See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 10 (1995) (“Formalism—the endeavour to treat particular fields of knowledge as if governed by interrelated, fundamental, and logically demonstrable principles of science—dictated most nineteenth-century intellectual pursuits.”).

23. *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 905 (Tex. App. 2000).

24. *Nat’l Group for Comm’ns & Computers Ltd. v. Lucent Techs. Int’l Inc.*, 331 F. Supp. 2d 290, 298 (D.N.J. 2004).

25. *Id.* (citations omitted).

26. See WHITE, *supra* note 4, at 230, 257.

27. NAFISI, *supra* note 3, at 21.

main character and those around him: “Cincinnatus appreciated the freshness and beauty of language, while other children ‘understood each other at the first word, since they had no words that would end in an unexpected way, perhaps in some archaic letter, an *upsilamba*, becoming a bird or catapult with wondrous consequences.”²⁸ Quite notably, *upsilambas* seem hard to describe. Rather, they are best recognized in person.

The same can be said for those limitations upon our reading courts’ attempts at understanding Islam. We probably would know a lot more by sitting on the bench, in the chambers, or beside the desk. Yet these limitations are not debilitating. Rather, acknowledging the limitations of our perceptions in these cases actually allows us to recognize that this assessment towards translation is, at the very least, incomplete.

II. APPROACHING ISLAM IN CHARLESTON

As *Reading Lolita in Tehran* is a memoir about reading cultural epigraphs in an environment that would seem to challenge the norms and practice of that reading, so this article is an anthology of seven distinct instances in which American courts attempt to read Islamic law through their own cultural interpretive lenses. Instead of Austen, Nabokov, and Fitzgerald, our six memoirists struggle with the cultural norms of the Prophet and his law. This section will not try to analyze the courts categorically. Rather, it will merely point out the narrative behind each court’s opinion.

A. *Bridas Corp. v. Unocal Corp.*

In April 2000, the Texas State Court of Appeals for the Fourteenth District decided *Bridas Corp. v. Unocal Corp.*²⁹ The matter involved Bridas Corporation’s (“Bridas”) claims of intentional interference with a contractual relationship against Unocal Corporation (“Unocal”).³⁰ The backdrop for this claim was the creation of a joint venture to build a pipeline for the transport of hydrocarbons across Afghanistan.³¹ Ultimately, Bridas brought a \$15 billion

28. NAFISI, *supra* note 3, at 20.

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

30. *Id.* at 894.

31. *Id.* at 895. The background to the *Bridas Corp.* dispute is a fascinating tale of politics, oil, and international relations. In 1991, Turkmenistan began soliciting offers to develop its natural resources. *Id.* Shortly thereafter, Bridas Corporation entered into an agreement with the Turkmenistan government to develop the nation’s hydrocarbons in certain areas. *Id.* Bridas is a South American oil company that had little to no experience in Asian governmental practices. See AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* 158 (2000). Bridas was contracted to explore the Keimir block in the western part of the country and the Yashlar Block in the eastern portion of Turkmenistan. *Bridas*, 16 S.W.3d at 895; see also RASHID, *supra* at 158. Through exploratory drilling, Bridas discovered a natural gas reserve holding an estimated 27 trillion cubic feet of gas. *Bridas*, 16 S.W.3d at 895. Importantly, Bridas invested more than \$400 million in exploring its

leases, an amount Ahmen Rashid aptly describes as “a staggering sum in those early days for a small oil company, when not even the oil majors were involved in Central Asia.” RASHID, *supra* at 158. Bidas was successful in its overall operations extracting upwards of 16,800 barrels of oil per day. But the big discovery was the massive repository of natural gas in the Yashlar region. *Id.* 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. *Id.* at 159.

In 1991, the former Soviet Union disbanded, leaving several independent nations; one of those nations was Turkmenistan. *Bidas*, 16 S.W.3d at 895. Turkmenistan is located on the Caspian Sea, bordering Iran to its south, Afghanistan to its east, and Uzbekistan and Kazakhstan to its north. *Id.* Turkmenistan is one of the most promising countries for extracting hydrocarbons from the earth. *Id.*

Because Pakistan did not border Turkmenistan, international cooperation was imperative to the Pakistani/Turkmen deal. *See* RASHID *supra* at 158-59. As the Afghan turbulence was coming to a head with the seizure of Khandahar by the Taliban, Bidas chairman Carlos Bulgheroni saw his pipeline as “a peace-making business.” *Id.* at 158. The most direct route was through Afghanistan, the stability of which 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, Pakistan. *Id.* at 159. The Afghan tribal leaders embraced the Bidas proposal, and Bidas prepared to move forward. *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.*

Bidas contacted Unocal Corporation in 1995 and extended an invitation for Unocal to participate with Bidas in the development of the Turkmenistan hydrocarbon project. *Bidas*, 16 S.W.3d at 895. However, no agreements were consummated between Unocal and Bidas. *Id.*

What followed in the summer of 1995 were independent efforts by Bidas and Unocal to secure the pipeline construction contract from Turkmenistan. *Id.* Rashid suggests that Unocal’s involvement and eventual success in obtaining the contracts related to two factors. First, Bidas was the subject of rumors of ill-gotten gain relayed to Turkmenistan President Saparmurad Niyazov by his advisors. RASHID, *supra* at 159-60. Second, Turkmenistan officials, including Niyazov, saw the financial possibilities of securing an American oil major to the project. *Id.* at 160. Particularly, Niyazov believed that Unocal’s involvement might lure the attention of the Clinton Administration to invest development funds in Turkmenistan. *Id.* Turkmenistan rejected several proposals by Bidas before accepting an offer from Unocal to build the pipeline in the Turkmenistan territory. *Bidas*, 16 S.W.3d at 895. “The agreement provided that Unocal would construct the pipeline, that [Unocal] would purchase gas from Turkmenistan at the Afghan border, and that Turkmenistan would retain the right to select gas reserves to dedicate to the project.” *Id.* Apparently the Unocal contract surprised the Bidas executives who 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* at 160.

Bidas then turned its attention to Afghanistan and courted certain Afghan officials to consent to an exclusive agreement to build the Afghanistan pipeline. *Id.* at 166-69. 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 the disclosure being untrue (Bidas actually only contracted with one person who claimed to deliver the Taliban). *Id.* at 168-69. Unocal was nevertheless panicked by the news and attempted to use Pakistani officials to sway the Taliban away from the Bidas deal. *Id.* 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. *Id.* at 169. However, the Taliban also coveted U.S. recognition—recognition that would bring money for roads, electricity, and other development. *Id.*

lawsuit against Unocal for interfering with its attempts to secure contractual rights for the transport of these hydrocarbons across Afghanistan.³²

The Texas State Court of Appeals conducted a two-part analysis. First, it decided what laws applied to the matter at hand. Second, it determined whether those laws recognized the tort claim for interference with a contractual relationship.³³ Regarding the choice of law question, the court applied the Restatement (Second) of Conflict of Laws to determine whether Turkmen or Afghan law would apply to this dispute, rejecting Bidas's argument that Texas law governed.³⁴ Then the court applied the "most

Bidas paid \$1 million to Barhanuddin Rabbani, "who controlled less than half of Afghanistan" and was losing more territory daily. *Bidas*, 16 S.W.3d at 895-96. Subsequently, Rabbani was removed from the capital city of Kabul and forced to the northeastern corner of the Afghanistan. *Id.* at 896. In the end, neither Bidas nor Unocal completed the project. *Id.* Unocal withdrew from the project in 1999, after several unsuccessful attempts to court Afghan officials. *Id.*

Bidas, whose assets in Turkmenistan were frozen by the Turkmen government, sought arbitration against Turkmenistan to enforce its earlier agreements. *Id.*; RASHID, *supra* at 174.

32. *Bidas*, 16 S.W.3d at 896.

33. *Id.* at 896-906.

34. *Id.* at 897. Section 6(2) of the Restatement (Second) of Conflicts of Laws identifies seven factors to be considered when a state has no legislative directive towards applying foreign law: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." RESTATEMENT (SECOND) CONFLICT OF LAWS § 6(2) (1971). 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 stated in [section] 6.

(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 and place of business of the parties, and (d) 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 of understanding how section 145 and section 6 comport with each other. *Bidas*, 16 S.W.3d at 897.

The *Bidas* Court followed precedent established by the Texas Supreme Court and another appellant court deciding cases with similar facts. *Id.* 897, 900; *see* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979); *CPS Int'l, Inc. v Dresser Indus., Inc.*, 911 S.W.2d 18 (Tex. App. 1995). For an expanded discussion of *CPS International*, see *infra* notes 54-74 and accompanying text.

significant relationship” test to analyze the contacts to the various forums.³⁵ Ultimately, the court decided that Afghan law, not Texas law, should apply to the disputes between the parties.

At least five expert witnesses appeared (four testifying on Unocal’s behalf) to testify to the sum and substance of Afghan law, its applicability, and its understandability.³⁶ Bidas’s expert, Dr. Mark Hoyle,³⁷ an administrative law judge from London, testified that Afghan law was difficult to comprehend because of the lack of available resources discussing Afghan law.³⁸ Accordingly, Hoyle testified that in his opinion and “based upon the Hanafi, as it has been codified in the Afghan Civil Code and Commercial Code, a cause of action exists for interference with an existing and prospective contractual relationship.”³⁹ In coming to his conclusion, Hoyle relied on

35. *Bidas*, 16 S.W.3d at 897. The court first determined that the situs of injury occurred in Turkmenistan and Afghanistan rather than in Texas. *Id.* at 897. Next, the court determined that the conduct causing the injury to Bidas either occurred in Turkmenistan or Afghanistan. *Id.* at 898. In making this determination, the court relied on *CPS International*. *Id.* In *CPS International*, the plaintiffs alleged tortious interference with a contract arising in Saudi Arabia. *CPS Int’l*, 911 S.W.2d at 18. The court held that the fact that tortious conduct may have been directed from the state of Texas did 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. *Id.* at 30. Bidas argued unsuccessfully that the holding in *CPS International* resulted in an unjust result. *Bidas*, 16 S.W.3d at 898. The *Bidas Corp.* court additionally cited facts that weighed heavily towards the application of foreign law, including that Bidas’s Chief Operating Officer acknowledged that the interference occurred in Turkmenistan, and that the gas contracts and protocols were not negotiated in Texas but in Turkmenistan. *Id.* at 898.

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. *Id.* at 898-99. Bidas is incorporated in the British Virgin Islands with a principle place of business in Buenos Aires, Argentina. *Id.* at 898. Unocal is a Delaware Corporation and is headquartered in California. *Id.* at 899.

Fourth, the court found that there was no business relationship previously existing between Unocal and Bidas to salvage an application of Texas law. *Id.* Finally, the court rejected Bidas’s claims that Texas public policy warranted application of Texas law to the matter. *Id.* at 899-900. Claiming that the state of Texas had an interest in regulating companies doing business in its borders, and emphasizing the difficulty in predicting and ascertaining both Turkmen and Afghan law, Bidas urged the rejection of foreign law in favor of Texas state law. *Id.* The court rejected both arguments and spent the remainder of the opinion explaining the contours of both Turkmen and Afghan law. *Id.* at 900-06. (The application of Turkmen law will not be discussed in this article because its law was derived from the legal systems of the former republics of the Soviet Union—it is not Islamic law. *Id.* at 900.)

36. *Id.* at 903, 904.

37. Hoyle has published one book relating to Islamic Commerce. See MARK S. HOYLE, *MIXED COURTS OF EGYPT* (1991). He has authored other books that address Islamic legal concerns in the context of international law. See *THE MAREVA INJUNCTION AND RELATED ORDERS* (1985) and *THE LAW OF INTERNATIONAL TRADE* (1981). He is also a co-founder and editor of the *Arab Law Quarterly*.

38. It is important to note that Hoyle’s testimony comported with Bidas’s overall legal strategy—arguing that the conflict of laws analysis should sway towards an application of Texas law because Afghan law was indeterminable. See *Bidas*, 16 S.W.3d at 899, 904.

39. *Bidas*, 16 S.W.3d at 904.

articles from the Afghan Civil Code, and interpretations of Islamic law from Egypt, Jordan, and the United Arab Emirates.⁴⁰

On the other side, Unocal (and its co-defendant Delta, a Saudi Arabian subsidiary of Unocal) presented four experts who convinced the court that not only was Afghan law ascertainable, but that it did not recognize a tort for interference with contractual relations. Unocal's first expert, Professor Ian Edge, testified that Afghanistan follows a purely non-secular form of Islamic law deriving from the Hanafi school of thought.⁴¹ Edge testified that the sources of decision come from religious scholars who interpret the three sources of Islamic law—the Qur'an, the Sunnah, and the Mejlle—not from judges.⁴² He further testified that under these sources of law, Afghanistan courts would not recognize a tort for interference with contractual relations.⁴³

In arriving at this conclusion, Edge noted that the Shari'a provides for recovery only when a physical injury has occurred to person or property.⁴⁴ Edge's conclusion that interference with a contractual relationship is neither tangible nor direct, and therefore uncompensable, was based on articles 89 and 1510 of the Mejlle.⁴⁵ In addition, because harm cannot result from a lawful act, Bidas could have no cause of action in Afghanistan.⁴⁶ Unocal's second and third witnesses, Muhammed Rostayee and Abdul Salam Azimi, agreed with Edge's conclusion that the Afghanistan civil code affords no remedy for Bidas's action.⁴⁷

The fourth expert presented by Unocal was Dr. Frank Vogel.⁴⁸ He first testified that Bidas's expert (Hoyle) used an inexact translation of the Afghan

40. *Bidas*, 16 S.W.3d at 904-05.

41. *Id.* at 903. Edge is a law professor at the University of London specializing in Islamic and Middle Eastern law. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 903.

45. *Id.* The Texas Court of Appeals also cited article 787 of the Afghanistan Civil Code in a footnote: "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." *Id.* at 903 n.6 (quoting CIVIL CODE art. 787 (Afg.)). The court further noted that article 551 defines "aversion" as the "intimidation of a person, unreasonably for executing an action without consent whether it may be material or spiritual." *Id.* (quoting CIVIL CODE art. 551 (Afg.)).

46. *Bidas*, 16 S.W.3d at 903-04.

47. *Id.* at 904. The second witness presented by Unocal was Muhammed Roystayee, a lawyer licensed to practice law in Afghanistan. He testified that "[t]here is no mention of [the causes of action pled by Bidas] in the civil code and neither in the Shari'a law." *Id.* (alterations in original).

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

48. Vogel is a Professor of Law at Harvard University Law School, specializing in Islamic Law, and is the director of the Harvard Islamic Studies Center. *Id.* at 905. He has written substantially on the subject of Islamic Commerce, including: FRANK E. VOGEL, ISLAMIC

Civil Code.⁴⁹ In an effort to contextualize Islamic non-recognition of indirect torts, Vogel stated:

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 unlikely 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 *Mejelle* 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 *Mejelle*, 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. . . .

. . .

So the person who has ordered it offers no excuse for the person who does it. The person who does 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.⁵⁰

In receiving this testimony (particularly the testimony by Vogel and Edge), the court decided that Afghanistan's law was "readily and reliably ascertainable" and that Afghan courts would not enforce a tort for tortious interference with a contract.⁵¹

LAW AND LEGAL SYSTEMS: STUDIES OF SAUDI ARABIA (2000) [hereinafter VOGEL, ISLAMIC LAW AND LEGAL SYSTEMS]; FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN (1998); Frank E. Vogel, *Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction*, in THE PERSIAN GULF AT THE MILLENNIUM: ESSAYS IN POLITICS, ECONOMY, SECURITY, AND RELIGION 249 (Gary G. Sick & Lawrence G. Potter eds., 1997).

49. *Bridas*, 16 S.W.3d at 905.

50. *Id.* (citing CIVIL CODE art. 89 and 1510 (Afg.)).

51. *Id.* at 906.

B. *CPS International, Inc. v. Dresser Industries, Inc.*

CPS International, a Panamanian Corporation, and Abdullah Rushaid Al-Rushaid, a Saudi Arabian national, formed a Saudi Arabian Company named Creole Al-Rushaid, Ltd. (“CARL”) in 1978. CARL was created with the purpose of conducting business in Saudi Arabia.⁵²

In 1983, CPS International and Al-Rushaid instituted an action in the Saudi courts to dissolve the corporation.⁵³ However, after the process proved cumbersome, CPS International alleged that Al-Rushaid deliberately attempted to slow the process of dissolving the corporation.⁵⁴ CPS International further alleged that Al-Rushaid conspired with Dresser Industries to drive CPS International out of the Saudi Arabian market.⁵⁵

A number of different suits in United States and Saudi Arabian courts finally culminated in a settlement between the parties.⁵⁶ Nevertheless, CPS International and Creole Production Services, Inc. (“Creole”) brought suit in Texas state court against Al-Rushaid and Dresser Industries, alleging the same claims urged to the Saudi Arabian courts.⁵⁷ The district court granted summary judgment against CPS International and Creole, finding that Saudi Arabian law applied and that the plaintiffs’ claims would not be recognized in Saudi Arabian courts.⁵⁸

52. *CPS Int’l, Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 20, 30 (Tex. App. 1995). CPS International was a wholly owned subsidiary of Creole Production Services, Inc., a Delaware corporation whose principle place of business is in Houston, Texas. *Id.* at 20. Creole Al-Rushaid was formed under Saudi Arabian law for the purpose of conducting operations in Saudi Arabia. *Id.*

53. *Id.* at 21.

54. *Id.*

55. *Id.*

56. *Id.* “In 1985, CPS International brought a federal anti-trust action against Dresser Industries [and Al-Rushaid],” asserting that the defendants were engaged in “a conspiracy to drive CPS International out of the Saudi Arabian market.” *Id.* The court eventually dismissed the matter holding that there was an insufficient impact on the U.S. market to proceed as a federal anti-trust matter. *Id.* Before the court dismissed the case, CPS International and Creole Production Services filed a second action in the same court alleging similar facts, and claiming that the effects were anti-competitive. *Id.* The court again dismissed CPS International’s action, stating: “If there are any anticompetitive effects, surely they are in Saudi Arabia, where CARL was eliminated as a competitor.” *Id.* Concurrently with the filing of its original suit, CPS International also filed a matter in the Saudi Arabian court against Al-Rushaid for breach of contract, breach of fiduciary duty, misappropriation of confidential information, and conspiracy. *Id.* The three-judge panel which heard the case held that these matters were non-justiciable under Saudi Arabian law but went on to investigate alternative means to resolve the parties’ disputes. *Id.* Al-Rushaid agreed to cooperate in the CARL dissolution, while CPS International promised to drop the aforementioned federal suits. *Id.* CPS International then brought the action discussed in this section in Texas state court. *Id.*

57. *Id.* at 19-21.

58. *CPS Int’l*, 911 S.W.2d at 19.

The appellate court reviewed the decision with the standards accorded to summary judgment decisions.⁵⁹ The court approached the question of determining foreign law as a mixture of fact and law.⁶⁰ The appellate court's decision treated the application of Saudi Arabian law as a question of law, rather than a contestable issue of fact.⁶¹ The court accordingly considered the issues on two discreet planes: first, whether the manner in which the Al-Rushaid defendants competed with CARL could have been determined by contract; and second, whether Saudi Arabian law would recognize a tort for interference with a contract.⁶² Only the second issue is relevant to our discussion, as it addresses the application of Islamic law.

59. *CPS Int'l*, 911 S.W.2d at 21. The standard of review considers whether the movant successfully carried his burden of proof at the trial level by "showing that there is no genuine issue of material fact and that a judgment should be granted as a matter of law." *Id.* (citing *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991)).

60. The court said that "the task of determining foreign law intuitively strikes us as a factual inquiry into the content or text of foreign rules of law." *Id.* at 22. The court noted, however, that Texas Rule of Evidence 203 makes clear "that the determination of the content of foreign law is a question of law for the court." *Id.* Thus, the court rephrased its assessment. Rather than deciding whether the trial court was correct in holding that no factual matter was at issue, it focused on determining whether the trial court reached a proper legal conclusion regarding the content of Saudi Arabian law. *Id.*

61. *Id.* at 22-23.

62. *Id.* at 21-23. Regarding the first issue, the court reviewed four different agreements executed between Al-Rushaid and CPS International in the context of their business relationship. *Id.* at 23-25. Al-Rushaid and Dresser relied upon three writings which directly or indirectly alluded to Saudi Arabian law being applicable to any dispute. *Id.* The first such agreement relied upon by Al-Rushaid and Dresser, which 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 [sic] commercial disputes at Dammam." *Id.* at 24. The contract continued by stating that the company would abide by all the rules and regulations existing in force in the kingdom of Saudi Arabia and "[a]ll provisions not stated in this contract will be governed by the code of the Companies Act." *Id.*

The second agreement appeared in the bylaws of CARL. *Id.* It provided that "[i]f any difference or dispute shall arise between the Parties as to the interpretation of [the bylaws] or any matter or thing arising therefrom or in connection therewith, then, upon either Parties [sic] 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, Dhahran, Saudi Arabia." *Id.* at 25.

The third contractual provision relied upon by Al-Rushaid and Dresser appeared in the working agreement between the parties. It stated that:

[E]ach director of CAR[L] 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 CAR[L] for the settlement of disputes.

Id. at 25 (alterations in original).

On the other hand, CPS International and Creole 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 International and Creole pointed to a fourth expression by the parties in the Technical Assistance Agreement, which provided: "[a]ny controversy, dispute,

The court's assessment of which law governed the tort claims brought by CPS International and Creole centered around the Restatement (Second) of Conflicts of Laws, and ultimately around whether Saudi Arabia's law would allow for the tort of interference with a contractual relationship.

CPS International and Creole produced expert William Van Orden Gnichtel, who testified that Saudi Arabia would recognize a claim for tortious interference with a contract.⁶³ In testimony, Van Orden Gnichtel 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 to another he will be required to compensate the wronged party."⁶⁴ The court found Van Orden Gnichtel's testimony fatally flawed because it only considered a general principle instead of focusing upon the actual conduct in the case.⁶⁵

Al-Rushaid and Dresser presented expert testimony from Joseph Saba, who presented a more precise overview of relevant Saudi Arabian law and addressed the specifics of the matter.⁶⁶ In an affidavit available to the lower court, he stated:

The American concept of tortious interference with contracts 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.⁶⁷

Saba continued by addressing a statement by Van Orden Gnichtel that the "Shari[']a . . . recognizes civil liability for wrongful acts resulting in damages. . . . It is not dependent on specific contractual arrangements or specific regulations promulgated by the government."⁶⁸ Saba said that though Van

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." *Id.* at 25.

The court ultimately agreed with the CPS International and Creole parties that the choice of law provision in the Technical Assistance Agreement was the only genuine choice of law provision. *Id.* at 28. In doing so, the court allowed the contract claims to proceed under U.S. law. *Id.*

63. *CPS Int'l*, 911 S.W.2d at 31. Apparently, Van Orden Gnichtel's testimony regarding Saudi Arabian law was based on conversations with a colleague who, unlike Van Orden Gnichtel, was licensed as a Saudi Arabian lawyer. *Id.* at 31 n.13.

64. *Id.* at 31.

65. *Id.*

66. *Id.* at 31-32.

67. *Id.* at 32.

68. *Id.* (alterations in original).

Orden Gnichtel's interpretation is correct when applied to Saudi Arabian law, it would be incorrect to apply this premise across the gamut of American tort claims:

The Saudi scope of liability of one private party to another does not encompass all acts which American law might consider to be wrongful. . . . [W]hile the existence of 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.⁶⁹

On subsequent cross-examination, CPS International 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.⁷⁰

The court subsequently addressed other issues of fiduciary duty, misappropriation of trade secrets, and conspiracy.⁷¹ However, because CPS International and Creole failed to posit arguments specifically relating to these claims, their tort claims were accordingly dismissed.⁷²

C. Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.

In 2004, the Delaware Supreme Court heard the matter of *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co. (Saudi Basic III)*.⁷³ In *Saudi Basic III*, Saudi Basic Industries Corp. ("SABIC"), a Saudi Arabian partner in a joint venture with Mobil Yanbu Petrochemical Co. ("Mobil") and Exxon Chemical Arabia, Inc. ("Exxon") sought to overturn a superior court order denying its request for judgment that it did not overcharge Mobil and Exxon for technologies licensed from a third party.⁷⁴ Mobil and Exxon countersued

69. *CPS Int'l*, 911 S.W.2d at 32.

70. *Id.*

71. *Id.* at 32-33.

72. *Id.* at 35.

73. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. (Saudi Basic III)*, 866 A.2d 1 (Del. 2005). The procedural history of this matter actually encompasses two underlying cases. In 2002, Saudi Basic Industries Corp. ("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 joint ventures to obtain proprietary information from SABIC. *Id.* at 10. They further sought a judgment declaring that the Exxon/SABIC venture owned the patents and an injunction requiring ExxonMobil to transfer them to the venture. *Id.*; see *Saudi Basic Indus. Corp. v. ExxonMobil Corp. (Saudi Basic I)*, 194 F. Supp. 2d 378, 384 (D.N.J. 2002). During the discovery phase of the trial, SABIC agreed to a consent order that would have required it to respond to overcharge allegations. *Saudi Basic III*, 866 A.2d at 10. Instead of responding, SABIC filed the request for judgment with the Delaware Superior Court. *Id.*

74. *Saudi Basic III*, 866 A.2d at 10-11.

SABIC and were awarded compensatory damages of \$220,238,108 and \$196,642,656 respectively.⁷⁵

In the trial court, both sides agreed that Saudi Arabian substantive law applied. Specifically, the trial court held SABIC liable for the Saudi tort of *ghashb* or usurpation.⁷⁶ SABIC argued that this conclusion was inappropriate because SABIC did not act openly, notoriously, and in the absence of right, and therefore failed to satisfy necessary requirements for *ghashb*.⁷⁷ Concretely, SABIC argued that because it acted surreptitiously and without the victim's

75. *Saudi Basic III*, 866 A.2d at 11. In 1980, SABIC created joint ventures with Mobil and Exxon to manufacture polyethylene in Saudi Arabia. *Id.* at 7. The partners of the joint ventures carefully negotiated their contract agreements and, as the court noted, 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. *Id.* 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.” *Id.* at 8. The text of the Exxon venture differed slightly: “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.*

To produce polyethylene, Mobil and SABIC had to license technology they did not own. *Id.* In the spring of 1980, SABIC informed Mobil that it would license the technology directly from Union Carbide Corporation (“UCC”) and then sublicense the technology to the joint venture. *Id.* “In . . . 1980, UCC and SABIC executed a agreement granting SABIC an exclusive license to the Unipol® PE technology within the Kingdom of Saudi Arabia.” *Id.* Mobil and Exxon were excluded from the meeting between UCC and SABIC. *Id.* In making this overture, SABIC assured Mobil that it would comply with the contractual requirements of passing on costs “dollar for dollar.” *Id.* 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 markup. *Id.*

In June 1987, spurred by poor conditions in the polyethylene market, UCC agreed to reduce its licensing royalties, which included the amount due from SABIC. *Id.* at 9. At the same time, Exxon and Mobil amended their joint ventures with SABIC to account for the adjusted royalty fees. *Id.* However, unbeknownst to either Mobil or Exxon, SABIC negotiated a royalty reduction rate for itself that was significantly larger than the reductions in either the Mobil or Exxon contracts. *Id.*

In 2000, ExxonMobil (now merged) discovered the overcharges. *Id.* at 9. A dispute arose between SABIC and the Saudi Taxing Authority over the royalties paid by SABIC to UCC under the SABIC/UCC agreement; the Saudi Government determined that the payments were taxable. *Id.* The decision prompted SABIC to send letters to the joint ventures explaining the tax dispute and demanding their contribution to the tax. *Id.* While verifying the accuracy of the SABIC indemnification demand, ExxonMobil discovered for the first time that SABIC had been overcharging the ventures. *Id.* at 9-10.

76. *Saudi Basic III*, 866 A.2d at 29. This analysis only focuses on the *ghashb* claims as relevant to Islamic law. *Id.* at 29-40. Other issues were presented for review, including the accuracy of the trial court's evidentiary rulings, the applicability of Delaware's borrowing statute, and the contractual construction of claims. *Id.* at 14-29.

77. *Id.* at 29, 33.

knowledge, *ghashb* was simply inapplicable to the dispute. Indeed, SABIC stated that all ExxonMobil proved was that SABIC had engaged in “secret conduct . . . based on the color of right.”⁷⁸

SABIC’s claims can be reduced to three discreet questions addressed by the court. First, it claimed that to commit *ghashb* under Saudi Arabian law, ExxonMobil was required to establish, but failed to show, “an open and obvious taking that is intentional and without any color of right.”⁷⁹ Second, it claimed that no Saudi Arabian court would have awarded enhanced damages in such a contract case.⁸⁰ Third, SABIC claimed that the trial court, though purporting to employ the methodology that a Saudi Arabian judge would have employed (*ijtihad*), “in fact invoked *ijtihad* merely as a ‘*post hoc*’ rationalization’ for foreign law rulings that were . . . arbitrary and unprincipled.”⁸¹

Addressing the question of *ijtihad* first, the Delaware Supreme Court affirmed the trial court’s reasoning and method.⁸² The court began by defining the religious aspects of Saudi Arabian law, flowing from the Hanbali school.⁸³ Dr. Vogel testified at the trial level that Saudi Arabian judges “hew conservatively to the Hanbali school.”⁸⁴ The court also noted the differences between Saudi Arabian law and that of common law countries; specifically, it noted that Islamic countries do not embrace precedent or *stare decisis* in the same way as Western courts do, and it recognized the relative unavailability of law reports to the public.⁸⁵

From this beginning, the Delaware Supreme Court cited the trial judge’s rationale in applying Islamic law:

SABIC’s arguments ignore the simple truth that the circumstances under which *ghashb* (usurpation) 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 *ghashb*. Nor can one point to one definition of, or a given set of circumstances giving rise to, *ghashb*. 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 *ghashb*. . . . Finally, because Saudi law decisions are not published, even *if* the decisions had precedential value (which all the experts

78. *Saudi Basic III*, 866 A.2d at 29.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 32.

83. *Id.* at 30.

84. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. (Saudi Basic III)*, 866 A.2d 1, 30 n.72 (Del. 2005).

85. *Id.* at 30-31.

agree they do not) the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.⁸⁶

The Delaware Supreme Court, in affirming the reasoning of the lower court, 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 seventeenth-century scholar, as well as the works of Ibn Qudama and Al Maqdisi.⁸⁷ The court, noting testimony from Professor Wael Hallaq that each time a Saudi Arabian law judge exercises *ijtihad*, “it is basically his best . . . effort to find what is the right thing to do,”⁸⁸ affirmed the trial court’s rationale as doing the “best it could . . . to reach the ‘right’ result.”⁸⁹

In coming to its conclusions, the lower court heard evidence from four Saudi Arabian law experts, as well as its own expert when conflict between the expert opinions was apparent. The court particularly noted the contradiction inherent in the position submitted by SABIC expert Dr. Vogel, opining that the court could not credibly engage in the *ijtihad* process.⁹⁰ 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 in 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?⁹¹

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

Turning to the specific issue of *ghasb*, the trial court had determined that “[i]n order to establish a claim for usurpation, [ExxonMobil] 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.”⁹² In coming to this definition, the trial court

86. *Saudi Basic III*, 866 A.2d at 31 (quoting *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. (Saudi Basic II)*, No. CIV.A.00C-07-161JR], 2003 WL 22016843, at *1 (Del. Super. Ct. Aug. 26, 2003)).

87. *Id.* at 31 & n.74.

88. *Id.* at 31 & n.75 (quoting *Saudi Basic II*, 2003 WL 22016843, at *2 n.8).

89. *Id.* at 31 (quoting *Saudi Basic II*, 2003 WL 22016843, at *2).

90. *Id.* at 32.

91. *Id.* at 32 (emphasis in original). The Delaware Supreme Court also noted the contradiction of SABIC posing this argument only after receiving an unfavorable judgment. *Id.*

92. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. (Saudi Basic III)*, 866 A.2d 1, 33 (Del. 2005) (citation omitted).

rejected SABIC's argument that *ghasb* must include elements of openness and notoriety, in addition to being intentional and without color of right.

The court relied upon experts who 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.'"⁹³ The court specifically rejected Dr. Vogel's definition of *ghasb*, which suggested that openness and intentional conduct were required.⁹⁴ Instead, the court embraced the testimony of Dr. Herbert Wolfson, who testified that the most revered Hanbali scholars do not include openness or intention in their definition of *ghasb*.⁹⁵ 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's ruling.

Regarding the practice (or non-practice) of awarding enhanced damages by Saudi courts, the lower court 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 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.⁹⁶

The court also noted that Dr. Wolfson testified that in tort actions in the Hanbali school, damages such as those awarded in the *Saudi Basic litigation* were not so irregular as to be incorrect.⁹⁷

93. *Saudi Basic III*, 866 A.2d at 33.

94. *Id.* The trial court questions Vogel's apparent subjectivity:

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.

Id. (citation omitted).

95. *Id.* at 33-34.

96. *Id.* at 35 (quoting *Saudi Basic II*, 2003 WL 22016843, at *2) (alteration in original).

97. *Id.* at 35.

D. *Blackstone v. Aramco Services Co.*

In 1964, Arabian American Oil Co. ("ARAMCO") hired Robert E. Blackstone to work in Saudi Arabia as a waterwell maintenance manager.⁹⁸ In 1979, ARAMCO conducted an internal investigation to determine the validity of allegations that five senior managers, including Blackstone, either "received favors from contractors or had improperly approved invoices for subcontractors."⁹⁹ Blackstone claimed that ARAMCO investigators were threatening him, and he returned to Texas.¹⁰⁰ Blackstone alleged that he was forced to take early retirement, and suffered from severe mental and emotional injuries.¹⁰¹

Blackstone filed suit against ARAMCO alleging improper termination, slander, negligence, false imprisonment, assault, and infliction of emotional distress.¹⁰² Among the remedies sought by Blackstone was *taẓ'ir*—a lashing of the tortfeasor by the state.¹⁰³ After deciding that Saudi Arabian law applied, the court turned to whether Saudi Arabian law recognized the torts Blackstone alleged. The court initially noted that:

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 a compensable claim for damages under Shari'a, but may subject the tortfeasor to the criminal sanction of *taẓ'ir*¹⁰⁴

Finding that Blackstone exhibited no physical injuries, the court denied his contention that Saudi Arabian law would afford a remedy for his claims.¹⁰⁵ Finally, the court noted that Blackstone's claim for imprisonment or lashings was beyond the jurisdictional scope of the courts.¹⁰⁶ The court noted that *taẓ'ir* is a penal claim and therefore outside the boundaries of the district civil court.¹⁰⁷

98. *Blackstone v. Aramco Serv. Co.*, No. 01-89-00203-CV, 1991 WL 63630, at *1 (Tex. App. Apr. 25, 1991).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Blackstone v. Aramco Serv. Co.*, No. 01-89-00203-CV, 1991 WL 63630, at *1 (Tex. App. Apr. 25, 1991).

105. *Id.* at *3. Blackstone claimed that his injuries included "depression, anxiety, tension, insomnia, anorexia, nervous eating, and seclusiveness." *Id.*

106. *Id.* at *5.

107. *Id.*

E. Rhodes v. ITT Sheraton Corp.

In 1994, Emma Louise Rhodes was injured while a guest at the Sheraton Jeddah Hotel and Villas (“Jeddah”) in Saudi Arabia.¹⁰⁸ Rhodes was a British national.¹⁰⁹ The defendants, all Massachusetts citizens, included Sheraton Middle East Management Corporation (“Sheraton Middle East”), which operated the Sheraton Jeddah for its Saudi Arabian owner, Saudi Brothers Commercial Company (“Saudi Brothers”).¹¹⁰ Rhodes did not bring suit against Jeddah or Saudi Brothers.¹¹¹

Rhodes, while staying at Jeddah, injured her spinal cord.¹¹² The beach at Jeddah’s resort complex included “a large concrete wharf, a wooden platform or jetty, and a lagoon.”¹¹³ Coral reefs lay underneath the jetty and bordered the lagoon.¹¹⁴ Rhodes hit her head on the coral when she dove off the jetty into the lagoon.¹¹⁵ Following her injury, Rhodes “lay in the water, face down and unable to move, until she was pulled out and taken to a nearby hospital.”¹¹⁶ Rhodes suffered a “high level spinal injury” and “spent . . . three months in a Saudi hospital, where she underwent surgery to fuse her spine.”¹¹⁷ As a result of her injuries, Rhodes was a tetraplegic; she had limited function of her right arm but could not move her left arm or either of her legs.¹¹⁸

The Massachusetts Superior Court reviewed whether an adequate alternative forum existed for Rhodes’s claims and whether the matter should be transferred.¹¹⁹ On the first issue, the court considered whether 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.¹²⁰

On the testimony of Frank Vogel,¹²¹ the court noted that the plaintiff would not be entitled to testify herself.¹²² Vogel testified that “[a]ll parties are presumed to be prejudiced in favor of themselves and therefore are not

108. Rhodes v. ITT Sheraton Corp., No. CIV.A. 97-4530-B, 1999 WL 26874, at *1 (Mass. Super. Ct. Jan. 15, 1999).

109. *Id.*

110. *Id.* at *1 & n.2.

111. *Id.* at *1 n.2.

112. *Id.* at *1.

113. *Id.*

114. Rhodes v. ITT Sheraton Corp., No. CIV.A. 97-4530-B, 1999 WL 26874, at *1 (Mass. Super. Ct. Jan. 15, 1999).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Rhodes v. ITT Sheraton Corp., No. CIV.A. 97-4530-B, 1999 WL 26874, at *2 (Mass. Super. Ct. Jan. 15, 1999).

121. *See supra* note 48.

122. Rhodes, 1999 WL 26874, at *2.

considered to be reliable witnesses” in Saudi Arabia.¹²³ Vogel noted that the plaintiff would be entitled to submit written assertions,¹²⁴ but on the commentary of scholar Peter Sloane, the court concluded that this testimony is somewhat disfavored compared to oral testimony.¹²⁵ The court also noted the lack of pre-trial discovery procedures, the lack of uniform rules of procedure in Saudi Arabian courts, the absence of jurisprudential precedent, and the biases against women as substantial procedural hurdles to the plaintiff.¹²⁶

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

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.” Given the theory of liability in this case, it also is significant that Saudi law does not recognize agency within the concept of torts. Moreover, consequential, indirect, and speculative damages generally are viewed as nonrecoverable through a Saudi court. If she establishes defendants’ liability, plaintiff could only expect to recover actual medical expenses and a fraction of her “*dijab*,” which is a fixed amount of compensation for personal injury.¹²⁷

On the basis of this discussion, the trial court ruled that the Saudi forum was not appropriate for plaintiff’s claims.¹²⁸

F. *Chadwick v. Arabian American Oil Co.*

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 work in Saudi Arabia.¹²⁹ Chadwick claimed that while employed in Saudi Arabia, he sought medical attention from a doctor retained by the Arabian American Oil Co. (“Arabian Oil”), which employed Chadwick’s independent contractor.¹³⁰ The doctor originally diagnosed Chadwick’s problem as gas and provided him with antacid treatments.¹³¹ A year later, Chadwick, still complaining of the same stomach pains, had an upper gastrointestinal x-ray performed by the same doctor retained by Arabian Oil, who diagnosed the problem as a

123. *Rhodes*, 1999 WL 26874, at *2.

124. *Id.*

125. *Id.* (citing Peter D. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 INT’L.LAW. 743, 751 (1988)).

126. *Id.* at *2 n.4, *3.

127. *Id.* at *5 n.9 (alteration in original) (citations omitted).

128. *Id.* at *5.

129. *Chadwick v. Arabian Am. Oil Co.*, 656 F. Supp. 857, 859 (D. Del. 1987).

130. *Id.* at 859.

131. *Id.*

duodenal ulcer.¹³² Later, after returning to the United States, Chadwick was diagnosed by a U.S. doctor as having a malignant stomach tumor.¹³³ As a result, his entire stomach, spleen, and a portion of his liver and pancreas were removed; he was unable to return to work.¹³⁴

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.¹³⁵ The court held that Saudi Arabian law does not recognize vicarious liability except in the limited circumstances where “it is proven that an actor’s free will is obliterated by the person directing the actor to act.”¹³⁶ 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.”¹³⁷ Thus, the court held that Chadwick, to the extent that he had a claim, had to proceed against the Saudi Arabian doctors, not Arabian Oil.

G. National Group for Communications and Computers Ltd. v. Lucent Technologies International, Inc.

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 International Inc. (“Lucent”).¹³⁸ NGCC sued Lucent for breach of contract relating to the installation of pay phone and emergency phone stations along highways in Saudi Arabia.¹³⁹ The total amount of the contract was \$75,460,902.¹⁴⁰ NGCC sought damages in excess of \$92,319,579, which included claims for future loss and unearned profits.¹⁴¹ The magistrate ordered the parties to submit evidence relating to Saudi Arabian law, as both parties agreed that Saudi Arabian law governed the dispute.¹⁴²

The court began its analysis of Saudi Arabian law by noting the differences between it and U.S. law. The court concluded the religious practices of Islam permeate every aspect of life in Saudi Arabia, most pertinently contract disputes. The court, relying on testimony from Frank Vogel,¹⁴³ noted that “the Saudi Arabia[n] legal system is governed exclusively by . . . ‘Shari’a.’”¹⁴⁴ The court then said “[i]n fact, “there are no ‘laws’ in Saudi Arabia other than

132. *Chadwick*, 656 F. Supp. at 859.

133. *Id.*

134. *Id.*

135. *Id.* at 858.

136. *Id.* at 861.

137. *Id.*

138. *Nat’l Group for Commc’ns & Computers Ltd. v. Lucent Techs. Int’l Inc.*, 331 F. Supp. 2d 290, 292 (D.N.J. 2004).

139. *Id.*

140. *Id.*

141. *Id.* at 298.

142. *Id.*

143. *See supra* note 48.

144. *Nat’l Group for Commc’ns & Computers Ltd. v. Lucent Techs. Int’l Inc.*, 331 F. Supp. 2d 290, 295 (D.N.J. 2004).

Islamic law, and any supplemental rules promulgated by the Saudi government are actually considered regulations known as ‘nizam.’”¹⁴⁵ The court noted that these regulations “are valid only to the extent that they are consistent with Shari’a.”¹⁴⁶ 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.. 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.¹⁴⁷

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.”¹⁴⁸

The court next examined the conservative orientation of Saudi law:

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. The Board of Grievances too is very conservative in its interpretation of commercial and contract law. 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.”¹⁴⁹

Finally, the court focused on *gharar*:

145. *Nat’l Group for Comm’ns & Computers Ltd.*, 331 F. Supp. 2d at 295.

146. *Id.*

147. *Id.* (citations omitted).

148. *Id.* (quoting VOGEL, ISLAMIC LAW AND LEGAL SYSTEMS *supra* note 48, at 15) (citations omitted).

149. *Id.* at 295-96 (quoting VOGEL, ISLAMIC LAW AND LEGAL SYSTEMS, *supra* note 48, at 305) (alteration in original) (citations omitted).

A key doctrine within the Shari'a is the prohibition on "gharar," meaning risk or uncertainty. Gharar is absolutely repugnant to Islamic law. 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 [measures] it.¹⁵⁰

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', 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.¹⁵¹

After this extensive discussion of Islamic Law, the court then proceeded to the questions underlying the dispute. The court noted that under Saudi Arabian law, damages available for breach of contract are generally limited to actual and direct losses.¹⁵² Further, "Saudi law does not permit damages that are 'ascertainable only [by] means involving speculation, contingencies, uncertainties or indeterminacy.'"¹⁵³

Thus, under the prohibition against *gharar*, the court would not allow expectation damages to be heard.¹⁵⁴ Additionally, under the same prohibition, Saudi Arabian law would not allow damages for lost profits, unrealized gains or future profits.

150. *Nat'l Group for Comm'ns & Computers Ltd.*, 331 F. Supp. 2d at 296 (quoting Frank E. Vogel, *Contract Law of Islam and the Arab Middle East*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 7-50 (Arthur Von Mehren ed., 2006)) (alteration in original).

151. *Id.* (quoting WILLIAM M. BALLANTYNE, *ESSAYS AND ADDRESSES ON ARAB LAWS* 274 (2000)).

152. *Id.* at 297.

153. *Id.*

154. *Id.* at 298.

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.¹⁵⁵

The court simply rejected this line of argument. Accordingly, the court limited the potential claims of the plaintiff to those damages actually suffered by NGCC, exclusive of any future or uncertain amounts.¹⁵⁶

III. THE POSTURE OF READING

In her memoirs, Nafisi relates her ability to describe her class participants by the way they read the works before them. Throughout the narrative, we learn the different nicknames of the girls that describe their emotional odyssey through Western literature. In a sense, reading literature in groups begs us to do just this—compare and isolate one another according to the way we read the text. Reading courts and court opinions encourages us to do the same.

This section categorizes the courts described in Part I as responding to the propositions presented by Islamic law with procedural distance (formalism), interpretive bias, or translation. The courts, like most readers, reach questions of substance through three cognitive stages: (1) recognition, (2) assimilation, and (3) response. Courts first attempt to recognize the issues that are involved, the law that is applicable, and the appropriate basis to determine the issues. Next, the courts assimilate the matters to determine what response they should make. Finally, they formulate their response. In all three stages, the perspectives of the court emerge.

One perspective is formalistic. In this posture, the court's recognition is already shaped by its normative perspective. Moreover, the law serves more as a bar towards assimilation than an entry to the cultural problem. What comes out then are opinions that give the appearance of deciding matters based on formalities, rather than reason, justice, or other mechanisms.¹⁵⁷

A second approach is interpretive. The idea is best described by Nafisi's description of approaches to *Lolita*. On the one hand, the descriptions of the narrator could be taken at face value, even though enough evidence exists in the text to disbelieve him—to believe that Humbert's rape of a twelve-year-old girl is justified because she is a "'moppet', 'little monster', 'corrupt', 'shallow', [or a] 'brat.'"¹⁵⁸ Certainly the text invites these approaches. But it is the

155. *Nat'l Group for Comm'n's & Computers Ltd.*, 331 F. Supp. 2d at 298.

156. *Id.*

157. To be fair, there are sound arguments that formalism is the best mechanism for preserving justice and fairness.

158. NAFISI, *supra* note 3, at 40-44.

experiential approaches that bring interpretation to life. If one concludes that Lolita is a moral character, or that Nabokov is a sick perverted fiend for romanticizing the rape of a twelve-year-old girl, then the experiences of the interpreters are brought to life inside the character. Interpretation always begs for personal insight, and therefore poses a problem when judges are faced with applying the law.

A third approach is translation. This approach involves reading the texts in a manner that allows them to stand on their own and, at the same time, permits us to understand them in light of the cultural scenery.

A. Formalistic Responses

To call formalism a posture that divorces itself from the facts and deals strictly with the law is perhaps unfair.¹⁵⁹ But to assume that formalistic approaches treat facts the same as the law is also unfair. Thus, formalistic courts, coldly and without regard to emerging patterns, simply apply the law. Foremost, the formalistic courts do not see themselves as making policy.

The *Bridas Corp.* case provides a good illustration.¹⁶⁰ The *Bridas Corp.* litigation resulted from contracts between Bridas and the governments of Afghanistan and Turkmenistan, and from Bridas's allegations that Unocal Corporation tortiously interfered with those agreements.¹⁶¹ The Texas Court of Appeals reviewed the question of whether the tort of interference with a contractual relationship would be allowed under Afghan law.¹⁶²

Recall the court's citation of Frank Vogel's testimony.¹⁶³ In receiving this testimony, the court decided that Afghanistan's law was "readily and reliably ascertainable" and that the Afghan courts would not enforce a tortious interference with a contract claim.¹⁶⁴ The court's approach was to use law, and law alone, to come to this result—a benchmark of formalism. Succinctly, to arrive at this result, the court determined that (1) Afghan law is readily ascertainable; (2) there is no tort concept of interference with a contract within Afghan law; and (3) principles derived from Afghan law would suggest that there is no similar cause of action.¹⁶⁵ The process is one 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. Nevertheless, the approach taken by the *Bridas Corp.* court could also be translative, as discussed below.¹⁶⁶

159. See Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2069-70 (1995).

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

161. *Id.* at 894-95. For further detail in understanding the *Bridas Corp.* case, see RASHID, *supra* note 31.

162. *Bridas*, 16 S.W.3d at 895.

163. See *supra* note 48-51 and accompanying text.

164. *Bridas*, 16 S.W.3d at 906.

165. See *id.*

166. See *infra* Part III.C.

B. Interpretive Approach

A second approach used by the courts surveyed is an interpretive approach. This approach is characterized by the opinion in *Rhodes*.¹⁶⁷ Recall the threshold questions as framed by the Massachusetts Superior Court—whether an adequate alternative forum existed for Rhodes’s claims and whether the matter should be transferred.¹⁶⁸ On the first issue, the court considered whether the Saudi Arabian courts were adequate alternative forums.¹⁶⁹

As previously mentioned, the rationale used by the court was that Massachusetts law seemed to be more “equitable” to the claims of the plaintiff.¹⁷⁰ On this basis, the trial court concluded that the Saudi forum was inappropriate for plaintiff’s claims.¹⁷¹ The court’s analysis is directly in contradiction to the formalistic approach of *Bridas Corp. Rhodes* addresses the law, first and foremost, in relation to the plaintiff’s injuries. That Saudi Arabian 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 a court that interprets Islamic law in terms of its own conceptions, rather than the unique postulations on which the system of Islamic law was built.

C. Translation Approach

A third approach used by courts surveyed is a translation approach. One takes concepts of Islamic law, finds parallels in American law, and then metes out the distinctions. For example, when the Delaware Supreme Court heard *Saudi Basic III*,¹⁷² the court attempted to understand the Islamic principle of *ghasb* in light of the word usurpation. The court’s approach could have been problematic had it confused the vernacular “usurpation” and the term of art “usurpation.”¹⁷³

167. *Rhodes v. IIT Sheraton Corp.*, No. CIV.A. 97-4530, 1999 WL 26874, at *1 (Mass. Super. Ct. Jan. 15, 1999).

168. *Id.* at *1-2.

169. *Id.*

170. *Id.* at *5.

171. *Id.* at *5; see Part II.E.

172. For background on *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.* (*Saudi Basic III*), 866 A.2d 1 (Del. 2005), see *supra* Part II.C.

173. See *Guth v. Loft Inc.*, 5 A.2d 503, 511 (Del. 1939), *superseded by statute on other grounds*, DEL. CODE ANN. tit 8 § 144, as recognized in *MHC Investment Co. v. Racom Corp.*, 254 F. Supp. 2d 1090 (Del. 2002). 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. Specifically, a corporate officer or director may not take an opportunity for his own if: (1) the corporation is financially able to exploit the

Indeed, Islamic scholars suggest that *ghasb* means an unjustified taking—the vernacular meaning of usurpation, a concept 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* would fail.

In weighing the expert testimony regarding *ghasb*, the court concluded that “[ExxonMobil] must show . . . 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.”¹⁷⁴ 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 render a more proper translation. Translation can occur not only in text but also in the function of judging. Importantly, the court in *Saudi Basic III* saw itself performing the function of a Saudi Arabian judge.

A second example of a court using a translation approach to Islamic law can be found in *National Group for Communications*.¹⁷⁵ NGCC sued Lucent for failure to perform and sought damages, not only for the amounts injured, but for lost profits, future loss, and lost opportunity.¹⁷⁶ The central Islamic concept considered was that of *gharar*.¹⁷⁷ The court proceeded by explaining the context of Islamic law,¹⁷⁸ the role of Islamic law judges within the legal system,¹⁷⁹ and the relation of the current dispute to the English vernacular. The court then addressed *gharar*.¹⁸⁰

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.”¹⁸¹ The court further noted that “Saudi law does not allow damages which are ‘ascertainable only by means involving speculation, contingencies, uncertainties or indeterminacy.’”¹⁸² Thus, under the prohibition against *gharar*, the court would not allow expectation damages to be heard.¹⁸³ Additionally, under the same prohibition, Saudi law would not permit damages for lost profits, unrealized gains, or future profits. The court’s assessment in *National Group for Communications* is transliterative, as it approached a Western concept—expectation damages—classified under an

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. *Id.*

174. *Saudi Basic III*, 866 A.2d at 33 (citation omitted).

175. *Nat’l Group for Commc’ns & Computers Ltd. v. Lucent Techs. Int’l Inc.*, 331 F. Supp. 2d 290 (D.N.J. 2004).

176. *Id.* at 292.

177. *Id.* at 296.

178. *Id.* at 295.

179. *Id.*

180. *Id.* at 296.

181. *Nat’l Nat’l Group for Commc’ns & Computers Ltd. v. Lucent Techs. Int’l Inc.*, 331 F. Supp. 2d 297 (D.N.J. 2004) (citation omitted).

182. *Id.* (citation omitted).

183. *Id.*

Islamic term, and then ruled according to the Islamic principles. Like *Saudi Basic III*, the court in *National Group for Communications* saw itself assuming the same role as an Islamic jurist, a point discussed further below.

Returning momentarily to the *Bridas Corp.* decision, the court could also have been utilizing a form of cultural translation to limit the issues before it. That is, if the court believed that the clerics in Afghanistan would not entertain a tort for intentional interference with a contractual relationship, then it is quite correct to deny application of the law on this basis. Notably, the expert for *Bridas Corp.* only presented evidence based on Islamic practice in Egypt, the United Arab Emirates, and Jordan, with nothing that would suggest the Afghan court would be inclined to lean in the same interpretive direction. Accordingly, the initial conclusion that the *Bridas Corp.* court was formalistic could be in haste.

Translation requires limitation—meaning limitation in definition and role. How a court addresses the cases before it dictates the extent to which a court limits its function. Neither the formalistic courts nor the interpretive courts embrace self-limitation; rather these two methodologies, on opposite ends of the spectrum, tend to insulate courts against Islamic law in different ways. For the formalistic court, the law (or procedure) itself provides 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 do not offend its policy consideration. Only the courts that embrace a translation process truly become self-limiting in their function and thereby translate Islamic law.

In analyzing the translation courts (e.g., *Saudi Basic III* and *National Group for Communications*), two characteristics are apparent. First, both courts appear to take the initiative on their own to understand the Islamic principles being described. In *Saudi Basic III*, the Delaware Supreme Court commented on the trial 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].¹⁸⁴

Similarly, the *National Group for Communications* judge not only accepted 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’

184. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.* (*Saudi Basic III*), 866 A.2d 1, 31-32 (Del. 2005).

disputes; 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 translation opinions is the courts' threshold desire to understand their roles not from the traditional standpoint of Western jurisprudence, but with a willingness to embrace an Islamic approach to the law. Notably, the trial court in the *Saudi Basic* litigation 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.'"¹⁸⁵ Similarly, the court in *National Group for Communications* began its analysis by describing the function of a Saudi law judge, who must resolve disputes in accordance with the Shari'a.¹⁸⁶ The approach is more than just semantics. It represents conscious 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.

Another way of stating this is to note the translation courts' deep respect for the institutional space of other cultures. This article has discussed that our cultural surroundings often provide the words for expressing our displeasure with the law, and *visa versa*.¹⁸⁷ In addition to providing a contextual basis for critique, our surroundings also provide a basis from which our imaginations can start. The fact that the place of reading is in Charleston does not inhibit the space being occupied from being Tehran.¹⁸⁸

Consider for a moment the distinctions between place and space. Place is concrete, tangible, and susceptible to not only description but limits. It is a location that can be visited. Quite clearly, Charleston and Tehran are places.¹⁸⁹ But Charleston and Tehran are also spaces, within the imagination of the reader.¹⁹⁰ Certain images come to mind when thinking of the two cities. For the reading group that Nafisi taught, Tehran's physical place was often overcome by its restrictive space. It was a place that was both being seized and was seizing. Naturally, such space impacts one's reading.

One then might reconsider some of the cases that we have read and wonder whether the spatial imagination of the settings of these cases impacted the ultimate decision (imagination) of the court. Did Afghanistan's chaos play

185. *Saudi Basic III*, 866 A.2d at 31 (quoting *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. (Saudi Basic II)*, No. CIV.A.00C-07-161JRJ, 2003 WL 22016843, at *2, n.8 (Del. Super. Ct. Aug. 26, 2003)).

186. *Nat'l Group for Comm'ns & Computers Ltd. v. Lucent Techs. Int'l Inc.*, 331 F. Supp. 2d 290, 295-97 (D.N.J. 2004)

187. See *supra* note 6 and accompanying text.

188. See Marc L. Roark, *The Constitution as Idea: Defining – Describing – Deciding in Kelo*, 43 CAL. W. L. REV. 363 (2007).

189. *Id.* at 370 (describing a place as a "physical domain that, regardless of what sits upon it, is a linear, measurable, and calculable area"); see also Igor Stramignoni, *Francesco's Devilish Venus: Notations on the Matter of Legal Space*, 41 CAL. W. L. REV. 147, 170 (2004).

190. See Roark, *supra* note 188, at 370 ("In such descriptions, the distinction between space and place is easily associable as the space becomes a place where it is particularized or named as a location. Places necessarily occupy spaces.")

a role in the way the *Bridas Corp.* court decided its outcome; certainly law becomes less ascertainable in chaotic places. Did the restrictive view of women in certain Islamic societies play a part in the *Rhodes* case? We certainly know it did, but whether this imaginative perception of space was fair or even accurate is a different question. The question then of space, like other legal questions, becomes a deeply moral question for the court—the court is left to its own conscience to determine whether its perceptions of the space are accurate or are tainted.

EPILOGUE

Approaching Islamic law is a daunting task, particularly for judges not trained in its philosophical narratives and norms. When Western judges apply Islamic principles, there is a natural translation process. The judge reacts to not only the Islamic principles he is applying, but to his own environment as well. In doing so, he reveals differences that are only exposed when the two sets of laws collide. The way a judge 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, formalistic opinions allow a court to safeguard itself by not delving into the differences and remaining on the surface.

Through translation, constructive methods for understanding Islamic law in the face of Western commerce are available to judges. In translating the law, the court redefines itself away from a role it is most comfortable with, and directs itself 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 meaning behind the law.