THE LAW FIRM OF

SALAH AL-HEJAILAN

The Law Firm of Salah Al-Hejailan
P.O.Box 1454 | Riyadh 11431 | KSA

Securities Regulation in Saudi Arabia

An Introduction

This document is provided as an introduction to Capital Markets Regulation in the Kingdom of Saudi Arabia.

For more information, contact the Law Firm of Salah Al-Hejailan, or visit our web page at: www.saudilaw.org.

LFSH

Michael O'Kane
Attorney at Law
Riyadh Office

E-Mail:
admin@saudilaw.org

Tel:
+966-1-44792200

Fax:
+966-1-4791717

www.saudilaw.org

Date : September 15, 2009

Reference:
(Please name in answer)

Riyadh Office:
Al-Dana Center, 54 Al-Ahsaa Street
Malaz District
P.O. Box 1454, Riyadh 11431
Kingdom of Saudi Arabia

Jeddah Office:
Amir Sultan Street, Corner Imam Malik Street
Rawdah District
P.O. Box 15141, Jeddah 21444
Kingdom of Saudi Arabia

Banking Business

As an initial matter, persons or entities (Saudi or foreign) conducting or seeking to conduct banking business activities in Saudi Arabia are subject to the Banking Control Law of 1966, which remains in effect today, and to strict regulation by the Saudi Arabian Monetary Agency ("SAMA"). SAMA is Saudi Arabia's Central Bank, which controls the issuing of Saudi currency (the riyal, commonly abbreviated SAR), manages foreign assets, regulates and monitors all banks and acts as the official bank of the Kingdom of Saudi Arabia.

Obtaining a banking license in the Kingdom is not a trivial matter; currently there are eight banks on SAMA's waiting list. Historically, expansion of the banking sector has been slow.

Securities Business

Investment or securities business activities (such as the provision of advisory services, asset management services, brokerage services, custodial services and the offer of securities by public offer or private placement) are governed by the Capital Market Law, which was enacted by Royal Decree M/30 on 1 August 2003. The Capital Market Law is administered and regulated by a new entity, the Capital Market Authority ("CMA"). The new law has given rise to a series of implementing rules and regulations aimed at regulating such activities, including:

- Offers of Securities Regulations;
- Listing Rules;
- Securities Business Regulations;
- Authorized Persons Regulations;
- Market Conduct Regulations;
- Takeover Regulations;
- Depository Regulations;
- Capital Market Authority Rules (the "CMA Rules"); and
- Glossary of Defined Terms.

A full definition of securities lists the following instruments.

The Capital Market Law defines securities broadly. For the purposes of the Capital Market Law, "securities" means:

(a) company negotiable and tradable shares;

(b) negotiable debt instruments issued by companies, the government, official public institutions or public enterprises;

(c) investment units issued by investment funds;

(d) instruments representing profit participation rights in the distribution of assets; or any thereof;

(e) any other rights or instruments which the CMA believes the public interest and the protection of investors call for being treated as securities. The CMA can also exercise its power to exempt from the definition of a security any rights or instruments if it believes the public interest and the protection of the investors do not require being treated as a security;

(f) warrants and other instruments entitling the holder to subscribe for any investment (such as those specified at sub-paragraphs 3.4 (a) and (b) herein;

(g) options to acquire or dispose of a security, contractually-based investment, currency or commodity of any kind;

(h) futures;

(i) contracts for differences;

(j) long-term insurance contracts[1];

(k) contracts of insurance providing specified benefits against risks of persons becoming incapacitated as a result of sustaining injury or accident;

(l) capital redemption contracts where effected or carried out by a person who carries on insurance business;

(m) pension fund management (other than a reinsurance contract) where effected or carried out by a person who carries on insurance business; and

(n) any right to or interest in any of the above instruments.

Given the creativity of capital markets generally to innovate and create new instruments and investment vehicles, the CMA will use its discretion expansively in this area.

International contracts entered into by SAMA will be enforced. Derivative transactions are viewed as a type of "security." Currency derivatives are defined in sections (g) and (n) of the Capital Markets Law as constituting a security:

"(g) options to acquire or dispose of a security, contractually-based investment, currency or commodity of any kind.

(n) any right to or interest in any of the above instruments."

[1] Persons or entities (Saudi or foreign) providing or seeking to provide insurance and/or reinsurance products and services in Saudi Arabia are subject to the Saudi Arabia Insurance Law and its implementing regulations, and strict regulation by SAMA. A discussion of this law is outside the scope of this Note.

In our view, subsection (n), “any right or interest in any of the above instruments,” makes it clear that the definition applies to derivative transactions and these are considered “securities” within the meaning of the Capital Market Law. Based on our experience with the CMA, it is clear that derivatives are a type of security and the acquisition or sale of such instruments is permitted under the Capital Market Law.

The introduction of the Capital Market Law makes it clear that derivative transactions are a type of security and their sale is permitted in the Kingdom. Enforcement issues are no longer within the jurisdiction of SAMA but with a new agency, the Capital Market Authority. The CMA has a similar function to the U.S. Securities and Exchange Commission and exercises a regulatory and enforcement function.

The new legislation clarified the status of derivative transactions. Thus, it is no longer the case that there is “an inherent uncertainty in Saudi Arabia in relation to derivative transactions.” Derivatives are simply another form of security defined in Saudi Arabia’s Capital Market Law, and in Saudi Arabia at least, subject to the jurisdiction of the CMA.

The passage of specific legislation “supplements” the Islamic *shari’a* so that these transactions can be engaged in. Please note that this does not mean that the *shari’a* can be ignored. The CMA would most likely be reluctant to enforce an obligation arising out of a transaction whose object offended Islamic prohibitions, such as pork belly futures, securities in companies whose sole business is liquor and the like. Except for such exceptions one would expect that the CMA will enforce a securities contract according to its terms in those cases within its jurisdiction. Note however that as in France and in civilian legal jurisdictions, there is no system of binding judicial precedent in Saudi Arabia.

Jurisdiction over capital markets is now squarely within the powers of the CMA. The CMA has established procedures for the sale of domestic and foreign securities in Saudi Arabia.

There are no exchange controls in Saudi Arabia. A reporting requirement applying to cross-border physical transfers of cash in amounts greater than roughly US$ 10,000 is now the law.

Enforcement of foreign judgments in Saudi Arabia has always been problematical. Foreign judgments are not generally enforceable in Saudi Arabia. Given that the securities business generally requires arbitration in case of disputes, a foreign arbitral award—in contradistinction to a foreign court judgment—will, in theory be enforced in Saudi Arabia assuming that the award does not contain an un-Islamic component, such as an award of interest. Purchases and sales of securities in Europe will not normally come under the jurisdiction of the CMA. We say “normally” because the CMA has established rules for private placements and exempt offerings in Saudi Arabia, and if the foreign issuer did not comply with the CMA rules for such offers, the CMA would exercise jurisdiction.

There is no withholding tax on the purchase or sale of securities in the Kingdom. Portfolio management might be subject to such a tax. For example, if a foreign broker were to become an “authorized person” under CMA regulations in conjunction with a Saudi partner to engage in the securities business in the Kingdom, with the

obligation to pay a management fee or royalty fee to a foreign parent or licensor. The management fee or royalty fee would be subject to tax withholding, but note that in the factual scenario presented, the foreign broker would have a presence, at least contractually, in the Kingdom.

Based on the enactment of the Capital Market Law, we can now say that it is settled in Saudi Arabia that the securities business does not constitute prohibited wagering or gambling. The contracts entered into thereunder do not violate the Kingdom's laws and are enforceable.

The fact that a company engaged in an unsuccessful derivatives transaction which led to corporate bankruptcy would not bestow jurisdiction on the CMA. A company enters bankruptcy because it is unable to pay its debts. The underlying reason really is irrelevant. No Saudi bank has ever entered bankruptcy. If a situation were to occur in which a rogue trader imperiled the bank's capital *á la* Barings or Long Term Capital Management, SAMA would intervene, not necessarily in order to benefit individual creditors, but to maintain the integrity of the Saudi banking system and the country's currency. We would expect that in the context of a financial meltdown that SAMA and the CMA would cooperate in order to work out a solution.

Oral contracts are enforceable in Saudi Arabia. A memorial of the agreement should be made as soon as possible.

While a document that is to be presented in court must be written in or translated into Arabic, an agreement is nevertheless valid and enforceable if entered into in English. English has become the language of commerce and banking in Saudi Arabia.

The general rule is that the parties will be held to their agreement.

PART II – CREDIT SUISSE'S QUESTIONS

A foreign securities company must obtain authorization to engage in the securities business in Saudi Arabia unless the proposed sale of securities falls within a recognized exception.

Credit Suisse must obtain authorization to engage in the securities business in Saudi Arabia unless the proposed sales fall into a recognized exception.

The individual executing an order should have a valid power of attorney unless he is acting on his own behalf. Powers of attorney are special enabling documents in Saudi Arabia. Powers of attorney granted by Saudi Arabian persons or entities for use in Saudi Arabia must be made before the competent Public Notary or other official having competence (such as a consular official) in order to be effective. Notwithstanding the foregoing requirements, powers of attorney made other than before a competent Notary Public or other official having competence have been upheld by the courts and committees of Saudi Arabia. You should know that, even if the power of attorney is expressed to be irrevocable, such irrevocability is normally deemed to be unenforceable. Under the *shari'a*, a power of attorney (including a power of attorney duly made as aforesaid), as a general matter is revocable at will by the grantor thereof even if the grantor has expressed a contrary position in writing.

Under some schools of Islamic jurisprudence, there is an exception to the general rule of revocability. The exception is that a grant of a power of attorney should be treated as irrevocable when (a) for the benefit of a third party it is stated and intended to be irrevocable and coupled with an interest and (b) such irrevocability is relied upon by such third party. The degree to which this exception would be applied by the courts and committees of Saudi Arabia is not clear.

It is helpful if the power of attorney is written in both the Arabic and English languages. This facilitates acceptance and use, and if a dispute were to arise, a document must be in Arabic to be admissible in the courts of Saudi Arabia. If the power of attorney is to be executed outside the Kingdom, the document should be signed, witnessed, notarized, bear a seal by the local chamber of commerce and be authenticated by the Saudi Embassy or consulate.

A power of attorney should not contain a promise to ratify or to agree in the future. Thus, language along the lines of "hereby ratifying and confirming all that…might lawfully do" is preferable to "undertakes to ratify and confirm" so that the delegation and promise is in the present, rather than constituting a future promise so that the power of attorney conforms to the laws and regulations of Saudi Arabia.

The individual person issuing the power of attorney on behalf of a company should have the authority to do so. This would be shown by a resolution of the Board of Directors; or, if the company has appointed a manager, by a letter from the manager. This letter should be on company stationery and validated by the Saudi Chamber of Commerce. There is no central registry for powers of attorney. The notary before whom the power of attorney is signed will make an entry in his notarial books as part of the process of execution.

The Anglo-American legal concept of "apparent authority" does not exist in Saudi Arabia.

As a general principle, we see no reason why a currency derivative transaction would not be enforced according to its terms. Presuming that the customer maintained an account outside Saudi Arabia, the bank could offset losses from its customers account.

A person or a party seeking to engage in the securities business must apply to the CMA for a license.

The provision of advisory services encompasses both "advising" and "arranging" activities, where "advising" means "advising a person on the merits of dealing in a security or exercising any right to deal conferred by a security" and "arranging" means "acting in any way to bring about a deal in a security or introducing parties in relation to securities business". The provision of brokerage services encompasses "dealing", "managing" and "custody". "Brokerage business" is restricted to a person holding a valid license, who is an agent of a joint stock company (that is itself licensed as a broker), unless otherwise exempt from these requirements by the CMA. "Dealing" means "to deal in a security, whether as principal or agent" and "to deal" means "to buy, sell, subscribe for or underwrite a security"; "managing" means "to manage securities belonging to another person in circumstances involving the exercise of discretion"; and "custody" means "safeguarding and administering assets

belonging to another person which include securities, or arranging for another person to do so".

No person may carry on any of the above-mentioned activities unless licensed to do so by the CMA. A person is presumed to carry on an activity from a place of business in Saudi Arabia if (i) he engages in the relevant activity or in securities business generally, in Saudi Arabia, or (ii) he breaches or has breached the advertising prohibition.

In accordance with Part Three of the Investment Business Regulations entitled "Investment Advertisement Prohibition", a person is prohibited from communicating an investment advertisement to a recipient in Saudi Arabia (other than a recipient whom he reasonably believes to be an authorized person, an exempt person or an institution) unless (i) he is an authorized person; or (ii) the investment advertisement is approved by an authorized person. For the purposes of Part Three, an "investment advertisement" is an invitation or inducement (in any form, whether written or oral) to engage in investment activity, which is made in the course of business and which is not excluded under Part Three, Chapter 2 of the Investment Business Regulations. Thus, an advertisement which meets the criteria set out above, but is excluded under Part Three, Chapter 2 of the Investment Business Regulations is an excluded investment advertisement.

An investment advertisement is communicated to a recipient in Saudi Arabia if it is available to persons in this country, including via the internet. Conversely, an investment advertisement is not communicated to a recipient in Saudi Arabia if it is directed only at persons outside the country. In addition, if the following conditions are met, an investment advertisement is deemed to be directed only at persons outside Saudi Arabia provided that:

(a) the investment advertisement is accompanied by an indication that it is directed only at persons outside Saudi Arabia and must not be acted on by persons in Saudi Arabia;

(b) there are in place proper systems and procedures to prevent recipients in Saudi Arabia (other than those to whom the investment advertisement might otherwise be lawfully have been made) engaging in the investment activity to which the investment advertisement relates with the person directing the investment advertisement, a relative of his or a member of the same group;

(c) the investment advertisement is included in:

(i) a website, newspaper, journal, magazine or periodical publication which is principally accessed in or intended for a market outside Saudi Arabia; or

(ii) a radio or television broadcast or teletext service transmitted principally for reception outside Saudi Arabia.

Contravention of the investment advertisement prohibition is an offence under the Capital Market Law and subject to a fine not less than SAR 10,000 and not to exceed SAR 100,000 for each violation and/or imprisonment for a term not to exceed nine months. The same penalties are applicable to a person who carries on, or

purports to carry on securities business without a license, whether as a broker (or an agent of a broker), an advisor or an arranger.

We should point out that efforts to regulate the Internet in this area have not been actively made by the CMA. Saudi Arabia filters the Internet for content, but we have not seen filtering on the basis of unapproved investment advertisements. The law in the advertisement area is thus probably mostly cosmetic. It is unlikely that the CMA would seek to intervene in circumstances where a Saudi resident viewed a general Internet website or even Credit Suisse's website and then contracted Credit Suisse on his own. Nevertheless, plans for an extensive in-country advertising campaign should take into account that these rules exist. Additionally, and in theory, all advertisements must be approved by the Ministry of the Interior. It appears that this mandate has fallen into disuse. However, newspapers and magazines coming into the country are censored for non-Islamic content. So far, the financial press seems relatively immune from the censor's pen.

Application for Authorization and Other Requirements

An application for either of the above-mentioned licenses may be submitted by the founders or the controlling shareholders of an applicant if the applicant is not yet established in Saudi Arabia. An application must be made on "Application Form for Authorisation", a copy of which can be downloaded from the CMA's website: www.cma.org.sa.

Obtaining a securities license in Saudi Arabia is similar to licensing procedures in the United States or the U.K. In effect, an applicant must demonstrate to the CMA that (i) it is fit and proper to carry on securities business of the kind and on the scale in respect of which it is seeking authorization, (ii) it has adequate expertise and resources for the kind of securities business that it seeking to conduct, (iii) it has the requisite systems, policies and procedures in place to fulfil it business and regulatory obligations and (iv) its directors, officers, employees and agents who will be involved in the licensed activity or activities have the requisite qualifications, skills, experience and integrity to conduct the securities business that the applicant proposes to carry on.

Corporate Requirements

In order to engage in dealing, managing and custodial activities, an applicant must be established in Saudi Arabia and must be (i) a subsidiary of a local bank, (ii) a joint stock company, (iii) a subsidiary of a Saudi joint stock company that is engaged in financial services business, or (iv) a subsidiary of a foreign financial institution that is licensed under the Banking Control Law. Please note that an applicant may be of any legal form established in Saudi Arabia to apply for a license to conduct advising or arranging activities.

Capital Adequacy Requirements

The CMA will grant a person a license to conduct advisory services or brokerage services (or both) within thirty days of receiving the requisite information and documentation pertinent to the application and upon satisfying itself that the applicant meets all the licensing requirements set out at paragraph 4.2, above.

Sales to Institutions

The paid up capital of the applicant must be not less than the following:

(i) dealing, managing and custodial activities: SAR 50 million (about US$ 13.5 million);

(ii) arranging: SAR 2 million (about US$ 550,000); and

(iii) advising: SAR 400,000 (about US$ 100,000).

The protective function exercised by the CMA in respect of the public at large does not apply to sales of securities or other financial products made to "authorized persons," i.e., licensed institutions or individuals.

Most commercial disputes in Saudi Arabia are resolved before the Board of Grievances or, if agreed by the parties in their contract or at the time the dispute arises, by arbitration. The Board of Grievances also has exclusive jurisdiction to hear claims against the Government and to supervise insolvency / bankruptcy proceedings and to hear claims for enforcement of foreign judgments and arbitration awards.

Disputes relating to land and personal property are usually heard before general Islamic law courts. Banking disputes involving a bank are, generally, heard before the SAMA Committee.

There are practical implications to choosing a court other than the courts of Saudi Arabia (such as English courts) as the forum for resolving disputes. We have seen an increasing tendency to use English law in choice of law clauses in tenders, even those issued by Saudi government agencies.

In the event the English courts do accept jurisdiction (in other words, if they themselves do not decline to hear the case through application of English conflict-of-law principles and order *renvoi* to Saudi Arabia), a major practical obstacle will arise should the prevailing party be compelled to execute its judgment against assets physically located in Saudi Arabia. Article 8(1)(g) of the Law of the Board of Grievances (Royal Decree No. M/51 dated 17/7/1402A.H.) grants the Board of Grievances jurisdiction over "requests for implementation of foreign judgments." Under Article 6 of the Procedural Rules Before the Board of Grievances (Council of Ministers' Resolution No. 190 dated 16/11/1409AH), a request for enforcement of a foreign judgment in Saudi Arabia must be filed in the form of a lawsuit, which means that the Board must independently review the "case documents" underlying the judgment and hear both parties. In essence, this amounts to a retrial of the case on the merits. Moreover, the Board is only empowered under Article 6 of the Rules to order enforcement of the foreign judgment "on the basis of reciprocity, provided that it is not inconsistent with the provisions of Shari'a."

In the recent past, the Board of Grievances has declined to hold that the English courts' judgments are entitled to reciprocal treatment, even in a case where the British applicant introduced an official letter from the Crown stating that, as a general

rule, the English courts will enforce Saudi judgments on the basis of reciprocity because, in the Board's view, the letter did not guarantee reciprocity.[2] In addition, the scrutiny of the facts and findings underlying a foreign judgment for their compliance with Shari'a ordinarily requires a time-consuming re-litigation of the issues. Hence, the choice of a foreign forum for the resolution of disputes under an insurance contract concluded in Saudi Arabia with a licensed non-Saudi insurer is hampered by not only the Board of Grievances' specific grant of jurisdiction over such cases, but the practical obstacles of eventually enforcing a foreign judgment against assets found in Saudi Arabia.

As for the second prong of the issue—the choice of a foreign state's substantive law to govern the interpretation of a contract entered into in Saudi Arabia—it has commonly been assumed that in a contract with a foreign party, a Saudi could freely agree to submit to the foreign law of his choice.[3] This assumption is no longer so clear. In a particularly contentious case involving a Saudi company and a Malaysian subcontractor, the Board of Grievances in Riyadh, in a lengthy opinion based largely on *Hadith* (the Traditions of the Prophet Mohammed), concluded that a Saudi, as a matter of public policy, cannot choose to have his obligations governed by any law other than Shari'a. The Board's judgment was appealed to the Review Panel, which remanded with the observation that a blanket prohibition against enforcing a foreign choice of law itself violated the Shari'a mandate that one fulfill one's legal obligations. Despite this recommendation from above, the Board reaffirmed its refusal to enforce the choice of foreign law in even stronger terms. On the other hand, in a much older decision, the Board of Grievances in Jeddah did not hesitate to enforce the choice of French law in a contract between a French perfume manufacturer and its Saudi agent. Suffice it to say, then, that the issue remains in a state of flux.

Settlement of Disputes between Saudi and Non-Saudi entity

There is nothing inherently offensive to the Shari'a when a Saudi party agrees to refer his disputes to foreign arbitration. However, substantial risks arise if (a) one of the parties to the contract disregards the foreign arbitration provision and files his claim before the Board of Grievances or (b) if the foreign arbitration proceeds to its conclusion and the prevailing party seeks to enforce the foreign award in Saudi Arabia. We shall look at each of these risks seriatim.

If a party despite the foreign arbitration provision, files a suit on the underlying contract before the Board of Grievances, the Saudi tribunal would not, in our experience, automatically dismiss the case for lack of jurisdiction. Perhaps this is due to the fact that under Article 6 of the Arbitration Law (Royal Decree No. M/46 dated 12/7/1403AH) (hereinafter the "Arbitration Law"), the Saudi tribunal has jurisdiction over an application to compel arbitration and must conduct a hearing at

[2]It bears mentioning that because Saudi Arabia's judicial system does not recognize the common-law system of binding precedent, decisions of the Board of Grievances are not published or publicly disseminated. Rather, such decisions remain confidential. For that reason, we apologize that we are unable to provide you with translations of these decisions – which were rendered in cases in which one of our legal consultants was personally involved – so that you might evaluate the Board's rationale for reaching its conclusion.

[3] It is, however, beyond any shadow of doubt that Saudi tribunals, unlike American federal courts, will never involve themselves in the interpretation or application of any law other than Shari'ah.

which both parties are present and heard to approve such application. In the cases alluded to above—all of which, coincidentally, arose in the context of one party attempting to avoid a foreign arbitration clause and the application of foreign law—the result has been that the Board of Grievances (in Riyadh at least) has shown a readiness to disregard the parties' choice and submit the dispute to arbitration in accordance with the local Arbitration Law.

As for the enforcement of foreign arbitral awards, there are no Saudi statutes that deal specifically with this issue. However, pursuant to Articles 20 and 21 of the Arbitration Law, an arbitral award has the same effect as a judgment, but only once the Board of Grievances has ascertained—following a hearing and often even the introduction of supplementary evidence—that it complies with Shari'a and issues an order of execution. Therefore, the practical obstacles to enforcing a foreign court judgment in Saudi Arabia apply with equal force to a foreign arbitral award.

That being said, by virtue of Royal Decree No. M/11 dated 17/7/1414 A.H., the Kingdom of Saudi Arabia has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (hereinafter the "New York Convention"). But, even this convention imposes substantial obstacles to enforcement. First, Article 3 of the New York Convention provides that each signatory will recognize arbitral awards and enforce them in accordance with its own rules of procedure. In the case of Saudi Arabia, these procedures are quite cumbersome. Under Article 18 of the Arbitration Law, an arbitral award, within five days of its rendering, must be filed with the Board of Grievances and the parties may submit objections to it within fifteen days after service. The Board then proceeds, under Article 19, to hear and rule on the objection. Even if there is no objection, the Board is required under Article 20 to ascertain that "there is nothing that prevents [the order's] enforcement in the Shari'a." Often, this entails a retrial of certain aspects of the case before the Board.

Second, under Article 5 of the New York Convention, a signatory like Saudi Arabia has the discretion to decline enforcement of a foreign arbitral award where "the recognition or enforcement of the arbitral award would be contrary to the public policy of the Contracting State."

Two statutes have direct applicability to this issue: the Law of the Board of Grievances, promulgated pursuant to Royal Decree No. M/51 dated 17/7/1402AH (hereafter the "Law"), and the Procedural Rules before the Board of Grievances (Council of Ministers' Resolution No. 190 dated 16/11/1409AH (the "Rules"). These laws are extensive – the first one contains 51 articles, and the second another 47. The highlights of the laws are as follows:

(a) According to Articles 7 and 11 of the Law, the Board of Grievances is composed of a president and a number of junior members holding the rank of court head (called "Counselors") or judge ("Junior Counselor"). The Board's headquarters are in Riyadh, but there are circuits in Jeddah and Dammam / Al-Khobar.

(b) According to Article 14 of the Rules, individual cases are assigned to a panel consisting of three members. One of these three must have the rank of court head, and the remaining two must be judges. In Riyadh, though, in interlocutory matters, such as the referral of a case to arbitration, it is our experience that only one

of the members will hear arguments, but any orders or judgments will be signed by the three members initially assigned.

(c) Article 11 of the Law sets forth the qualifications to serve as a member of the Board of Grievances.

A candidate for appointment to the Board must neither have been sentenced to any criminal punishment – be it *hadd* (punishment specifically prescribed in the Holy Qur'an) or *ta'zir* (discretionary punishment) – nor convicted of any crime impinging on integrity, nor subjected to any disciplinary action leading to dismissal from public office.

(d) Historically, the jurisdiction of the Board of Grievances was restricted to administrative matters. However, under Article 8 of the Law, the Board's jurisdiction has been extended much further – for example, to requests for implementation of foreign judgments and to prosecutions of forgery cases. Moreover, and more relevant to your inquiry, pursuant to Council of Ministers' Resolution 241 dated 26/10/1407AH, all commercial disputes have been referred to the Board, while arbitrations in Saudi Arabia must be commenced and conducted under the Board's supervision and, under Article 20 of Council of Ministers' Resolution 7/2021/M dated 8/9/1405AH (the "Implementing Regulations of the Arbitration Law"), all arbitral awards must be reviewed by the Board before they are made enforceable to ensure their compliance with Shari'a.

(e) As one would expect in any judicial forum, there are rules of pleading and adversarial argument, as well as evidence, which are found not only in the Rules but, some judges would suggest, in the more recent and much more extensive Law of Shari'a Procedure (Royal Decree M/21 dated 20/5/1421AH).

That being said, it is clear that hearings before the Board are somewhat less formal than a Western attorney might expect except that a party cannot be represented before the Board of Grievances without first presenting a power of attorney signed before a notary on sealed paper. If the party is non-Saudi, the power of attorney must be signed before a notary in the party's home country, and this signature must be authenticated by the necessary local authorities (typically the clerk of court of the jurisdiction in which the notary is qualified, followed by the Minister of Justice), then legalized by the Royal Consulate of Saudi Arabia and, finally, by the Ministry of Foreign Affairs in Riyadh.

One commences a suit before the Board of Grievances by filing a statement of claim, which is served on the opponent and to which the opponent is generally given a generous amount of time by the Board to respond. Although Article 18 of the Rules requires an "acceptable excuse" for failure to appear, in our experience, adjournments of hearings and extensions of time to respond are granted as a matter of course. In this regard, it should be noted that the Saudi judicial system is generally lenient when it comes to enforcing even statutory time limits because anything in the nature of a prescriptive period is viewed as inherently anathema to Shari'a. If a document is attached to a party's submission, it must be accompanied by a certified Arabic translation (*see* Article 13 of the Rules) and the other party will be given sufficient time to review it and respond in writing. Hearings are not transcribed verbatim; rather, pursuant to Article 21 of the Rules, at the

conclusion of a hearing, the head of the particular panel hearing a case will recite the minutes of the hearing, which the clerk will write by hand into a ledger (in Arabic, *mahdar*). Once the recitation is completed, it will be read aloud by the clerk to the attorneys present at the hearing, and each will sign his name on the margin of every page.

(f) Once the Board has rendered a decision in a commercial case or entered an order approving an arbitral award, a party may appeal it to the Review Panel (in Arabic, *Ha'yat ut-Tadqiiq*). Pursuant to Article 36 of the Rules, this appellate tribunal is empowered to adjudicate the matter anew, which means that each party will have the right to present written submissions and witnesses and even to introduce new facts; in some cases, the Review Panel will also appoint experts to assist in its *de novo* review of the Board of Grievance's decision. More typically, though, the Review Panel simply remands the case to the Board of Grievances with a recommendation that the decision be upheld or reversed. This recommendation, it should be noted, is strictly non-binding on the Board. However the Review Panel acts, though, its judgments – again pursuant to Article 36 of the Rules – are final.

A Counterparty can agree to submit to, and appear in, an arbitral proceeding or a judicial proceeding in either English or American courts.

A judicial decree obtained in a foreign jurisdiction is not entitled to enforcement.

Derivative transactions are defined as "securities" falling under the rubric of "securities business" and as such do not constitute prohibited wagering or gambling.

In general terms, the current approach of Saudi law on insolvency is that it does not always differentiate between individual and corporate insolvency, and this approach has given rise to additional criminal and tortuous liabilities on a bankrupt debtor which may further delay payments to creditors, not to mention possibly cause the local courts, in certain circumstances, to disregard the corporate personality that exists between a company and its shareholders.

Furthermore, the Saudi jurisprudence has traditionally adopted a different approach as to insolvency in civil and commercial matters. Thus, a distinctions has come to be drawn between a bankrupt Individual engaged in commercial activities (*mujlis*) and a bankrupt individual not engaging in commercial activities (even though this was not the case under the Shari'a).

There is no specific law in Saudi Arabia dealing with corporate insolvency, instead the Saudi legislature's approach to regulating insolvency so far has tended to adopt a piece meal approach. There are three main laws governing the liquidation of companies which will need to be considered:

(i) the Saudi Companies Regulations 1965 (***SCR***) which will only apply in the case of 'dissolved' companies;

(ii) the Commercial Court Law of 1931 (***CCL***) which regulates the bankruptcy of both Individuals and general partnerships; and

(iii) the Bankruptcy Protective Settlement Law (***BPS***) which is a formal corporate rehabilitation procedure.

In addition, please note the specific APRs provisions on accounting/handling client money and other insolvency administration powers assumed by CMA in relation to authorized persons who become insolvent. Although, these provisions are not corporate insolvency rules in the traditional sense, the effect of these provisions are that clients will not have their investments constituting part of the APs assets. In addition the APRs cross refers to the BPS which will also be relevant in the context of insolvent APs.

Saudi Companies Regulations

The SCR provides for a relatively straightforward liquidation procedure upon the occurrence of certain events prescribed under Article 15 that will automatically render a company dissolved. These events constitute general grounds for dissolution applicable to all types of partnerships and companies. Nevertheless, this does not prevent the existence of special grounds for dissolution applicable to specific companies such Articles 178-180 for limited liability companies.

Article 15 states:

"With regard to the special causes of dissolution particular to each kind of company, a company shall be dissolved for any of the following reasons:

1. Expiration of the term set for the company.
2. Realization of the object for which it was established, or the impossibility of (realizing) such object.
3. Transfer of all interest or shares to one partner (or stockholder).
4. Loss of all the company's assets or the major part thereof, so that the remainder cannot be effectively utilized.
5. Agreement of the partners to dissolve the company before the expiry of its term, unless the memorandum of association stipulate otherwise.
6. Merger of the company into another.
7. If, at the request of one of the parties concerned and for serious reasons that justify such a step, a decision is issued by the Commission for the Settlement of Commercial Companies' Disputes to dissolve the Company.

Once the company is dissolved it shall be liquidated in accordance with Part 11 of this Law provided that there is no conflict with the company's articles of association and memorandum."

Article 15 has omitted to mention bankruptcy (*iflas*) as one of the grounds for dissolution. It is here that the corporate insolvency procedure becomes complicated, since Article 15 is denied to insolvent companies registered under the 1965 regulations, and this is further confirmed by Ministry of Commerce Circular 222/9063, 5/3/1406 which deems a limited liability company which is unable to settle its debts as bankrupt so that all the creditors can share pro rata in getting their debts paid in accordance with the provisions of bankruptcy laid down in the CCL.

Commercial Court Law

A bankrupt (*mujlis*) is defined, under Article l03 CCL, *"as a person whose debts exceed his assets and who is thereby unable to discharge his liability for such debt"* i.e. cash flow insolvency. The CCL distinguishes between three forms of bankruptcy as follows:

(i) real bankruptcies under Art 105 that are narrowly restricted to bankruptcies as a result of natural disasters beyond the bankrupt's control, namely fire, flood and other natural disasters;

(ii) negligent bankruptcies under Art 106, whereby a trader fails to disclose to, or actively conceals from, his creditors his insolvency and carries on trading until he exhausts his capital; and

(iii) fraudulent bankruptcies under Article 107, where by a 'fraudulent' bankrupt is deemed an imposter by practicing tactics and intrigues with regard to his capital or conceals his assets to practice fraud or to cheat traders.

Upon an application by the bankrupt or one of his creditors the effects of a bankruptcy application under Article 110 is that: *"The court may make an order of seizure against him and declare him bankrupt, his written and verbal contracts shall be null and void as of the date of bankruptcy order, where the partnership is declared bankrupt, the partnership assets and the assets of the active partners shall be seized because the active partners are deemed to be jointly liable"*. Once bankruptcy is adjudicated, the CCL allows a period of time for creditors to record their claims with the board trustee and the creditors' trustees (Article 116) the debts owed to the bankrupt are collected by the same board trustee and the creditors' trustee (Article 113) who supervise the attachment of the bankrupts movable and immovable properties and, after obtaining a court order sells them by public auction (Article 114).

There has been some debate over the proper applicability of the above provisions since their treatment of bankrupt debtors is particularly harsh in comparison to other countries, particularly in cases of negligent and fraudulent bankruptcies where the debtors arrest and imprisonment are likely consequences. Thus, it is unclear to what extent these provisions would be applicable to corporate bodies since very few formal bankruptcies have been filed in practice under these provisions. This may be attributed to the fact that Chapter 10 of the CCL dealing with bankruptcy (*iflas*) was not intended to deal with all types of companies but only individuals and general partnerships.

Bankruptcy Protective Settlement ("BPS")

The BPS is a formal corporate rehabilitation proceeding akin to Chapter 11 of the U.S. Bankruptcy Code, yet it is a relatively new law which has not been properly tested in any great amount by the courts. The new regulations are designed to deal with commercial entities, whether individuals or companies, who are unable to reach an amicable settlement with their creditors and thus seek to file a settlement petition before the Board of Grievance.

Under Article 2, the filling of a petition is restricted solely to a debtor, who must clearly state the reasons for his financial positions, his proposal for settlement and the means of implementation, as well as a detailed statement of his movable and immovable property[4], and the names of his creditors, debtors with the amounts of their rights and debts[5]. The decision to grant the petition is left to the Board of Grievance if it is satisfied that the requirements contemplated under Article 2 have been satisfied.

However, the regulation does offer an unwilling creditor some protection against protective settlement proceeding under Article 7 which states that the protective settlement proceeding shall only be allowed if accepted by a two third majority of junior and senior creditors. According to the Explanatory Memorandum on these regulations the reason for this two third majority is 'to protect junior creditors from domination by the minority of senior creditors'.

Once the petition is accepted by the court a total moratorium is imposed[6] and all necessary arrangement are taken to preserve the debtor's properties, including the seizure of the debtor's property held by third parties, the confiscation of guarantees before expiry of their terms, and even the dismissal of part of the employees. Thus, the BPS differs from the bankruptcy procedure discussed earlier under para 3 above in that it dose not aim to liquidate the debtor's property, but rather to provide the debtor acting in good faith with the opportunity to proceed with his business as usual, subject to the controllers supervision[7].

It should be stated that the effect of these regulations on creditors are stated in Articles 9, 10 and 11, namely, that the settlement only applies to those creditors who have been invited to participate in the proceeding and not ordinary debtors whose debts originated after the filling of the protective settlement petitions[8]. Article 11 explains the impact of claims brought against the debtor during the settlement period: *"The Claims and the enforcement proceedings against the debtor are to be ceased upon enactment of the decision initiating the settlement proceeding: the joint debtors and the guarantors shall not benefit in this decision"*.

Finally, it should be stated that although the implication of lifting the corporate veil do not appear so relevant at first sight in the context of Bankruptcy Protective Settlement, nevertheless, Article 8 encourages what is termed 'novel procedures' for settlement. Thus, it is possible for the veil to be lifted in order for a personal guarantee, by one shareholder, be issued in settlement of a one or more of the creditors claim.

10.2 Please see section 10.1.

10.3 Please see section 10.1.

10.4 This is correct, unless there are contractual or security provisions to the contrary.

---

[4] Article 2(a).
[5] Article 2(b).
[6] Article 4.
[7] Article 5, Article 6.
[8] Article 10.

11. Oral contracts constitute enforceable obligations in Saudi Arabia.

12. It is not necessary that the contract be written or translated into Arabic to make it enforceable. As an evidentiary matter, any oral testimony, document or tangible thing (i.e., a video or audio recording) sought to be introduced into evidence in a Saudi court must be translated into Arabic.

14. SAMA would not normally be involved in any disputes between counterparties unless one of the counterparties is a bank. In the context of a securities transaction, SAMA would normally decline jurisdiction in favor of the CMA. It is unlikely that a Saudi bank would initiate a case before the Board of Grievances in a matter involving a derivatives transaction.

Yours sincerely,

Michael O'Kane