

**A Reformative Legal Vision for the Kingdom:  
The Adoption of Rules of Discovery in the Civil Procedural System of Saudi Arabia:  
Considering the Example of the United States Discovery Regime**

by

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Can the United States civil discovery regime be adopted in Saudi Arabia? If so, to what extent? This dissertation examines whether the Saudi Civil Procedure Law might adopt the United States discovery regime to resolve existing problems with unreasonable delays, shortage of judges, and the loss of people's rights. This dissertation then addresses some advantages and challenges of such adoption and proposes solutions for these challenges.

This research provides a comparative analysis of both legal systems and explores the possibility of adopting discovery in Saudi Arabia. It studies the status quo in both jurisdictions to explain how to employ discovery from the United States in Saudi Arabia. This dissertation considers the discovery absence in Saudi Arabia and the problems caused by this absence. This research also examines the discovery rules in the United States' Federal Rules of Civil Procedure to determine whether adopting discovery would be beneficial to the Saudi legal system. Furthermore, it provides recommendations about how Saudi Arabia should reform its civil procedure system by adopting a discovery regime.

This research seeks to understand discovery inefficiencies in Saudi Arabia through a comparison with the United States discovery. It conducts a literature review concerning civil procedure in both jurisdictions to understand the applicability of discovery in Saudi Arabia. It explains how discovery would resolve some legal problems in Saudi Arabia. This dissertation

explains how adopting pretrial discovery would help courts provide for the exchange of legal materials. It also addresses how the pretrial exchange of materials would shorten the length and complexity of trials and assist with judicial procedures. This research examines some scholarship by both critics and proponents of the United States discovery regime. It also provides some legal methods to adopt discovery in the Saudi legal system.

This dissertation concludes that Saudi Arabia should adopt a discovery regime like the United States regime. This adoption, however, must be with greater tribunal involvement in discovery and a stricter discovery scope. It also concludes that parties must show valid reasons to request discoverable materials, and requesters must be responsible for the discovery expenses.

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## **1.0 Introductory Chapter**

This introductory chapter provides an overview of the dissertation. The road map at the end of this chapter contains an outline of the subsequent chapters and provides the applicable research methodology. This chapter also provides some sources that are used in advancing the thesis. It also sets forth the methods used to prove the thesis and provides the research plan for this dissertation. It also explains the ways in which the Saudi legal system fails to achieve justice when a litigant lacks the facts needed to prove its case due to the lack of a system of formal discovery.

## **1.1 The Problem: Lack of a Formal Discovery Practice in the Saudi Arabia's Civil Justice System**

The Saudi legal system currently suffers inefficiencies such as delayed and lengthened proceedings which waste judicial and party resources.<sup>1</sup> These inefficiencies are caused by parties who procrastinate regarding hearings and by the lack of sufficient formal rules, expectations, and mechanisms to find facts and exchange evidential documents and other information.

Research has shown that trial proceedings in Saudi Arabia are extremely slow because of a lack of guidance on the manner and the timing of presenting evidentiary materials in civil litigation.<sup>2</sup> This leads to delays in achieving justice and final judgments in civil proceedings. Abdul-Aziz Al-Jarallah, a Saudi attorney, states that the reason for this delay is the poor management of cases.<sup>3</sup> He confirms that the lack of a clear mechanism for the administration of cases, starting from filing the case until the verdict is granted, is the most important and overlooked

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<sup>1</sup> This dissertation provides an overview of the Saudi legal and judicial systems and an overview of the Saudi Civil Procedure Law (Law of Procedure before Shariah Courts) and its current applications in the Saudi courts. The reason for providing these overviews is to provide a background and allow other researchers and readers to have a better understanding of the Saudi system in general in order to eliminate any ambiguity or misconceptions about the legal and judicial systems in Saudi Arabia.

<sup>2</sup> Abdul-Aziz Al-Jarallah, *Adam Wojoood Aleyaat Wadeha Le'darat Alqadaya Tasabbab Beta'kheeraha fy Almahakem [The Absence of a Clear Mechanism for the Management of Cases in Courts Causes Delaying the Cases]*, AL RIYADH (Jul. 6, 2013), <http://www.alriyadh.com/849809>.

<sup>3</sup> *Id.*

factor in delaying the judicial process.<sup>4</sup> Al-Jarallah calls to take advantage from the institution of systems of case management developed in countries such as the United States and United Kingdom in which distinctive methods are adopted to manage the proceedings. These methods save time, effort, and money.<sup>5</sup>

Instead of enforcing a formal mandatory mechanism to help parties to find facts and necessary information outside of courtrooms, the rules for obtaining and exchanging information in the current Saudi Civil Procedure Law emphasize the importance of appearing in judicial hearings and physically providing the relevant documents, testimonies, and all other relevant material in court before judges.<sup>6</sup> These legislative imperfections encourage parties acting in bad faith to postpone revealing unfavorable relevant information or materials in their possession, and this often delays resolution of the dispute.<sup>7</sup> Parties are not required to meet to resolve their dispute

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<sup>4</sup> *Id.*

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

<sup>6</sup> NIZAM AL-MORAFAT AL-SHARI'AH [THE SAUDI CIVIL PROCEDURE LAW], Royal Decree No. (M/1) 22 Moharram 1435 H. [26 November 2013] Cabinet Resolution (No. 11) 8 Muharram 1435 H. [12 November 2013], Art. 55-60, [hereinafter Civil Procedure Laws].

<sup>7</sup> Bashar Almofada, *Moqtarahat Letatweer Alejra'at Alqadaeyah [Proposals for the Development of the Judicial Proceedings in Saudi Arabia 'I']*, AL EQTESADIAH (Feb. 13, 2016), [https://www.aleqt.com/2016/02/13/article\\_1029884.html](https://www.aleqt.com/2016/02/13/article_1029884.html).

out of court.<sup>8</sup> Delays are further exacerbated by the severe shortage of judges in Saudi Arabia.<sup>9</sup> The adoption of a formal discovery regime in Saudi Arabia would most likely expedite civil proceedings.<sup>10</sup>

Civil proceedings in Saudi Arabia take an exorbitant amount of time to be resolved.<sup>11</sup> Some proceedings may take several years in court waiting to reach a final judgment. This is especially true in family law cases.<sup>12</sup> The length of the proceedings may, in part, depend on how complex the case is, and how many parties are involved in it.<sup>13</sup> The major cause for delay is that plaintiffs have the burden to provide all the materials that support their allegations when they file cases in court.<sup>14</sup> However, no legal authority seriously inspects the materials, in or out of court, to ensure that the

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<sup>8</sup> Civil Procedure Law, *supra* note 6, Art. 145.

<sup>9</sup> Hamad Al-Jumhor, *Wezarat Aladl Tosre' Alnathar fy Alqadaya wa Oqoobat Sarema Lelmomateleen fy Alhodoor [The Ministry of Justice Try Speed Up the Consideration of the Cases and Strict Penalties on Procrastinating Parties in Attending the Hearings]*, AL RIYADH (Apr. 4, 2011), <http://www.alriyadh.com/620194>.

<sup>10</sup> Almofada, *supra* note 7.

<sup>11</sup> Abdullah Obiaan, *Wazeer Aladl Le Okaz: Alqadi Yakhda' Lelraqaba wa Ta'deboh Yatem Besarreyah [Minister of Justice to Okaz: Judge Is Subject to Censorship, and Discipline Are Confidential]*, OKAZ (Feb. 14, 2016), <http://www.okaz.com.sa/article/1043057/%D8%A7%D9%84%D8%B1%D8%A3%D9%8A/>.

<sup>12</sup> Al-Rashed, Abdul-Aziz. *Atwal Qadaya Almahakem: Altalaq, Alhadana, Alkhol [The Longest Cases in Court: Divorce, Custody, and Khul' divorce]*, AL RIYADH (Aug. 8, 2014), <http://www.alriyadh.com/959085>.

<sup>13</sup> Osama Al-Jama'an, *Mahakem Motakhassesah Tahsem Alqadaya Almotarakemah [Specialized Courts to resolve the Backlog of Cases]*. AL RIYADH (Sep. 30, 2013), <http://www.alriyadh.com/871739>.

<sup>14</sup> Civil Procedure Law, *supra* note 6, Art. 66.

plaintiffs have provided all of the evidentiary materials in their possession, and no legal penalty exists for failing to do so.

Similarly, while the Saudi Civil Procedure Law requires defendants to submit their answers and counter claims, which support their defenses, (3) days prior to the first judicial hearing, there is no penalty for failing to do so either.<sup>15</sup> Very limited penalties exist to ensure the parties' compliance with the current rules of providing evidentiary materials to court.<sup>16</sup> If a party discovers that related information or documents are in the possession of the adverse party, and the party is in need of these materials to support its allegations, the only way it has to get these materials is a court order to compel, which may take a long time and require a valid reason to be granted.<sup>17</sup>

### **1.1.1 Plaintiffs Must Present Evidence at the Commencement of an Action Without the Help of a Discovery Process**

Islamic and Saudi laws impose the burden of proof initially on plaintiffs, so plaintiffs must submit to courts proof supporting their claims. Defendants are not obligated, except by a court order, to reveal any evidentiary materials in their possession that support the plaintiffs' claims, unlike initial disclosures and discovery requirements provided in the Federal Rules of Civil

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<sup>15</sup> *Id.* Art. 45.

<sup>16</sup> *Id.* Art. 53.

<sup>17</sup> Civil Procedure Law, *supra* note 6, Art. 145.

Procedure (FRCP) in the United States (Rules 26-37).<sup>18</sup> Defendants also have the right to deny all or some of the plaintiffs' claims, and they are not required to provide any proof supporting their denial. If a defendant answers by raising an affirmative defense, then the defendant must prove all of the allegations in its affirmative defense, and its mere denial of the plaintiff's claims is not sufficient.<sup>19</sup>

Unlike the civil procedure system in the United States that includes a discovery practice, Article 66 of the Saudi Civil Procedure Law requires judges, before questioning the defendants, to question the plaintiffs in their first hearings about the legality of commencing cases against defendants and to check the materials they possess to prove their cause of action against defendants.<sup>20</sup> Plaintiffs must support their claims with some evidentiary materials to persuade the court that they might be entitled to relief.<sup>21</sup> If the court does not believe that a plaintiff has a legitimate cause of action against its defendant, then the court must issue its decision to disregard the plaintiff's claims due to the lack of sufficient proof supporting its cause of action.<sup>22</sup>

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<sup>18</sup> TALA'AT DEWIDAR, ALWASEET FE SHARH NIZAM ALMORAFAT ALSHAREYAH ALJADEED WA LAEHATOH ALTANFETHEAH BEL MAMLAKAH ALARABIA ALSAUDIA [THE MEDIATOR IN EXPLAINING THE SAUDI CIVIL PROCEDURE LAW AND ITS EXECUTIVE REGULATION] (4TH ED., 2017), at 474.

<sup>19</sup> *Id.* at 473.

<sup>20</sup> Civil Procedure Law, *supra* note 6, Art. 66.

<sup>21</sup> Civil Procedure Law, *supra* note 6, Art 66.

<sup>22</sup> *Id.* Art. 66, Clause 1 of its executive regulation.

If the plaintiff finds more materials supporting its allegations after the court's dismissal of the case, the plaintiff may request that the same court reconsider its allegations supported by the newly possessed materials. The plaintiff can request the reconsideration of its cause of action even after the court's decision becomes final. If the court is persuaded by the new materials, it must permit the plaintiff to resume the lawsuit and must allow the service of the summons again on the defendant, and accordingly, the defendant must appear in court to refute the plaintiff's allegations.<sup>23</sup>

In addition to facts about the methods parties use in a proceeding to find facts and obtain legal material from each other, Article 149 of the Saudi Civil Procedure Law includes one of the rules that was developed to obtain legal materials from a non-party. This article states that the court may, on its own or by a motion, bring a third party to a proceeding.<sup>24</sup> The court may force that third party to submit documents or any kind of materials in its possession necessary for the proceeding.<sup>25</sup> Article 149 also authorizes the court to oblige any government agency to provide any papers or documents necessary for a proceeding.<sup>26</sup> It is explicit that the Saudi courts have the dominant role in administering the disclosure of materials that are in the possession or control of a party or non-party.

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<sup>23</sup> *Id.* Clause 2 of its executive regulation.

<sup>24</sup> *Id.* Art. 149.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

### **1.1.2 Oath Procedure Used if Plaintiff Lacks Evidence or Defendant Denies Claims:**

#### **Plaintiff Loses with No Chance to Gather Needed Materials**

Judges have a broad discretion in admitting or rejecting a plaintiff's evidentiary materials. If the plaintiff does not have sufficient proof, then the court may shift the burden of proof to the defendant upon the plaintiff's request. The defendant, accordingly, must take an oath denying the plaintiff's allegations, and this is the sole remaining way to prove or deny the plaintiff's claims. The court must direct the defendant to take the oath, refuting the plaintiff's claims; otherwise, the court must rule for the plaintiff, granting it the relief it seeks. If the defendant takes the oath denying the plaintiff's claims, then the court must issue a verdict in favor of the defendant and dismiss the plaintiff's case.<sup>27</sup>

The defendant most likely proceeds in one of the two following ways: 1) by admitting the plaintiff's claims, so the judge must issue the final judgment in favor of the plaintiff granting it the relief it seeks or 2) by refuting the plaintiff's claims, so the court must apply an Islamic Law rule taken from a prophetic *Hadith*<sup>28</sup> (a notable saying of the Prophet Mohammad) which states that

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<sup>27</sup> Civil Procedure Law, *supra* note 6, Art. 111-112; see also Dewidar, *supra* note 18, at 474.

<sup>28</sup> Hadiths are a record of the traditions and sayings of the Prophet Muhammad that are revered and received as a major source of Islamic law and moral guidance, considered as the second source of legislation in Islamic Law after the authority of the Quran, the Holy Book of Islam. See Albert Cragg, *Hadith*, BRITANNICA, <https://www.britannica.com/topic/Hadith> (last updated Aug. 5, 2020).

"the burden of proof falls on who claims, and the oath taking falls on who denies."<sup>29</sup> If the plaintiff provides admissible materials to court supporting its claims, then the court would most likely issue its verdict granting the plaintiff what it seeks for relief.

From my prior professional experience as a lawyer in Saudi Arabia,<sup>30</sup> I can attest to the fact that there are some attorneys who successfully hide crucial materials and potential witness testimony to delay the proceeding and sway the decision in their favor. Saudi Arabia currently has no sanctions for such bad faith behavior.<sup>31</sup> In comparison, the existence of a discovery phase in

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<sup>29</sup> HISHAM AWAD, OSOUL ALMORAFAT ALSHAREYAH FE ALNIZAM ALKDHA'AE AL SAUDI [THE ORIGINS OF ISLAMIC CIVIL PROCEDURE IN THE SAUDI JUDICIAL SYSTEM] (2ND ED., 2017), at 407.

<sup>30</sup> As a lawyer who formerly practiced in Saudi Arabia's civil courts, I am familiar with Civil Procedure Law in Saudi Arabia and have first-hand experience with the practical problems of Civil Procedure Law, namely, the lack of discovery process. As a lecturer in King Abdul-Aziz University, my scholarship focused on Civil Procedure Law in Saudi Arabia. During my LL.M. degree, I took civil procedure classes at Maurer School of Law and have thoroughly studied the discovery rules in the Federal Rules of Civil Procedure. I believe that I have the capability to conduct a comparative research analysis concerning the civil procedure rules in the United States and in Saudi Arabia. The pertinent coursework that I have taken in which the main subject matters were relevant to the procedure laws in Saudi Arabia and the United States are the courses of Civil Procedure, Foundations of Fiqh (Islamic Jurisprudence), Executive Procedures, Sources of Obligation, Legal Effects of Obligation, Evidence, the Rules and Theories of Fiqh (Islamic Jurisprudence), Fiqh (Islamic Jurisprudence) of Punishments, and Criminal Procedure courses. Also, I have participated in many legal forums and courses in the field of procedural laws with participation of some law scholars, attorneys, and judges.

<sup>31</sup> Civil Procedure Law, *supra* note 6, Art. 53.

the United States civil proceedings leads most cases to be settled outside of court.<sup>32</sup> Sanctions for violations of the discovery rules by failing to disclose materials in a proper manner are stated in Rule 37 of the United States' Federal Rules of Civil Procedure to encourage adequate disclosure by all parties.<sup>33</sup> Documents, testimonies, expert reports, or any other materials to support a party's argument must be revealed to the adverse party during the discovery phase prior to the trial; otherwise, the defiant party would not be able to use these materials at trial, and it may be responsible to pay any incurred costs for the adverse party, including attorney's fees, for submitting a motion to compel to court.<sup>34</sup>

### **1.1.3 Defendants Often Deny Claims and Few Consequences for False Denials: Plaintiffs**

#### **May Lose Due to the Lack of Discovery**

Defendants often deny even meritorious claims because of decreasing religious beliefs and few consequences for false denials. Lack of discovery means that plaintiffs with meritorious claims may lose without a real practical opportunity to prove their claims. Taking individuals' religious beliefs into account when considering evidentiary materials in court is crucial because justice requires it in certain incidents where no other solid ground exists to examine the legitimacy of

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<sup>32</sup> Hirbyand, James. "What Percentage of Lawsuits Settle Before Trial? What Are Some Statistics on Personal Injury Settlements?". <http://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/>.

<sup>33</sup> FED. R. CIV. P. 37

<sup>34</sup> *Id.*

evidence.<sup>35</sup> The main reason for the reliance on people's religious beliefs in Islamic Law rules is Islam's prevailing belief in God's fair judgments, rewards and punishments in the afterlife. This belief must induce people to do good deeds, be righteous, and to refrain from committing wrongdoings.<sup>36</sup>

Relying on such rules is causing people, in many incidents, to lose their rights, because people's religious beliefs have changed over time and many do not take the oath performance before courts seriously. Some are not sincere and religious as Islamic Law trusts them to be, especially to prove or deny legal rights through taking oaths as the sole evidentiary method to finalize judicial disputes.<sup>37</sup> Litigants' failure to be truthful in performing the oath underlies this proposal to consider discovery as an alternative to preserve people's legal rights. Since plaintiffs do not possess any admissible evidence to support their claims other than their defendants' deceptive oaths, these violations go unremedied.

The current application of oath taking in Saudi laws is causing unfairness since justice relies merely on the defendant's righteousness and the sole way the plaintiff has to prove its allegations is the defendant's religious oath. Legal systems and justice must rely on a formal legally grounded process and not on litigants' religious beliefs. To be more specific, taking oaths must not

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<sup>35</sup> HUSSAIN AL-SHEIKH, *ALMABADI ALQADA'EH FI AL SHARI'AH AL-ISLAMIYYAH* [JUDICIAL PRINCIPLES IN ISLAMIC LAW] (2006), at 8.

<sup>36</sup> *Id.* at 5.

<sup>37</sup> Awad, *supra* note 29, at 407.

be the sole approach to resolving disputes if the plaintiff does not have enough proof in their possession to support their claims.

## **1.2 A Possible Solution: Adoption of Discovery Regime Similar to the United States’ Regime**

Under the Federal Rules of Civil Procedure in the United States, plaintiffs can secure materials through initial disclosures and discovery from other parties and from third-party witnesses. This dissertation research seeks to understand the discovery inefficiencies in Saudi Arabia through a comparison with the United States discovery regime. Saudi Arabia currently has no discovery regime. This research, therefore, addresses this issue by analyzing United States civil discovery rules and their potential applicability to the Saudi legal system. Conducting a critical literature review of the civil procedure systems regarding discovery in both the United States and Saudi Arabia provides a better understanding of the status and operation of discovery in these different jurisdictions. Critically reviewing the literature also provides a guide to substantive solutions to reform the Saudi legal system by adopting a discovery regime.

Having researched in the field of Saudi Arabian civil procedure and related parts of written Islamic Law, it is clear that there has not been any academic research in Saudi Arabia that explores the United States civil discovery regime and considers its potential application to Saudi Arabia's civil procedure system.

This research explains how the adoption of a discovery regime in the Saudi Civil Procedure Law would have a positive effect on resolving some of the most critical problems in the Saudi legal system such as the unreasonable delays to achieve justice.<sup>38</sup> This project also lays out

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<sup>38</sup> Al-Jumhor, *supra* note 9.

practical ways that the adoption of a discovery process could prevent undue delay in the Saudi legal system. It also addresses methods to prevent fraud and other malfeasance caused by parties who act in bad faith and attempt to obtain an advantage and delay justice by hiding or deferring the provision of information or other legal materials that might be crucial to conclude the litigation in favor of an adverse party.

This research consults the relevant parts of the United States' codes and rules, mainly the Federal Rules of Civil Procedure in which Title V, disclosure and discovery, is stated.<sup>39</sup> Also, Chapter 15 of *Moore's Manual: Federal Practice and Procedure* which discusses the discovery process in the United States in detail<sup>40</sup> as well as *Federal Practice and Procedure* by Wright & Miller, specifically Volume 8, which discusses depositions and the discovery process in the United States.<sup>41</sup> Considering these rules throughout this research, in addition to some secondary resources, facilitates understanding the current status of the discovery practice in the United States and, therefore, highlights ways the Saudi legal system may benefit from the United States approach.

One of the secondary resources cited in this research is *Public Counsel's Guides and Forms: Discovery*. This publication contains discussion about the principles of the discovery process in the United States.<sup>42</sup> It also contains some guides concerning the discovery rules stated

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<sup>39</sup> FED. R. CIV. P. 26-37.

<sup>40</sup> "MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE."

<sup>41</sup> CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE CIV. (3D ED., 2008).

<sup>42</sup> PUBLIC COUNSEL, GUIDES AND FORMS: DISCOVERY (2015) [hereinafter Public Counsel].

in the Federal Rules of Civil Procedure (FRCP).<sup>43</sup> These guides include a guide to discovery basics, a guide to the obligations of initial disclosure, a guide to requests for production and admission, and a guide to interrogatories in the United States.<sup>44</sup> This dissertation places particular importance on researching the applicability and possibility of adopting a discovery regime in Saudi Arabia by providing further explanations of the basics and guidelines for discovery application in the United States.

In other secondary resources cited in this research, *Significant Changes to the Federal Rules of Civil Procedure*,<sup>45</sup> and *Significant New Changes to the Rules of Discovery in Federal Court*,<sup>46</sup> the authors, Ellsworth and Jimerson, discuss in detail the practical impacts of the new changes to the discovery rules in the Federal Rules of Civil Procedure (2015). They confirm that the amendments to the rules are intended to speed up litigation, minimize the costs of discovery, and to concentrate litigation on the pleas at issue. Ellsworth and Jimerson provide overviews of the recent changes to the federal rules regarding discovery and other practical applications. They also consider the advantages achieved by these new amendments.

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<sup>43</sup> *Id.*

<sup>44</sup> Public Counsel, *supra* note 42.

<sup>45</sup> Laura Ellsworth, *Significant Changes to the Federal Rules of Civil Procedure*, JONES DAY (Sep. 25, 2015), <http://www.jonesday.com/significant-changes-to-the-federal-rules-of-civil-procedure-expected-to-take-effect-december-1-12015-practical-implications-and-what-litigators-need-to-know-09-25-2015/>.

<sup>46</sup> Brandon C. Meadows, *Significant New Changes to the Rules of Discovery in Federal Court*, JIMERSON BIRR (Feb. 15, 2016), <https://www.jimersonfirm.com/blog/2016/02/significant-new-changes-to-the-rules-of-discovery-in-federal-court/>.

In addition, Brett Harrison, the author of *International Discovery: Around the World in Ninety Minutes*, discusses obtaining evidence from other countries being used in United States litigation.<sup>47</sup> Harrison discusses the legal ways to obtain evidence for litigation in the U.S. from specific jurisdictions: Canada, United Kingdom, Mexico, China, and France.<sup>48</sup> Harrison also examines the relationship between the United States Federal Rules of Civil Procedure (FRCP) and the Hague Convention in terms of the procedures required to obtain evidence from abroad for litigation taking place in the United States.<sup>49</sup> Harrison discusses the factors involved in issuing or enforcing a discovery order in transnational civil litigation under the United States discovery rules and in the Hague Convention.<sup>50</sup> Harrison also considers the main discovery methods in the FRCP taken to find facts and obtain materials, such as document requests, depositions and interrogatories, and compares them to the tools to find facts and collect evidence required by the Hague Convention, which are Letters of Requests (Letters Rogatory) and through diplomatic officials and

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<sup>47</sup> Brett Harrison, *International Discovery: Around the World in Ninety Minutes*, 2008 ABA SECTION OF LITIGATION 1, 1.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> Harrison, *supra* note 47, at 2; see also The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1-42, *concluded* Mar. 18, 1970, 12140 U.N.T.S. 240 (entered into force Oct. 7, 1972) [hereinafter The Hague Convention].

<sup>50</sup> Harrison, *supra* note 47, at 3; see also The Hague Convention, *supra* note 49.

commissioners.<sup>51</sup> Harrison also discusses problems which might occur in relation to the application of some clauses of the Hague Convention in common law and civil law jurisdictions.<sup>52</sup>

In one resource cited in this dissertation, *Disclosure and Discovery Under the Federal Rules of Civil Procedure*, the writer, Judge Anthony Battaglia, discusses the procedural changes that have caused the discovery rules and procedures in the Federal Rules of Civil Procedure to evolve.<sup>53</sup> According to Battaglia, the changes in the federal rules in 1993 were about dividing discovery into two major categories (court controlled discovery and attorney controlled discovery).<sup>54</sup> The 2000 amendments were about having national uniformity in the federal courts and about minimizing discovery costs.<sup>55</sup> The 2006 amendments to the FRCP dealt with the discovery of Electronically Stored Information.<sup>56</sup> Finally, the 2015 amendments focused on the discovery of Electronically Stored Information.<sup>57</sup>

Judge Battaglia discusses the discovery rules that deal with the parties' conference, joint discovery plan, initial disclosure, and duty to supplement disclosure in terms of participants, time,

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<sup>51</sup> Harrison, *supra* note 47, at 6-9.

<sup>52</sup> *Id.* at 8; see also The Hague Convention, *supra* note 49.

<sup>53</sup> ANTHONY J. BATTAGLIA, DISCLOSURE AND DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE (2016),  
at 1.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 52.

<sup>57</sup> *Id.* at 56.

place, costs, and scopes.<sup>58</sup> Battaglia also discusses pretrial disclosure as well as the scope of discovery.<sup>59</sup> Next, he examines the concept of proportionality, which were introduced in the 2015 amendments to the Federal Rules of Civil Procedure, to further narrow discovery.<sup>60</sup>

Battaglia also examines ways to handle the privileges that apply to all materials subject to discovery including Electronically Stored Information.<sup>61</sup> He also includes a detailed discussion of interrogatories, document requests, requests for admissions, requests for physical or mental examination of a party, and subpoena practice as they apply in the wake of the amendments to the discovery rules in 2015.<sup>62</sup> Finally, a detailed discussion of Rule 37(c), concerns the failure to disclose, false or misleading disclosure, and refusal to admit, takes place.<sup>63</sup>

In one cited article, *A Measured Approach To E-Discovery*, Hodges Shiva, presents this research as a guide and includes introductory basics for attorneys dealing with the civil and ethical rules that govern E-discovery especially in terms of costs and burdens.<sup>64</sup> Also, in *Best Practices for Courts and Parties Regarding Electronic Discovery in State Courts*, Allman et al discuss the implications of discovering electronically stored information, and the new amendments regarding

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<sup>58</sup> Battaglia, *supra* note 53, at 7, 13, 16, 22, 94.

<sup>59</sup> *Id.* at 44-46.

<sup>60</sup> *Id.* at 48.

<sup>61</sup> *Id.* at 84.

<sup>62</sup> *Id.* at 127, 141, 147.

<sup>63</sup> *Id.* at 152.

<sup>64</sup> Shiva V. Hodges, *A Measured Approach to E-Discovery: A Federal Practitioner's Guide to the Civil and Ethical Rules Governing E-Discovery*, 64 S. C. L. REV. 755 (2013).

E-discovery in the federal rules and therefore in states' laws.<sup>65</sup> Allman et al consider the consensus in some state cases about best practices courts and parties might adopt while practicing e-discovery.<sup>66</sup> In addition to the primary resources, these last two publications facilitate Chapter Two's discussion of E-Discovery's scope, advantages and limits.

In *Discovery in International Civil Litigation: A Guide for Judges*,<sup>67</sup> *Discovery in Transnational Litigation: Procedures and Procedural Issues*,<sup>68</sup> and *Discovery and Other Procedures*,<sup>69</sup> the authors, Harkness, Ogden, and Amann discuss service of process outside of the United States for proceedings taking place inside the country, and service of process in the United States for foreign proceedings. Also, they consider methods to discover legal materials located abroad, and how to comply with discovery requests from foreign courts. Harkness, Ogden, and Amann examine the challenges and consequences of seeking discovery abroad as well as how to obtain evidence abroad under the U.S. discovery process and The Hague Convention. These three publications are useful guides to developing legal methods in Saudi Arabia to comply with foreign

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<sup>65</sup> Thomas Y. Allman et al., *Best Practices for Courts and Parties Regarding Electronic Discovery in State Courts*, 2016 CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 1.

<sup>66</sup> Allman et al, *supra* note 65.

<sup>67</sup> TIMOTHY HARKNESS, *DISCOVERY IN INTERNATIONAL CIVIL LITIGATION: A GUIDE FOR JUDGES* (2015).

<sup>68</sup> David Ogden & Sarah Rapawy, *Discovery in Transnational Litigation: Procedures and Procedural Issues*, 2007 ABA BUSINESS LAW SECTION 1.

<sup>69</sup> AM. SOC'Y INT'L L., *DISCOVERY AND OTHER PROCEDURES* (2014).

discovery requests and to conduct discovery abroad for Saudi civil proceedings in case a discovery regime is adopted in the legal system.

In *Tailoring Discovery: Using Nontranssubstantive Rules to Reduce Waste and Abuse*, one of the articles cited in this research, the author, Joshua Koppel, argues that the current system of discovery in the United States causes many practical problems and should be reformed.<sup>70</sup> Koppel believes that the current discovery practice in the United States imposes burdens on parties in terms of unreasonable amounts of time and money, forcing them to settle their cases out of court to avoid losses.<sup>71</sup> Koppel also claims that some discovery procedures are not necessary for justice and waste courts' resources.<sup>72</sup> Koppel suggests redrafting the discovery rules based on the subject matter of each case to make the discovery practice narrower and more efficient.<sup>73</sup> Koppel's publication is one of the major references in Chapter Two, which examines the disadvantages of the current application of the United States discovery and the recommendations to overhaul the United States discovery regime.

Some other resources also considered in this dissertation such as *Pretrial Litigation in a Nutshell*,<sup>74</sup> discuss litigation procedures in general prior to the trial stage, including discovery

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<sup>70</sup> Joshua Koppel, *Tailoring Discovery: Using Nontranssubstantive Rules to Reduce Waste and Abuse*, 161 U. PA. L. REV. 243 (2012).

<sup>71</sup> *Id.*

<sup>72</sup> Koppel, *supra* note 70.

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

<sup>74</sup> R. LAWRENCE DESSEM, *PRETRIAL LITIGATION IN A NUTSHELL* (5TH ED., 2012).

procedures. Others, like *Discovery Practice*<sup>75</sup> thoroughly discuss the practice of discovery and disclosure in United States federal courts and/or state courts from the preliminary stages of discovery up to advanced ones. Some of these publications focus particularly on depositions,<sup>76</sup> and others consider discovery applications in civil cases only, which is the main target of this dissertation.<sup>77</sup> Furthermore, much research exists, including *Discovery Problems and Their Solutions*,<sup>78</sup> that considers the problems with applying discovery rules in the United States and the problems caused by the discovery practice. These publications also suggest some solutions to these problems and discuss how the discovery regime in the United States can be reformed to resolve some procedural issues. Some considered publications such as *Arkfeld on Electronic Discovery and Evidence*<sup>79</sup> examine electronic stored information and the E-discovery process and its stages in the United States, in both a theoretical and a practical context.

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<sup>75</sup> ROGER S. HAYDOCK & DAVID F. HERR., *DISCOVERY PRACTICE* (5TH ED., 2009).

<sup>76</sup> PAUL BERGMAN & ALBERT J. MOORE, *NOLO'S DEPOSITION HANDBOOK* (5TH ED., 2010).

<sup>77</sup> JAY E. GRENIG & JEFFREY S. KINSLER, *HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE* (3RD ED., 2010).

<sup>78</sup> FAX, CHARLES, PAUL SANDLER, & PAUL GRIMM., *DISCOVERY PROBLEMS AND THEIR SOLUTIONS* (3RD ED., 2013).

<sup>79</sup> MICHAEL R. ARKFELD, *ARKFELD ON ELECTRONIC DISCOVERY AND EVIDENCE* (3RD ED., 2010).

### **1.3 Dissertation Addresses the Benefits and Challenges of Incorporating a United States Discovery Style in Saudi Arabia and Proposes Legislation to Achieve the Best Result**

Adopting a formal discovery regime in the Saudi legal system to disclose relevant evidentiary materials in the litigant's possession or control would fulfill an Islamic and therefore Saudi legislative goal of delaying the taking of oath until having exhausted all other methods to prove the parties' allegations.<sup>80</sup> These other methods include disclosing materials in other parties' possession, as postponing oath taking does not conflict with Islamic or Saudi rules. Islamic and Saudi legislations agree that delaying oath taking should be the last option to end disputes when no other solid proof is discovered in the parties' possession.<sup>81</sup>

The adoption of a discovery regime in Saudi Arabia may save time and financial resources by finalizing the dispute before getting into the trial court, and also save the court's resources in considering and deciding the case.<sup>82</sup> The current system of exchanging information in Saudi Arabia during trial causes delay.<sup>83</sup> By adopting mandatory pretrial discovery, the courts would provide for the exchange of information. There must be a pretrial stage for exchange of information that would shorten the length and complexity of trials and assist in judicial procedures in a legal system facing a significant shortage of judges. The adoption of a discovery regime, influenced by United

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<sup>80</sup> Civil Procedure Law, *supra* note 6, Art. 111-115.

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

<sup>82</sup> Almofada, *supra* note 7.

<sup>83</sup> *Id.*

States discovery, in Saudi Arabia could accelerate justice and legitimize court decisions that result from the lack of a formal discovery regime.<sup>84</sup>

This research, therefore, considers some relevant aspects of Saudi laws to obtain a better understanding of the judicial and legal systems in Saudi Arabia. It considers articles from *The Basic Law of Governance [Al-Nizam Al-Asasi Llhokm]*<sup>85</sup> and *The Saudi Judiciary Law [Nizam Alqada]*.<sup>86</sup> This dissertation also significantly examines *The Saudi Civil Procedure Law [The Law of Procedure before Shariah Courts or Nizam Almorafa'at Alshariah]* because it is the main source of civil procedure rules in Saudi Arabia.<sup>87</sup> Also, this research discusses relevant parts to this dissertation from *The Saudi Enforcement Law [Nizam Altanfeez]*<sup>88</sup>, *The Law of the Board of Grievances [Nizam Dewan Almazilem]*<sup>89</sup> and *The Saudi Procedure Law before the Board of*

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<sup>84</sup> *Id.*

<sup>85</sup> AL-NIZAM AL-ASASI LLHOKM [BASIC LAW OF GOVERNANCE], Royal Decree No. (A/90) 27 Shaban 1412 H. [1 March 1992] [hereinafter Basic Law of Governance].

<sup>86</sup> NIZAM AL-QADA [THE SAUDI JUDICIARY LAW], Royal Decree No. (M / 78) 19 Ramadan 1428 H. [1 October 2007] Cabinet Resolution (No. 303) 19 Ramadan 1428 H. [1 October 2007] [hereinafter Judiciary Law].

<sup>87</sup> Civil Procedure Law, *supra* note 6.

<sup>88</sup> NIZAM AL-TANFEEZ [THE SAUDI ENFORCEMENT LAW], Royal Decree No. (M / 53) 13 Shaban 1433 H. [3 July 2012] Cabinet Resolution (No. 261) 12 Shaban 1433 H. [2 July 2012] [hereinafter Enforcement Law].

<sup>89</sup> NIZAM DEWAN AL-MAZALEM [THE LAW OF THE BOARD OF GRIEVANCES], Royal Decree No. (M/78) 19 Ramadan 1428 H. [1 October 2007] Cabinet Resolution (No. 303) 19 Ramadan 1428 H. [1 October 2007] [hereinafter Board of Grievances Law].

*Grievances [Nizam Almorafa'at Amam Dewan Almazilem]*<sup>90</sup> with similar parts in *The Law of Procedure before Shariah Courts*.<sup>91</sup>

This dissertation also examines some Islamic Law written publications. *Judicial System in Islamic Shariah [Nizam Al Qada Fe Al Shariah Al Islamiah]*<sup>92</sup> discusses in detail the legal and judicial systems under Islamic Law and how these systems run practically. Also, this dissertation considers research that provides overviews of Islamic Fiqh (*Islamic jurisprudence*) from legal perspectives. One of these publications is *Introduction to Jurisprudence [Al Madkhal Ela Fiqh Almorafa'at]*.<sup>93</sup> This research also considers other publications, like *Judicial Organization in Islamic Jurisprudence [Al Tanzem Alqadai Fi Al Fiqh Al Islami]*,<sup>94</sup> that consider the current applications of Islamic Law in some Islamic countries, especially Saudi Arabia. This research also refers to some books such as *The Mediator in Explaining the New Legal Arrangement in Saudi*

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<sup>90</sup> NIZAM AL-MORAFAT AMAM DEWAN AL-MAZALEM [THE SAUDI PROCEDURE LAW BEFORE THE BOARD OF GRIEVANCES], Royal Decree No. (M / 3) 22 Moharram 1435 H [26 November 2013] Cabinet Resolution (No. 13) 8 Muharram 1435 H. [12 November 2013] [hereinafter Board of Grievances Procedure Law].

<sup>91</sup> Civil Procedure Law, *supra* note 6.

<sup>92</sup> ABDULKAREEM ZIDAAN, NIZAM AL QADA FE AL SHARIAH AL ISLAMIAH [JUDICIAL SYSTEM IN ISLAMIC SHARIAH] (2ND ED., 1989).

<sup>93</sup> ABDULLAH AL KHNEIN, AL MADKHAL ELA FIQH ALMORAFAT [INTRODUCTION TO THE PROCEDURAL JURISPRUDENCE] (1ST ED., 2001).

<sup>94</sup> MOHAMMED AL-ZAHAILY, AL TANZEM ALQADAI FI AL FIQH AL ISLAMI [JUDICIAL ORGANIZATION IN ISLAMIC JURISPRUDENCE] (2012).

*Arabia* [Alwaseet Fe Sharh Altanzem Alqadai Aljadid Belmamlaka Alarabia Alsaudia],<sup>95</sup> that discuss the legal and judicial systems in Saudi Arabia with particular emphasis on civil procedure issues. These books explain the current arrangement of judicial laws in Saudi Arabia as well as suggesting reforms to the legal and judicial systems in relation to several relevant matters.<sup>96</sup> This dissertation also consults some publications, such as *The Mediator in Explaining the Saudi Judiciary Law* [Alwaseet Fe Sharh Nizam Alkdha'a Alsa'oudi Aljadid],<sup>97</sup> that examine the current Saudi Civil Procedure Law and some of its applications and problems in the legal system.

Abdullah Ansary, in *A Brief Overview of the Saudi Arabian Legal System*, provides general information about Saudi Arabia and the history of the Saudi legal system.<sup>98</sup> Ansary further addresses some constitutional documents and the three branches of authority in Saudi Arabia.<sup>99</sup> Ansary includes a thorough discussion about the judicial branch and its sectors in Saudi Arabia.<sup>100</sup>

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<sup>95</sup> AHMED MAKLOUF, ALWASEET FE SHARH ALTANZEM ALQADAI ALJADID BELMAMLAKA ALARABIA ALSAUDIA [THE MEDIATOR IN EXPLAINING THE NEW LEGAL ARRANGEMENT IN SAUDI ARABIA] (2013).

<sup>96</sup> Mohammed El Ghamdi, *Talab Almodai Ao Almodaia Aleh Alemhaal Wa Athira Thilak Fe Etalat Modat Al Dawat* [Request for a Grace Period and Its Impact on Extending the Length of Suit in Islamic Fiqh and the Saudi Law of Procedure before Shariah Courts], 39 UMM AL QURA JOURNAL OF SHARI'A STUDIES 34 (2007).

<sup>97</sup> ALI BARAKAT, ALWASEET FE SHARH NIZAM ALKDHA'A ALSA'OU DI ALJADID [THE MEDIATOR IN EXPLAINING THE SAUDI JUDICIARY LAW] (2012).

<sup>98</sup> Abdullah Ansary, *UPDATE: A Brief Overview of the Saudi Arabian Legal System*, GLOBALEX (Aug. 2015), [http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html).

<sup>99</sup> Ansary, *supra* note 98.

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

In addition, Ayoub Al-Jarbou, the author of *The Role of Traditionalists and Modernists on the Development of the Saudi Legal System* discusses the roles of the traditional (conservative) and modern schools of thought and studies their backgrounds.<sup>101</sup> Al-Jarbou also considers the legal impact of these two groups on the Saudi legal system in terms of legislation, the judicial system, legal education and different perspectives about the application of laws in Saudi Arabia.<sup>102</sup> These last two publications are important references in writing about Islamic Law and the Saudi legal and judicial systems in Chapter One and Chapter Three of this dissertation.

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<sup>101</sup> Ayoub M. Al-Jarbou, *The Role of Traditionalists and Modernists on the Development of the Saudi Legal System*, 21 ARAB LAW QUARTERLY 191 (2007).

<sup>102</sup> *Id.*

## 1.4 The Research Methodology

This research provides a comparative legal analysis as the primary research method for further knowledge about both the United States and Saudi legal systems and studies the possibility of adopting a discovery regime in Saudi Arabia. Comparative legal analysis as a method to study the legal status quo in the United States and Saudi Arabia can show how to effectively transplant the beneficial aspects of the discovery from the United States' legal system to the Saudi legal system.

Some legal research methods from publications that study the methodology of comparative law, such as *The Method and Role of Comparative Law*,<sup>103</sup> are consulted in this dissertation to understand the role of law in the United States and Saudi Arabia and to understand how to conduct such an analysis. Also, considering such publications creates a better awareness of the functional comparative methods that have helped during the writing of this dissertation. One of the guides to conducting the comparative legal analysis in this dissertation is *How to Do Comparative Law*,<sup>104</sup> which discusses the (9) essential principles for conducting an adequate comparative legal study. These principles are considered when writing the comparative parts of this dissertation. Other publications, including *Methodology of Comparative Legal Research*,<sup>105</sup> which focus on academic comparative legal writing in detail, were also considered during writing this research. These

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<sup>103</sup> Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451 (2008).

<sup>104</sup> John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617 (1998).

<sup>105</sup> Mark Van Hoecke, *Methodology of Comparative Legal Research*, 1 LaM 1 (2015).

publications discuss the background of comparative legal analysis, the reasons for conducting comparative legal research, the levels of legal systems that can be compared, and how to conduct such comparisons between numerous jurisdictions. These publications additionally consider certain elements in these systems that should be compared to have a higher level of understanding of these legal systems.

Generally, a comparative legal analysis takes place where researchers try to characterize the similarities, differences or both of two or more systems to compare the results of problems in these systems.<sup>106</sup> The purpose of this kind of analysis is to examine the relations between laws or legal systems in different jurisdictions to find solutions for similar legal issues in these systems.<sup>107</sup> For a greater understanding of any legal system, a comparison with a different legal system should be conducted. Currently, using foreign laws in writing new regulations has become very common in legislative enactment.<sup>108</sup> Comparative legal studies are crucial in the area of Comparative Law, which refers to the discussion of laws and legal systems between different countries in terms of their similarities and differences.<sup>109</sup> Comparative Law includes the analysis of foreign legal systems even if there is no apparent point of reference between the systems, as is the case in this research where no formal discovery regime currently takes place in Saudi Arabia.<sup>110</sup>

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<sup>106</sup> Hoecke, *supra* note 105.

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

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

<sup>109</sup> *Id.*

<sup>110</sup> *Comparative Law*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Comparative\\_law](https://en.wikipedia.org/wiki/Comparative_law) (last updated Jul. 26, 2020).

The comparative analysis in this dissertation examines the absence of a formal discovery regime in the Saudi civil procedural system. It also discusses present legal problems, such as delayed justice, which are caused by this procedural issue. There is also a thorough consideration of the cultural and legal factors that have led to the existing deficiency in the current legal system of Saudi Arabia. This research scrutinizes Title V of the United States Federal Rules of Civil Procedure, which contains the disclosure and discovery rules (Rules 26 to 37 and Rule 45), to identify their advantages and disadvantages. The purpose of this examination is to uncover how discovery would be beneficial to the Saudi civil procedure system and to what extent discovery can be adopted.

Throughout this research, there are several reviews of the discovery rules of the Federal Rules of Civil Procedure and some comprehensive legal primary and secondary sources, which discuss the discovery regime in the United States legal system to fully comprehend the essence of the discovery practice. This dissertation also discusses legal scholarship by both critics and proponents of the United States existing discovery regime. After thoroughly examining the discovery rules in the Federal Rules of Civil Procedure, this dissertation discusses the probability of adopting discovery into the Saudi Civil Procedure Law with an eye to the current procedural situation in Saudi Arabia. This research also considers the judicial problems that could be resolved if discovery rules were adopted in Saudi Arabia. Of particular consideration is given to the best ways to achieve the adoption of discovery rules into the Saudi Civil Procedure Law and the legal mechanisms to activate applicable discovery rules into the legal system.

This research also provides a literature review of commentary analyzing the disclosure and discovery rules from Title V of the United States Federal Rules of Civil Procedure. This is followed

by a discussion of the pros and cons of the discovery process in United States jurisprudence. After doing so, this research examines the applicability of United States discovery rules to Saudi Arabia's Civil Procedure Law. It then lays out a plan to explain how to adopt discovery into the legal system of Saudi Arabia.

This research conducts a comparative analysis of the latest update of the discovery rules in the Federal Rules of Civil Procedure in the United States (2019) and the Saudi Civil Procedure Law (2013).<sup>111</sup> The analysis focuses on the advantages and disadvantages of the application of the United States' discovery regime and the prospective advantages and disadvantages of such application in Saudi Arabia's legal system.

Finally, in addition to the Recommendation Section at the end of the dissertation, spread throughout this research are recommendations about how Saudi Arabia should reform its civil procedure system by including a discovery regime in its Civil Procedure Law. This research also addresses the potential legal reactions to the adoption of a discovery regime in Saudi Arabia. In addition, this dissertation addresses the challenges of adopting discovery in Saudi Arabia under the current legal situation and demonstrates how these challenges may be pragmatically confronted and resolved.

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<sup>111</sup> Several provisions and articles of the current Saudi Civil Procedure Law were amended over the course of the last (7) years, since the law's enactment. In the last amendment, which took place on April 8, 2020, Article 35 of this law was repealed in respect of the enactment of the new commercial law, the Commercial Courts Law and Procedures.

## **1.5 The Dissertation Roadmap**

This research conducts a comprehensive study of the discovery regime in the United States, with special consideration to evaluating the pros and cons of the discovery rules in the United States Federal Rules of Civil Procedure. The aims of this study are to ascertain whether discovery rules could be appropriately incorporated into the Saudi Arabia's Civil Procedure Law and to explain the purposes and benefits of this adoption. The following is an outline of the chapters in this research:

**2.0** Chapter One: The Saudi Arabia Civil Justice System and its Lack of a Discovery Regime

**3.0** Chapter Two: The Discovery Regime in the Federal Rules of Civil Procedure in the United States

**4.0** Chapter Three: The Adoption of the United States Discovery in the Saudi Arabia System

**5.0** Chapter Four: Amendments Made Under Recent Laws and Potential Challenges of Adopting Discovery in Saudi Arabia

### **1.5.1 Chapter One: The Saudi Arabia Civil Justice System and its Lack of a Discovery Regime**

#### **Chapter 1 Sections:**

**2.1** The Role of Islamic/Shariah Law in the Saudi Arabia Legal System

**2.2** The Structure of the Government in Saudi Arabia

### 2.3 Judicial Education in Saudi Legislation

### 2.4 The Civil Litigation System in Saudi Arabia

The first section of Chapter One, Section 2.1 defines Islamic Law, examines the rules of this law, and provides some explanations of the practical role of Islamic Law in the Saudi legal system. This section also discusses the nature of the Saudi legal system and how it is a mixture of Islamic laws and modern civil laws. Section 2.1 then examines the rules of civil procedure in both Islamic Law and the Saudi legal system as well as the purpose of setting these rules. It also introduces the rules of the exchange of evidentiary materials in civil proceedings from the Saudi Civil Procedure Law. Section 2.1 also discusses how these rules are applied in the Saudi legal system, taking into consideration the change in the process of submitting legal materials between the old and new civil procedure laws.

Section 2.2 considers the branches of authority in Saudi Arabia and the structure of the government. This section also discusses the separation of powers in Saudi Arabia as well as considers the process of formulating and revising laws and regulations in the Saudi legal system. Section 2.2 then examines the role and power of the monarch over the three branches of authority, especially their power over the judiciary branch.

Section 2.3 includes a description of the three types of legal education in Saudi Arabia. This section emphasizes the Saudi concepts of Shariah in training and educating judges, with a detailed description of how judges are trained in Saudi Arabia. Section 2.3 also addresses the educational requirements for judgeship candidacy in Saudi Arabia and addresses some attempts to improve the current methods of legal education.

Section 2.4 of Chapter One provides a general view of the civil litigation system in Saudi Arabia. The first subsection of Section 2.4 considers the recent wave to overhaul and improve the Saudi judicial system in all respects. Section 2.4 then addresses the judicial structure in the Saudi legal system, including some explanations about the two court systems and the types of courts within each system in addition to addressing the role of the quasi-judicial committees in the legal system. Section 2.4 then discusses the current Saudi legal and procedural situations without a discovery regime. This includes the plaintiff's initial obligations and the methods of disclosing evidentiary materials under the Saudi Civil Procedure Law in addition to the challenges that the plaintiff confronts without an opportunity for discovery. Section 2.4 of Chapter One also discusses defendant responsibility to respond to the plaintiff's claims as well as examine the current system of judicial hearings in the Saudi legal system. It also considers the current rules that govern the legal procedures to take oaths and authenticate witness testimony in the Saudi civil courts. Section 2.4 then addresses some problems that exist due to relying exclusively on the religious oath taking. It also addresses the consequences of the lack of discovery in Saudi Arabia. The last subsection of Section 2.4 discusses additional issues that exist in the Saudi legal system: leniency in judicial hearings, no binding precedents, no summary judgment, and no jury trials.

## **1.5.2 Chapter Two: The Discovery Regime in the Federal Rules of Civil Procedure in the United States**

### **Chapter Two Sections:**

#### **3.1 The Purposes, Limits, and Scopes of Discovery and E-discovery Practice in the United States**

### **3.2 Practicing Discovery under the Federal Rules of Civil Procedure**

### **3.3 Sanctions and Legal Consequences of Violating Discovery Rules in the United States**

### **3.4 The Advantages and Disadvantages of the Discovery Regime in terms of Time and Cost; Consequences of the Discovery Practice in the United States, Supported by Statistical and Empirical Studies**

### **3.5 The Role of Judges in Pretrial Discovery in the United States; Arguments about their Reluctance to Impose Sanctions**

Section 3.1 of Chapter Two discusses the limits, scope and purposes of practicing document discovery and E-discovery of Electronically Stored Information (ESI). It also provides an overview of the discovery rules in the Federal Rules of Civil Procedure (FRCP), in addition to examining discoverable legal materials under the discovery rules. Section 3.1 then discusses the purposes of establishing the discovery rules under the FRCP. This section also discusses the scope of document discovery practice and electronic discovery under the FRCP. It then examines the time limit of discovery practice under the FRCP. It also considers the principle of privilege in the United States, such as the privilege of attorney-client and doctor-patient relationships, in which the professional materials are confidential and protected from discovery. Section 3.1 then discusses the protective orders submitted to courts in the United States related to discovery matters. The last subsection of Section 3.1 addresses some amendments to the FRCP to alter or narrow the scope of discovery practice.

Section 3.2 of Chapter Two discusses the federal rules of discovery in the United States. Section 3.2 then provides a detailed discussion about the initial disclosure's rules under the FRCP,

including initial disclosure time and format as well as exclusions from the initial disclosure. Section 3.2 also considers the discovery phase under the Federal Rules of Civil Procedure, including holding the conference of the parties under Rule 26(f) and preparing a joint discovery plan. It then examines the methods of taking discovery under the Federal Rules of Civil Procedure. Section 3.2 also examines each discovery method available under the discovery rules and shows how each method is taken to find facts and obtain information from adverse parties in the United States civil proceedings. These methods include depositions, interrogatories, requests for production, requests for admission, physical and mental examinations, and subpoenas. This section also addresses the discovery of electronically stored information (ESI). Section 3.2 also considers the legal approaches for parties to supplement their initial disclosure and discovery responses. This section then discusses the process of pretrial disclosure as well as the burden of the cost of litigation in the United States, including discovery expenses.

Section 3.3 of Chapter Two discusses the legal consequences and sanctions that United States courts may apply on defiant litigants upon violating of the rules of discovery. This discussion includes sanctions related to the discovery of electronically stored information (ESI).

Section 3.4 of Chapter Two first discusses the advantages of implementing the discovery regime in the United States legal system. This section then discusses the disadvantages of the discovery practice, especially in terms of discovery expenses and the time consumed in conducting discovery. It also mentions the quantity of discovery in United States civil litigations. Section 3.4 also examines the effects of the discovery practice on litigants and courts in the United States civil litigation. It also considers the evolution of discovery and discusses the effects of applying discovery on litigants' behaviors. This discussion helps to identify whether discovery rules have a

positive effect in the United States or whether these rules may contain obstacles that make them less attractive for incorporation into the Saudi legal system. Also, throughout Section 3.4 mention is made of existing empirical research regarding the impacts of discovery rules on the progress and speed of litigation and settlement in the United States. This is one way to help to identify how discovery rules could be most effectively adopted in Saudi Arabia. Chapter Two also presents statistical evidence about the effects of discovery on a litigant's behavior. This chapter also considers some arguments about the main role the discovery process plays in the increased expenditure on litigation in the United States.

Section 3.5 of Chapter Two addresses the role of judges in the pretrial discovery process in the United States as well as tribunals' reluctance to apply discovery sanctions on defiant litigants.

### **1.5.3 Chapter Three: The Adoption of the United States Discovery in the Saudi Arabia System**

#### **Chapter Three Sections:**

- 4.1 Debates about the Discovery Practice in the United States
- 4.2 Legal Issues Posed by the Lack of Discovery and the Advantages of Discovery Practice in the Saudi Legal System
- 4.3 The Impact of Discovery on Saudi Litigants with a Discussion about the Attitude of Islamic Law Regarding Settlements
- 4.4 Recommended Reforms to the Saudi Legal System to Enable Discovery
- 4.5 Steps to Activate the Discovery Regime in the Saudi Legal System
- 4.6 Allocation of Discovery Costs After Adopting Discovery in the Saudi Legal System

Section 4.1 of Chapter Three addresses some arguments that examine the benefits of discovery, as well as the problems and abuses inherent in the current discovery practice in the United States. It also addresses some legal scholars' suggestions for how to reform the United States discovery regime, such as demanding more tribunal involvement in the discovery process and more specific directions on discovery practice as well as demanding specifically designed discovery rules. Section 4.1 also addresses some reformative proposals to enhance the efficiency of the United States discovery practice in addition to studying some recommendations to confront the negative impacts of the discovery regime on United States civil litigation. These include recommendations to reform discovery rules to eliminate existing problems and minimize the high expenses of litigation in the United States by tailoring the cost of discovery, developing patterned discovery methods, establishing substance specific discovery rules, setting limitations on discovery to reduce its costs, eliminating abusive use, and simplifying the discovery rules for self-represented (pro se) litigants.

Section 4.2 of Chapter Three addresses existing problems and legal consequences that result from the absence of a discovery process in Saudi Arabia as well as some issues that discovery would resolve. This section also scrutinizes the intended purposes of using the discovery process in the Saudi legal system, as well as the advantages of discovery adoption that would most likely help to solve some current problems in the Saudi legal system.

Section 4.3 of Chapter Three addresses the prospective evolution in the Saudi legal and judicial systems if Saudi Arabia were to adopt a discovery regime similar to the United States experience. It also evaluates the impact of discovery on Saudi litigants and discusses factors that influence parties to settle civil cases and whether these factors are present in Saudi civil litigations.

This is in addition to examining the attitude of Islamic Law in regard to conducting settlements to resolve disputes. Section 4.3 also considers ways in which the adoption of discovery into the Saudi system would affect the current legal and judicial situation, especially the nature of judicial hearings and Saudi religious and cultural values, with special consideration of any legal grounds for limited disclosure of materials in Saudi civil proceedings.

Section 4.4 of Chapter Three analyzes mechanisms to amend the current Saudi Civil Procedure Law for the adoption of a discovery process as well as mechanisms to stimulate this adoption in the legal and judicial systems, such as establishing a new stage for initial disclosure and discovery practice and revising the relevant rules of evidence and the concept of time limits. Section 4.4 then discusses legal methods and gives some suggestions to amend the current rules of the Saudi Civil Procedure Law to be compliant with discovery practice. It also addresses some rules of the Saudi Enforcement Law related to discovery adoption in Saudi Arabia. The last subsection of Section 4.4 addresses the need for explicit discovery permissions in the power of attorney to allow Saudi attorneys to conduct discovery appropriately upon adoption.

Section 4.5 of Chapter Three provides some steps and formal methods to activate the application of discovery in the Saudi legal system. These methods include considering legitimate interest as the legal ground for discovery requests. This section also discusses how to change the methods of educating Saudi judges to make them more familiar with civil laws and the discovery practice, which would make the implementation of the discovery rules more effective. Section 4.5 also considers legal approaches to appointing discovery magistrates upon discovery adoption. This includes the recommendation to amend the Civil Procedure Law to assign judicial lieutenants as magistrates to oversee the discovery practice to save judges' time and effort with some

explanations about the current role of judicial lieutenants in the Saudi legal system. The last subsection of Section 4.5 discusses the proposed discovery sanctions that courts must apply on defiant litigants who violate discovery rules.

Section 4.6 of Chapter Three discusses the allocation of discovery costs upon adopting a discovery regime in Saudi Arabia. It also discusses the likelihood of the State being willing to cover discovery expenses. It also considers the parties that must be responsible for paying the cost of discovery if the State does not bear discovery costs upon adopting a discovery regime. The last subsection of Section 4.6 provides some recommendations for allocating discovery costs to litigants responsible for paying these costs.

#### **1.5.4 Chapter Four: Amendments Made Under Recent Laws and Potential Challenges of Adopting Discovery in Saudi Arabia**

##### **Chapter Four Sections:**

**5.1** Recent Civil Procedure Law Reforms in Saudi Arabia

**5.2** Recent Amendment in the Saudi Commercial Judicial System Preferring Early Disclosure

**5.3** Examinations of the Incompatibility of United States Discovery with the Civil Law System

**5.4** The Compatibility of Discovery with Islamic and Saudi Laws

**5.5** Challenges of Adopting a Discovery Regime in Saudi Arabia

**5.6** Coping with the Challenges of Adopting Discovery in the Saudi Legal System

Section 5.1 of Chapter Four addresses some improvements in the civil procedural system in Saudi Arabia established under the new Civil Procedure Law (enacted in 2013). These

improvements include setting new rules or amending existing rules under the old law to achieve a better resolution of cases. They also include improvements in regard to serving summons, defendants' appearances, evidentiary material disclosure rules, compelling non-parties to submit materials, and representation rules.

Section 5.2 of this chapter considers recent reforms in the commercial judicial system in Saudi Arabia to adopt new rules in the litigation process that encourage expedited litigation and the early disclosure of information in commercial cases. Section 5.2 also contains a discussion about recent amendments to commercial regulations to permit electronic exchange of memorandums and legal documents between parties to preserve time and resources and speed up the process of commercial litigations. This section also considers the newly required preliminary session for litigants in commercial cases to discuss their dispute and layout a roadmap before the pleading sessions to achieve the best resolution of the dispute as early as possible. The last subsection of Section 5.2 discusses the relevant parts to this dissertation of the newly enacted commercial law in Saudi Arabia: the Saudi Law of Commercial Courts and Procedures (2020), which adds to commercial law practice some discovery aspects similar to the United States federal discovery rules.

Section 5.3 of Chapter Four addresses some arguments about the incompatibility of United States discovery approaches with those of a civil law system with a consideration of their relevance to adopting discovery in Saudi Arabia. This section discusses how similar proposals to adopt discovery were received in Europe. It also highlights literature that has addressed perceived incompatibilities and differences between civil law jurisdictions and the United States approaches to discovery. This includes a comparative perspective and a procedural contrast between the

United States and Germany. Section 5.3 also discusses the experience of some civil law jurisdictions in endeavoring to apply United States discovery methods to their legal systems. This includes Japan, which enacted its discovery regime in 1996 as well as Taiwan, which adopted discovery in the year of 2000.

Section 5.4 of this chapter examines the compatibility of discovery with the rules of Islamic and Saudi laws. This section shows that Islamic and Saudi laws do not have major restrictions on the methods of proof in civil cases. It also considers Islamic Law's flexibility in adopting new methods to find facts and obtain materials as long as these methods do not contradict the general rules of Shariah. Section 5.4 also addresses an exception to this Islamic Law flexibility: restricted methods of proof in Islamic Criminal Law. This section also demonstrates how discovery fulfills some Islamic Law justice requirements. Section 5.4 also includes explorations about any cultural or religious reasons that might negatively impact the adoption of discovery in Saudi Arabia. Conducting these explorations will help to identify the applicability of the United States discovery regime to Saudi Arabia.

Section 5.5 of Chapter Four considers the possible challenges of adopting a discovery regime in the Saudi legal system. These include the difference between discovery and the current process to establish claims and defenses in Saudi courts, the tribunals' negative reactions to previously enacted laws in Saudi Arabia and how this might affect the adoption on discovery, and the influence of conservatives on the legislation process in Saudi Arabia and how this might affect the discovery adoption. The last challenge discussed in Section 5.5 is the difference between civil law and common law jurisdictions, which complicate legal transplants from one jurisdiction to another.

The last section of Chapter Four, Section 5.6, analyzes the best approaches that can be taken to confront and resolve the challenges of adopting discovery in Saudi Arabia and avoiding undesirable legal consequences. One of these is demonstrating that a discovery agreement is compatible with the general rules of Shariah Law. Section 5.6 then discusses the main legislation basis in Saudi Arabia, the unprescribed public interest (*Almaslaha Almursalaha*), as one of the legal methods to cope with the challenges of adopting discovery. This section also proposes including discovery clauses in commercial contracts as a legal approach to applying discovery practice in the Saudi legal system whether the legislature in Saudi Arabia embraces this dissertation to include discovery as part of the Saudi Civil Procedure Law or not. The last subsection of Section 5.6 discusses the relation between discovery adoption and the current attorney-client relationship in Saudi Arabia. This includes a proposal to reform the rules that govern this relationship upon adopting a discovery regime to be more advanced in protecting clients' crucial information from being unreasonably subject to discovery and therefore ensuring the proper practice of discovery.

## 2.0 Chapter One: The Saudi Arabia Civil Justice System and its Lack of a Discovery Regime

### 2.1 The Role of Islamic/Shariah Law in the Saudi Arabian Legal System

#### 2.1.1 What is Islamic Law (or Shariah Law)?

In short, Islamic Law rules are the rules stated in the *Quran* (the holy religious book for Muslims) and *Sunnah* (the certified rules, actions, and admissions of the Muslim Prophet "Mohammed"). This is in addition to Islamic Jurisprudence (*Fiqh*, literally "understanding"), which consists of the opinions and books of distinguished Islamic scholars (*Ulama*, literally "the possessors of knowledge"), which were written during the last fourteen hundred years, the age of the Islamic religion.<sup>112</sup>

Professor Frank Vogel, who thoroughly examined the Saudi legal system in his book *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia*, writes in this regard:<sup>113</sup>

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<sup>112</sup> Maren Hanson, *The Influence of French Law on the Legal Development of Saudi Arabia*, 2 ARAB L.Q. 272, 272-273 (1987); see also FRANK E. VOGEL, *ISLAMIC LAW AND THE LEGAL SYSTEM OF SAUDI: STUDIES OF SAUDI ARABIA* (2000), at 4-5, 16, 22, 145-46; see also Hossein Esmaeili, *On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System*, 26 ARIZ. J. INT'L & COMP. L. 1, 6-7 (2009); see also Ansary, *supra* note 98, at 66; see also Al Khnein, *supra* note 93, at 6; see also Zidaan, *supra* note 92, at 5.

<sup>113</sup> Vogel, *supra* note 112, at 22.

[The] western concept of law is that it is a system of formal, objective, publicly known, generally applicable, compulsory rules, whether published legislation, the decisions of courts interpreting legal materials and applying them, or from authoritative scholarly analyses of legislation, court decisions, and other sources of law. [In Islamic Law, however, this concept is less followed.] [P]erhaps falling within it is a rule stated categorically and clearly in a Qur'anic verse or in an authentic Hadith [authentic Prophet traditions] that the verse clearly states a ruling and binding legal judgment, acceptable and applicable in all Muslim societies...[A]nother form of law resembling this western notion of law is the law of a legal school, insofar as it is seen as a fixed legal corpus of rules that is binding on the school's adherents.

Unlike most civil law jurisdictions, Saudi judges, when considering cases, first examine the rules stated in the *Quran*, *Sunnah* and the books of Hanbali Islamic Jurisprudence<sup>114</sup> (*Fiqh*).<sup>115</sup> The purpose of this examination is to observe the relevant rules that should be applied on the considered cases.<sup>116</sup> If the judge does not find in these resources enough rules related to the case

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<sup>114</sup> The Hanbali school of thought is one of the four well-known Sunni schools of thoughts. The name of this school is inspired by the name of the school founder Imam Ahmed Ibn-Hanbal, who lived in the second century of Islam (AD 780-855). Ibn-Hanbal school of thought is a well-established school in the Saudi society as well as the Hanbali jurisprudence in the Saudi judicial system. See Al-Jarbou, *supra* note 101, at 206.

<sup>115</sup> Vogel, *supra* note 112, at 16; see also Ahmed A. Al-Ghadyan, *The Judiciary in Saudi Arabia*, 13 ARAB L.Q. 235, 235 (1998); see also Ansary, *supra* note 98, at 67-68.

<sup>116</sup> "The Judicial Board designated particular publications within the Hanbali School as the official and main sources for the Shariah courts within its jurisdiction. Paragraph (c) of the resolution stipulated that judges were to rely on the two late Hanbali authoritative works authored by the famous Hanbali jurist Mansur ibn Yunus al-Bahuti al-Hanbali (1052 AH/1642 AD): (1) *Sharh Muntaha al-Iradat* (Explanation of *Muntaha al-Iradat* Manual); and, (2) *Sharh al-lqna'* (Explanation of *Al-lqna'* Manual). In seeking a resolution to a given problem, judges should follow the answer upon which both books agree, or which was provided by one of them and not the other. However, in the

at hand, the judge often turns to the recent statutory regulations and multiple courts' precedents looking for the appropriate rules to be applied on the case in question.<sup>117</sup> Upon examining some Saudi judges' rulings, it is clear that the main resources that the Saudi judges use in issuing their judgments are the *Quran*, *Sunnah*, and some books for Islamic scholars and jurists from different Islamic schools of thoughts (Hanbali, Shafi'i, Maliki and Hanafi),<sup>118</sup> in addition to some consultation of modern civil statutes.<sup>119</sup>

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event of a discrepancy, *Sharh al-Muntaha* prevails; when neither of the two books are available, or if they do not provide an answer to a given problem, judges revert to an abridgment or summary thereof: (1) *Zad al-Mustaqni' fi Ikhtisar al-Muqni'* (A Summary of *Al-Iqna'*) by Sharaf al-Din Abu al-Naja al-Hajjawi (968 AH/1560); and, (2) *Dalil al-Talib li Nayl al-Matalib*, (A Summary of *Muntaha al-Iradat*) by Mar'i ibn Yusuf al-Karmi (961 AH/1554). If an answer still cannot be found, other Hanbali law books may be consulted, and decisions issued in accordance with the prevailing opinion that they contain." See Ansary, *supra* note 98, at 67-68.

<sup>117</sup> Salah Al-Hejailan, *Legal Developments in Saudi Arabia*, 4 Y.B. ISLAMIC & MIDDLE E. L. 338, 340 (1997-1998).

<sup>118</sup> "The four schools of Sunni jurisprudence are distributed throughout the Islamic World as follows: The Hanafi school was the official law of the Ottoman Empire, and is today the official law of Iraq, Egypt, Sudan, and Libya. It is found among Muslims in Turkey, Syria, Lebanon, Jordan, India, Pakistan, and Afghanistan. The Maliki school is found in North Africa, among the Muslims of West Africa, and Kuwait. The Shafi school is prevalent in Lower Egypt, the Hijaz, Southern Arabia, East Africa, Indonesia, and Malaya. The Hanbali school is found in Qatar and is the official law of Saudi Arabia." See Hanson, *supra* note 112, at 274.

<sup>119</sup> Ansary, *supra* note 98, at 66. see also Vogel, *supra* note 112, at 16, 22, 145-46; see also Al-Ghadyan, *supra* note 115, at 235.

Judges in Saudi courts have been highly urged, and sometimes obliged, to rely on the jurisprudence of the Hanbali school of thought.<sup>120</sup> The purpose of this encouragement is to eliminate disparity between similar judgments and to inform litigants of the kind of law the courts will apply in their cases.<sup>121</sup> In regard of the formulation of adjudications in Saudi Arabia, Professor Vogel writes: "[t]he judge must follow God's law, seeking to know it from the revelation, the Qur'an and Sunnah. The judge must be knowledgeable about the texts, a scholar...[In a gray area], where there is no clear verse of the Qur'an or report from the Prophet, the judge is to use his understanding...[H]is understanding may be guided by similarities and analogies to cases he finds in the revelation."<sup>122</sup>

Professor Vogel further explains Islamic Law and its role in Saudi Arabia by stating:<sup>123</sup>

Except for the Qur'an, all of the ... sources of Saudi law, even the collection of the Prophet's practices, were compiled or written by scholars, the Ulama. The authority of Ulama to produce these texts rests on their status as scholars, and not on any official or formal positions they may hold such as judge or instructor in a scholarly institution...From these sources, then, other Ulama, such as the Mufti and judges of Saudi Arabia, produce Fiqh to guide others or to decide disputes. Ordinarily, it does take a scholar to evaluate these sources and create a ruling. A non-scholar is under

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<sup>120</sup> Al-Jarbou, *supra* note 101, at 206; see also Al-Ghadyan, *supra* note 115, at 235; see also Esmaeili, *supra* note 112, at 33, where the author states "[t]he courts in Saudi Arabia follow the Hanbali School version of Shariah law in core issues such as contract, family, and criminal law. The system corresponds more closely to a civil law system, rather than to the common law. Theoretically, Shariah and Islamic jurisprudence have more similarities with common law than civil law."

<sup>121</sup> Al-Jarbou, *supra* note 101, at 206; see also Ansary, *supra* note 98, at 67&68.

<sup>122</sup> Vogel, *supra* note 112, at 16.

<sup>123</sup> *Id.* at 145-46.

conscientious obligation to seek the advice of a person more skilled than he or she in interpretation, either obtaining his fatwa or consulting a book in which he has recorded his opinions.

This subsection discussed the main principles of Islamic Law and the Islamic Law role in the Saudi legal system. The subsequent one focuses on the nature of the Saudi legal system with some examinations of the influence of Shariah on the sources of legislation, the adopted laws, and authority branches in Saudi Arabia. This following subsection also includes a brief discussion about the nature of the branches of authority in Saudi Arabia.

### **2.1.2 The Nature of the Legal System in Saudi Arabia**

The Saudi legal system consists of a blend of Islamic Law (also called Shariah law) and modern civil laws. Due to the unique nature of the Saudi legal system and its recentness, many Saudi modern civil laws in different fields of law have been borrowed either in whole or in part from the legal systems of some Western and Arab countries, particularly the Egyptian legal system.<sup>124</sup> These borrowed laws do not contradict the general principles of Shariah laws in Saudi Arabia. The rules of Shariah law and enacted civil laws work simultaneously in the Saudi legal system to achieve justice and fulfill the society's juristic needs.<sup>125</sup>

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<sup>124</sup> Hanson, *supra* note 112, at 288; see also Al-Jarbou, *supra* note 101, at 210.

<sup>125</sup> Al-Ghadyan, *supra* note 115, at 235; see also Al-Jarbou, *supra* note 101, at 210. Even though Al-Jarbou criticized the Saudi legal system in this article, the author states on this page of the article the idea of "duality," which makes it worth citing from a criticizing article. See also Esmaeili, *supra* note 112, at 33.

The Kingdom of Saudi Arabia generally adopts the civil law system doctrine; however, the Saudi legal system is also greatly influenced by the rules of Shariah Law.<sup>126</sup> This combination makes the Saudi legal system a unique mixture of Islamic Law rules and some modern civil statutes that must be compliant with Islamic Law rules.<sup>127</sup> Even though some other Arab countries, such

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<sup>126</sup> In December 2014, the late King Abdullah issued a Royal Order to establish a committee to frame a new project to codify judicial verdicts to fulfill judiciary needs. Many Saudi legal scholars consider this Royal Order as a forward step towards codifying the legal rules of the Islamic Law. This project is part of the huge reform of the Saudi legal system initiated by King Abdullah. *See* Ansary, *supra* note 98, at 70; see also Ahmed Basrawi, *The Development of the Judicial System in Saudi Arabia under Vision 2030*, AL TAMIMI & CO. (Mar. 2018), <https://www.tamimi.com/law-update-articles/the-development-of-the-judicial-system-in-saudi-arabia-under-vision-2030/>, writing that "there is a special committee comprised of highly regarded scholars in Saudi Arabia appointed by King Abdullah to codify Sharia jurisprudence in relation to civil, contract, criminal and family cases in order to bring more clarity and uniformity to judicial rulings. This ongoing project will be a crucial tool in improving Saudi Arabia's legal and judiciary system"; see also *Litigation Procedures and Strategies: Saudi Arabia*, WORLD TRADEMARK REVIEW (Dec. 13, 2016), <http://www.worldtrademarkreview.com/Intelligence/trademark-litigation/2017/Country-chapters/Saudi-Arabia>. at 1.

<sup>127</sup> Basic Law of Governance, *supra* note 85, Art. 48; see also Hanson, *supra* note 112, at 274; see also Al-Ghadyan, *supra* note 115, at 235; see also *Litigation Procedures and Strategies*, *supra* note 126, at 1; see also Esmaeili, *supra* note 112, at 28, where this combination of Shariah and modern law in Saudi Arabia is expressed by the author, who writes: "[i]n some areas such as personal law matters (marriage, divorce, custody of children and inheritance), Islamic jurisprudence (Fiqh) is the dominant law. The ulema (Muslim jurists) are the interpreters of the law and deliver judgments in this area whilst the state sees no reason to involve itself with the ulama. Yet in other areas, such as criminal law, there is a kind of shared responsibility and power arrangement between the ulama and the King.

as Egypt, Jordan, Oman and a number of other jurisdictions in the Islamic World have legal systems that are a blend of civil law system principles and Islamic Law rules, most of these jurisdictions have several laws and regulations that explicitly contradict the rules of Shariah. Shariah laws are the constitutional and dominant laws over all other enacted laws in Saudi Arabia as per the statement of Article 1 of the Saudi *Basic Law of Governance*.<sup>128</sup> These enacted laws must not contradict the rules of Shariah; otherwise, they must be considered invalid. In any other legal jurisdiction, this would most likely not be the case.<sup>129</sup>

Another unique feature of the Saudi system is that it has no modern written Constitution, which has supremacy over all of the country's statutes and regulations, as the constitutions of most countries do.<sup>130</sup> The major sources of legislation, which have sovereignty over legislative practice in the Saudi legal system, are the legislative sources of Islamic Law.<sup>131</sup> These include the "*Holy*

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This cooperation is based on the nature of criminal law and procedure under Islam. In other areas, such as taxation, immigration, and traffic matters, the state is the primary authority."

<sup>128</sup> Saudi Arabia does not have a Constitution, but it has several constitutional documents and laws such as the Saudi *Basic Law of Governance*, the Law of the Council of Ministers and the Succession Commission Law.

<sup>129</sup> Esmaili, *supra* note 112, at 6-7; see also Al-Ghadyan, *supra* note 115, at 235.

<sup>130</sup> Basic Law of Governance, *supra* note 85, Art. 1. This article of the law states that the Constitution of the Kingdom of Saudi Arabia is the Book of God (the Holy Quran) and the Sunnah of His Messenger, peace be upon him. However, some legal scholars in the West call the Saudi *Basic Law of Governance* the new Saudi Constitution because it contains constitutional provisions similar to the distinctive constitutional clauses of other countries' constitutions.

<sup>131</sup> Vogel, *supra* note 112, at 34-36; see also Litigation Procedures and Strategies, *supra* note 126, at 1.

*Quran*," the holy religious book for Muslims;<sup>132</sup> "*Sunnah*," which contains certified rules, actions and admissions of the Muslim Prophet "*Mohammed*" which occurred during his lifetime;<sup>133</sup> the "*Ijma*," which is the consensus of Muslim religious scholars on the legitimacy of a subject, a rule or a religious principle;<sup>134</sup> and the "*Qiyas*," literally "analogy," which extends a legal rule that is well established in one legal situation to apply to another situation because the two situations share the same characteristic,<sup>135</sup> and this validates applying the same rule to both.<sup>136</sup> Jurisprudential interpretations, opinions and discussions regarding any of these four resources of legislation form the *Fiqh* "*understanding*" or the Islamic jurisprudence. Other legal documents exist in Saudi

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<sup>132</sup> Basic Law of Governance, *supra* note 85, Art. 7; see also Vogel, *supra* note 112, at 37-39; see also Litigation Procedures and Strategies, *supra* note 126, at 1.

<sup>133</sup> Basic Law of Governance, *supra* note 85, Art. 7; see also Vogel, *supra* note 112, at 40-43; see also Litigation Procedures and Strategies, *supra* note 126, at 1.

<sup>134</sup> Basic Law of Governance, *supra* note 85, Art. 8; see also Vogel, *supra* note 112, at 45-50; see also Litigation Procedures and Strategies, *supra* note 126, at 1; see also Hanson, *supra* note 112, at 273, writing that "Ijma, the third source, is the consensus of the community and is used to resolve situations in which no applicable rules are found in either the Quran or Sunna. It is believed by Islamic scholars that God will not permit an entire community to follow a particular practice if it offends His law."

<sup>135</sup> Islamic law calls this common characteristic a "legal cause" or (Ella) in Arabic.

<sup>136</sup> Vogel, *supra* note 112, at 51-55; see also Hanson, *supra* note 112, at 273, stating "[i]f the Quran, Sunna, and Ijma are unable to supply an appropriate solution to a problem, the fourth source, Qiyas or analogy, is used to derive the correct rule. This allows for the use of logic and reasoning and results in a wider range of interpretation. The use of both Ijma and Qiyas varies with the particular school of Islamic thought."

Arabia that should be considered as constitutional documents (Basic Laws)<sup>137</sup> are: the Saudi Basic Law of Governance,<sup>138</sup> the Law of the Council of Ministers,<sup>139</sup> the Consultative Council Law (*Shura Council Law*),<sup>140</sup> the Succession Commission Law,<sup>141</sup> and the Law of Provinces.<sup>142</sup> The reason for considering these to be constitutional documents is because the legislative

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<sup>137</sup> Bureau of Experts at The Council of Ministers website [hereinafter BETCM website], First Folder, *available at*:  
<https://laws.boe.gov.sa/BoeLaws/Laws/Folders/2>.

<sup>138</sup> BETCM website, *The Saudi Basic Law of Governance*, *available at*:  
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/16b97fcb-4833-4f66-8531-a9a700f161b6/1>

<sup>139</sup> BETCM website, *The Saudi Council of Ministers Law*, *available at*:  
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/93e87aa7-f344-4711-b97c-a9a700f1662b/1>

<sup>140</sup> BETCM website, *The Saudi Consultative Council Law*, *available at*:  
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/b5cf540a-e6ac-426a-b348-a9a700f163de/1>

<sup>141</sup> BETCM website, *The Saudi Succession Commission Law*, *available at*:  
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/3213c2f6-eaf8-45dc-8f8c-a9a700f167ee/1>

<sup>142</sup> BETCM website, *The Saudi Law of Provinces*, *available at*:  
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/93f81644-fbbc-49ca-b33c-a9a700f16701/1>

(regulatory)<sup>143</sup> branch in Saudi Arabia tends to consider these laws as primary laws that have superiority over all the other modern laws in the country.<sup>144</sup>

The government in Saudi Arabia, as in many other countries including the United States, consists of three branches: the judiciary branch, the executive branch, and the legislative branch.<sup>145</sup> The Saudi *Basic Law of Governance*, which is considered in Saudi Arabia as a constitutional document, obliges these three branches of authority to cooperate with each other in the performance of their functions to achieve the best interest of society. The same law also states that any disputes arising among these branches must be referred to the King since he is the main reference for all of these authorities.<sup>146</sup>

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<sup>143</sup> The authority in Saudi Arabia prefers to use the term "regulatory" instead of "legislative" in the Saudi laws and regulations. This intention is clearly emphasized in the Saudi *Basic Law of Governance* since this law use the term regulatory authority to refer to the legislative authority in Saudi Arabia. Practically, no genuine difference exists between the two terms. The reason for using the term "regulatory" is only to emphasize that the legislative branch in Saudi Arabia is regulating Islamic rules and not legislating alternative secular laws. See also JOSEPH A. KECHICHIAN, *LEGAL AND POLITICAL REFORMS IN SAUDI ARABIA* (2013), at 26; see also Hanson, *supra* note 112, at 289, where the author writes "[b]ecause only God can legislate, the Arabic word 'kanun' which means 'law' is not used in Saudi Arabia. In place of kanun which represents secular or temporal law (and is therefore prohibited by the Sharia), Saudi Arabia employs the word 'nizam' meaning 'regulation'."

<sup>144</sup> BETCM website, First Folder, *available at*: <https://laws.boe.gov.sa/BoeLaws/Laws/Folders/2>.

<sup>145</sup> Basic Law of Governance, *supra* note 85, Art. 44; see also Ansary, *supra* note 98, at 12.

<sup>146</sup> Basic Law of Governance, *supra* note 85, Art. 44; see also Ansary, *supra* note 98, at 12.

This subsection of Chapter One focused on the current Saudi legal system and the impact of Shariah Law on the nature of the legal system, including sources of legislation and the adoption of civil laws. The next one discusses the definition and concepts of civil procedure in Islamic Law and in the Saudi Arabia legal system. It also discusses the purposes and goals of establishing civil procedure rules in addition to discussing the influence of Shariah on the Saudi Civil Procedure Law.

### **2.1.3 Civil Procedure in Islamic and Saudi Laws**

Defining the term civil procedure in Islamic and Saudi laws is important so that readers of this dissertation can understand the rules of the civil procedural system in Islamic Law, and consequently, the rules of the legal system of Saudi Arabia as well as the rules of Saudi Civil Procedure Law. It is true that most Saudi civil procedure rules are inspired from the procedural rules of Islamic Law. The name of the Saudi Civil Procedure Law can be translated as the *Law of Procedure before Sharia Courts*.<sup>147</sup> This is to show the solid connection between Islamic Law and the Saudi legal system, especially in terms of the civil procedural rules to be applied in courts of law.

Scholars of Islamic jurisprudence have defined civil procedure in numerous ways to describe the court rules that both courts and litigants must observe when practicing law. Most of

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<sup>147</sup> BETCM website, *The Saudi Civil Procedure Law*, available at:

<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/f0eaae46-9f84-40ee-815e-a9a700f268b3/2>

these definitions agree on certain principles.<sup>148</sup> Therefore, the rules of civil procedure in both the Islamic Law and the Saudi Civil Procedure Law may be defined as the rules and regulations governing the practice from pleading and related matters at the beginning of the case to the final decision. This definition is comprehensive and includes, within the land of procedural law, all procedural actions that occur in court. These actions begin with filing a complaint in court and proceed until the final judgment on the disputed matter takes place.<sup>149</sup> The researcher believes this to be the best definition to describe the procedure of legal practice in the Saudi courts of law.<sup>150</sup>

The Saudi Civil Procedure Law is the primary procedural law in the Saudi legal system. This dissertation mainly considers this law. All the other procedural laws in Saudi Arabia consider the Civil Procedure Law as the main procedural source. If any gap exists in the rules of the Criminal Procedure Law or the Procedure Law before the Board of Grievances, these laws must refer to the Civil Procedure Law to fill in these procedural gaps and fulfill justice requirements.<sup>151</sup>

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<sup>148</sup> Al Khnein, *supra* note 93, at 26.

<sup>149</sup> *Id.* at 27; see also Bakr Al-Haboob, *Nazariat Albotla'an Fe Nizam Almorafa'at Alshareyah [Theory of Invalidity in the Saudi Shariah Procedure Law]*, 28 AL-ADEL JOURNAL 163, 166 (2006).

<sup>150</sup> The procedures of legal practice in Saudi Arabia are quite similar to the Islamic procedural rules. To emphasize this connection, the legislation in Saudi Arabia names the Saudi Civil Procedure Law as the Law of Procedure Before Shariah Courts to demonstrate the connection of this law to the Islamic procedural laws. See Civil Procedure Law, *supra* note 6.

<sup>151</sup> NIZAM AL-EJRA'AAT AL-JAZAE'AH [THE SAUDI CRIMINAL PROCEDURE LAW], Royal Decree No. (M / 2) 22 Muharram 1435 H. [25 November 2013] Cabinet Resolution (No. 12) 8 Muharram 1435 H. [14 November 2013],

The main purpose of setting civil procedural rules is to regulate legal approaches to safeguard public rights and terminate people's disputes through courts of law.<sup>152</sup> The main intention of setting these formal methods is to protect society's and individual's legal rights, which is considered as a binding rule.<sup>153</sup> Because of this, unlike all other Saudi civil laws, the general rule for litigants is to follow only procedural methods set by the Civil Procedure Law. Litigants, therefore, cannot agree to disregard any process set by the Civil Procedure Law unless they are instructed to do so by the court.<sup>154</sup> Courts of law would most likely consider conducting any legal procedures that are not specifically mentioned either in Islamic Law rules or in the Saudi Civil Procedure Law to be invalid.<sup>155</sup>

One of the declared purposes of the Saudi Civil Procedure Law is to manage legal practice in terms of the process that the judicial branch must follow to protect and maintain individual's and entities' rights. The Civil Procedure Law in Saudi Arabia provides detailed rules that deal with three major subjects.<sup>156</sup>

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Art. 218, [hereinafter Criminal Procedure Law]; see also Board of Grievances Procedure Law, *supra* note 90, Art. 4, 5, 43&60; see also Awad, *supra* note 29, at 10.

<sup>152</sup> Al-Haboob, *supra* note 149, at 166; see also Al Khnein, *supra* note 93, at 26-27.

<sup>153</sup> Al-Haboob, *supra* note 149, at 173.

<sup>154</sup> Civil Procedure Law, *supra* note 6, Art. 95; see also Al-Haboob, *supra* note 149, at 176.

<sup>155</sup> Civil Procedure Law, *supra* note 6, Art. 95; see also Al-Haboob, *supra* note 149, at 174.

<sup>156</sup> Awad, *supra* note 29, at 6.

First, the Civil Procedure Law discusses rules of the judicial entity and contains rules that deal with the composition of the judiciary branch, civil court types and roles, and the duties and rights of individuals who work in or deal with the judiciary branch.<sup>157</sup> Second, the Civil Procedure Law addresses the rules of distributing jurisdiction among civil courts, depending on the type and size of cases.<sup>158</sup> Third, the law also discusses in detail the procedures litigants must follow before courts of law to obtain legal protection. These procedures include rules that cover every aspect of the case, from its filing in court until the granting of final judgment.<sup>159</sup> It also includes methods to appeal these adjudications.<sup>160</sup> A separate law, the Saudi Enforcement Law, discusses all matters relevant to the procedures of enforcement in Saudi Arabia, such as competent authorities and enforcement disputes.<sup>161</sup>

Another major goal of formulating civil procedural law is to finalize disputes at the earliest possible time. To fulfill this purpose, the Saudi Civil Procedure Law applies as a general policy what is called the principle of Concentration of Dispute.<sup>162</sup> The Concentration of Dispute refers to the strict procedural orderliness that both litigants and tribunals must follow to reach adjudications

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<sup>157</sup> Civil Procedure Law, *supra* note 6, Art. 6, 11-14, 42-43, 62, 66, 71, 94-100, 106, 114, 117, 119, 122, 125, 128, 144, 163-66, 208-10, 230 and 238.

<sup>158</sup> *Id.* Art. 24-40.

<sup>159</sup> *Id.* Art. 41-175.

<sup>160</sup> *Id.* Art. 176-204.

<sup>161</sup> Enforcement Law, *supra* note 88; see also Awad, *supra* note 29, at 6.

<sup>162</sup> The principle of Concentration of Dispute is called in Arabic legal language (Mabda'a Tarkeez Al-Qusoma).

at the earliest time. The Saudi Civil Procedure Law sets very precise time limits that litigants must comply with to finalize disputes with the lowest costs, and therefore fulfill the Concentrations of Dispute principle.<sup>163</sup>

To activate the application of the principle of Concentration of Dispute, the Saudi Civil Procedure Law requires some factors to be met. Article 45 of the Civil Procedure Law contains one of these factors. This article orders defendants (similar to plaintiffs' obligation under Article 41 of the same law) to present to court all of their claims and defenses accompanied with the materials in their possession or control that support their allegations before the assigned first hearings. The purpose of this requirement is to allow the judges overseeing the cases the opportunity to examine the submitted documents before encountering the litigants.<sup>164</sup> This factor, however, is not enforced in the Saudi legal system as it should be, and many litigants currently do not actually comply with this disclosure of evidence rule. From my practical experience in the legal field in Saudi Arabia, I can attest that most often parties present materials they possess on or after the first hearing not before. According to the Saudi Civil Procedure Law, litigants may amend their original allegations after plaintiffs file their case in court and after the first hearing concludes if they have valid reasons to do so.<sup>165</sup> This includes presenting new materials in court, which means that the new materials prompt the litigant to amend their original allegations accordingly.

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<sup>163</sup> Awad, *supra* note 29, at 387.

<sup>164</sup> Civil Procedure Law, *supra* note 6, Art. 45; See also Article 41 of the same law, which specifies the information, including pieces of evidence in their possession, that plaintiffs must submit to court when they file their cases.

<sup>165</sup> *Id.* Art. 83-84.

Article 178 of the Civil Procedure Law contains another factor necessary to activate the Concentration of Dispute principle. Article 178 contains some limitations that prevent litigants from submitting any appeals on preliminary injunctions if it will not end the disputes before the courts of law.<sup>166</sup> One reason for such prevention is to safeguard the tribunals' and litigants' resources until achieving their final adjudications and terminating the disputes before the courts of law. Postponing appealing preliminary injunctions does not forbid any litigant from appealing the first-degree court's final decision.<sup>167</sup> In other words, Article 178 prevents litigants from appealing preliminary injunctions until the court decides the case because the court's final adjudication may be in favor of the party who seeks to appeal the preliminary injunction, which makes the appealed preliminary injunctions before granting the final adjudication on the case considered a waste of judicial resources.

Article 75 of the Civil Procedure Law and its executive regulation<sup>168</sup> contain a third factor related to the principle of Concentration of Dispute in the Saudi procedural system. This factor deals with the revocation of the right to proceed with specific legal actions or file certain motions if these procedures were not performed in a timely manner or in the order specified by law. One

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<sup>166</sup> *Id.* Art. 85&178.

<sup>167</sup> *Id.* Art. 176-77; see also Awad, *supra* note 29, at 387.

<sup>168</sup> The executive regulation of a law is the document of regulations issued by the competent executive authority in the State to interpret the rules of the law and to set forth plans to put these rules into effect practically. The executive regulation of the Saudi Civil Procedure Law is the document of regulations issued by the Ministry of Justice and the Supreme Judicial Council that contains further explanation for each article of the Saudi Civil Procedure Law.

example of this is the revocation of the right to file a motion to dismiss a case if the interested litigant presents any claim or challenges any defense regarding the subject matter of the case.<sup>169</sup>

In order to maintain the tribunals' and defendants' resources and to safeguard them from malicious lawsuits, which is a main goal of enforcing civil procedural rules, the Saudi Civil Procedure Law also requires judges, before questioning defendants, to ask plaintiffs to submit to tribunals all evidentiary materials that support their cause of action and allegations against defendant.<sup>170</sup> The tribunals must dismiss plaintiffs' cases if they fail to provide sufficient pieces of evidence.<sup>171</sup> The law requires the defendants to answer the plaintiffs' claims either (3) days or (1) day prior to the first assigned hearing, depending on the case type. If the court acknowledges the plaintiff's allegations, then the court may question the defendant about their dispute.<sup>172</sup>

Adopting a discovery regime to be a stage in the procedural process in the Saudi civil litigations will prompt the enforcement of the Concentration of Dispute principle in the legal system. This is because discovery practice will most likely help to increase the efficiency of resolving disputes by setting precise time limits that litigants must comply with to end their disputes at the earliest time and with the lowest costs.

In sum, Section 2.1 of Chapter One examined the civil procedure aspects in Saudi Arabia and in Islamic Law in addition to the effects of Shariah on the Saudi civil procedural principles.

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<sup>169</sup> Civil Procedure Law, *supra* note 6, Art. 75; see also Awad, *supra* note 29, at 387.

<sup>170</sup> Civil Procedure Law, *supra* note 6, Art. 66.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* Art. 45.

The following section, Section 2.2, considers the structural arrangement of government in Saudi Arabia (branches of authority), including the essence of the separation of powers in the country, the process of enacting new laws, and the King's role especially in relation with the judiciary branch. It also includes a discussion about the nature of the current approaches to judicial education in Saudi Arabia.

## 2.2 The Structure of the Government in Saudi Arabia

### 2.2.1 The Branches of Authority and Formulation of Laws

#### 2.2.1.1 Branches of Authority

State authority in Saudi Arabia, as in most countries, consists of three branches: the executive, the legislative (regulatory),<sup>173</sup> and the judicial. The Saudi *Basic Law of Governance* (Basic Law) discusses each branch's power, and its relationship to the other branches.<sup>174</sup> Even though the Basic Law confirms that each branch may not interfere in another branch's specialty, no actual separation of powers between the executive and legislative branches exists in Saudi Arabia.<sup>175</sup> As discussed in the next section, the separation of powers does exist to some extent between the judiciary and executive branches. The Saudi *Basic Law of Governance* and the Judiciary Law maintain the principle of separation of powers between the King and executive

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<sup>173</sup> The authority in Saudi Arabia prefers to use the term "regulatory" instead of "legislative" in the Saudi laws and regulations. This intention is clearly emphasized in the Saudi *Basic Law of Governance* since this law uses the term regulatory authority to refer to the legislative authority in Saudi Arabia. Practically, no genuine difference exists between the two terms. The reason for using the term "regulatory" term is only to emphasize that the legislative branch in Saudi Arabia is regulating Islamic rules and not legislating alternative secular laws. See also Kechichian, *supra* note 144, at 26.

<sup>174</sup> Basic Law of Governance, *supra* note 85, Art. 44; see also Kechichian, *supra* note 144, at 25.

<sup>175</sup> Ansary, *supra* note 98, at 12; see also Kechichian, *supra* note 144, at 29.

branch, and the judiciary branch by blocking any potential interference in judges' judicial performance.<sup>176</sup>

Interfering in another branch's specialty does occur, for instance, in the process of making laws. Both the executive branch, represented by the King and the Council of Ministers, and the legislative branch, represented by the Consultative (*Shura*) Council, must work cooperatively to draft and activate statutes and regulations.<sup>177</sup> The King, the Council of Ministers, and the Consultative (*Shura*) Council share legislature, while the Consultative Council (the Parliament or Congress) is the sole competent authority for legislation in most civil law countries.<sup>178</sup>

The Consultative (*Shura*) Council as a legislature has the power to examine any new proposed bills and to discuss modification of enacted laws.<sup>179</sup> To approve the enactment of bills or amendment of statutes, two thirds of the Council's members must agree on the matter.<sup>180</sup> The Consultative Council then submits its decision to the King (who is also the Prime Minister). The King then refers the matter to the Council of Ministers for discussion and approval by the ministers

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<sup>176</sup> Judiciary Law, *supra* note 86, Art. 1-4; see also Basic Law of Governance, *supra* note 85, Art. 46&48; see also Al-Ghadyan, *supra* note 115, at 237; see also Kechichian, *supra* note 144, at 25.

<sup>177</sup> Basic Law of Governance, *supra* note 85, Art. 67; see also Ansary, *supra* note 98, at 12; see also Kechichian, *supra* note 144, at 26.

<sup>178</sup> NIZAM MAJLIS AL-SHURA [THE SHURA COUNCIL LAW], Royal Decree No. (A/91) 27 Shaban 1412 H. [1 March 1992], Art. 23, [hereinafter Shura Council Law]; see also Kechichian, *supra* note 144, at 26&120.

<sup>179</sup> Shura Council Law, *supra* note 178, Art. 15; see also Kechichian, *supra* note 144, at 120.

<sup>180</sup> Shura Council Law, *supra* note 178, Art. 16&17; see also Ansary, *supra* note 98, at 17; see also Kechichian, *supra* note 144, at 120.

who are appointed by the King.<sup>181</sup> The matter in question might also be passed to the Bureau of Experts at The Council of Ministers (BETCM) for further consideration.<sup>182</sup>

If the perspectives of the Consultative Council and the Council of Ministers differ regarding enacting or amending a statute, then the final decision will be up to the King, who decides whether to adopt one of the council's conclusions or to return the matter to the Consultative Council for reconsideration.<sup>183</sup> As a matter of public policy,<sup>184</sup> any proposed laws or regulations must be compatible with Shariah laws (Islamic Law) and the Saudi *Basic Law of Governance* since they are superior laws in the legal system of Saudi Arabia. The legislature must examine all their bills to ensure that they fully comply with these laws; otherwise, the other branches of authority

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<sup>181</sup> Shura Council Law, *supra* note 178, Art. 16&17; see also Ansary, *supra* note 98, at 17; see also Kechichian, *supra* note 144, at 120.

<sup>182</sup> Ansary, *supra* note 98, at 17; see also Kechichian, *supra* note 144, at 120.

<sup>183</sup> Shura Council Law, *supra* note 178, Art. 17; see also Kechichian, *supra* note 144, at 120. Some commenters argue that the Saudi legislative entities are only "monarchical fig leaf" since the King is the one who appoints all the members of the Consultative Council and the Council of Ministers. See Vogel, *supra* note 112, at 170 where he states that "Saudi Arabia has constitutionally defined legislative and executive branches. But at the present stage of Saudi constitutional development, they are still understood as extensions of the king's power, however much they may have become indispensable and institutionalized."

<sup>184</sup> A big debate remains about the exact significance of the "Public Policy" term in the Saudi laws. This term may be defined as the set of political, social, economic and moral foundations on which the Saudi community is based. These foundations, however, must comply with Shariah laws to be considered valid foundations in Saudi Arabia.

would most likely reject these proposed bills.<sup>185</sup> To comprehend this matter more fully, the next subheading discusses the practical process to formulate new laws and regulations through the legislature in Saudi Arabia.

### **2.2.1.2 Formulation of Laws in the Saudi Legal System**

Saudi Arabia adopts the civil law doctrine and has statutes governing many areas of law. In fact, some Saudi statutes were adopted from other legal jurisdictions, such as the Egyptian and French legal systems, especially in the area of private law.<sup>186</sup> The Saudi legislature had slightly modified some of the adopted statutes to be compatible with Shariah laws and not to conflict with the public policy of the Kingdom of Saudi Arabia.<sup>187</sup> Some examples of adopted, but modified, statutes are in the Saudi Corporate Law and the Saudi Criminal Procedure Law.<sup>188</sup> Saudi Arabia also adopted other regulations in the public law area, such as the regulations that govern customs and public finance.<sup>189</sup>

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<sup>185</sup> Basic Law of Governance, *supra* note 85, Art. 48&67; see also Ansary, *supra* note 98, at 19.

<sup>186</sup> Hanson, *supra* note 112, at 274&288.

<sup>187</sup> As stated earlier, a big debate remains about the exact significance of the "Public Policy" term in the Saudi laws. This term can be defined as the set of political, social, economic, and moral foundations on which the Saudi community is based. These foundations, however, must comply with Shariah laws to be considered valid foundations in Saudi Arabia.

<sup>188</sup> Criminal Procedure Law, *supra* note 151.

<sup>189</sup> Hanson, *supra* note 112, at 290; see also Ansary, *supra* note 98, at 68-69.

Even though many of the provisions of the old Saudi Judiciary Law (enacted in 1975) were taken from the rules of Islamic jurisprudence, some of the provisions of this law were greatly influenced by the judiciary systems of other Arab countries, such as Egypt, which adopts the principles of the civil law system.<sup>190</sup> The flexible nature of the Saudi legal system makes adopting foreign legal processes highly possible, as long as they comply with Shariah laws. This includes the possibility of adopting a formal regime to practice discovery in the Saudi legal system.<sup>191</sup>

In terms of the process of making new statutes or revising enacted ones in Saudi Arabia, these laws have to pass through two major entities: the Consultative Council (*Shura Council*) and

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<sup>190</sup> Al-Jarbou, *supra* note 101, at 210; see also Hanson, *supra* note 112, at 290, where the author states "[a] prime example of the influence of French law in the area of private law is the Saudi Companies Law. Royal Decree No. M-6 dated 22 Rabia 1385 (21 July 1965) was copied from the Egyptian code, which was directly patterned after the French company law before the amendments of 24 July 1966. The types of company formation available for Saudi companies corresponds directly to their French counterparts. These two examples of many emphasize the profound influence of French law on the development of Saudi law, an influence permeating all areas of the law with the exception of personal family law, which remains strictly Islamic. Much of this influence, as can be seen, has come by way of Egypt which began its relationship with the French legal system many years before."

<sup>191</sup> Hanson, *supra* note 112, at 290, where the author writes "[t]his brief study demonstrates how Saudi Arabia was able to take advantage of the legal expertise of its neighbors and fill in the voids left by Islamic law while always conforming to the Sharia. The Kingdom is first and foremost an Islamic state and owes special thanks to Egypt for its legal contribution based on an integration of French and Islamic principles in the creation of its legal institutions. Egypt has been the conduit for the reception of French legal principles into the Islamic culture of Saudi Arabia. The Kingdom has now entered the twentieth century along a path of development integrating Western legal concepts for the benefits of its citizens while always retaining its Islamic heritage."

the Council of Ministers.<sup>192</sup> The Consultative Council has legislative authority, which is its primary specialization in addition to other specialties assigned to it by the Consultative Council Law (*Shura Council Law*).<sup>193</sup> The Council of Ministers has both executive authority and legislative authority, which is another example of how Saudi Arabia does not officially recognize the principle of the separation of powers.<sup>194</sup>

Note that not all ideological groups support the adoption of civil law. The passive attitude of conservative groups in Saudi Arabia, including religious scholars (Ulama), toward enacted civil laws has led the personnel who have sovereignty in the country's leadership (the King and the government) to exclude these groups from engaging in making these laws. The conservatives' rejection of dealing with these laws, claiming that these man-made laws are illegitimate under the Shariah law, has led to limiting the conservative's participation in the whole legislative process in Saudi Arabia.<sup>195</sup>

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<sup>192</sup> Basic Law of Governance, *supra* note 85, Art. 67&70; see also Asem Alseyat, *Marahel Estdar Alqanoon fy Almamlakah Alarabeyya AlSaudia [The stages of issuing the law in the Kingdom of Saudi Arabia]*, ALJAZEERAH (Jun. 7, 2014), <http://www.al-jazirah.com/2014/20140706/rj8.htm>.

<sup>193</sup> Shura Council Law, *supra* note 178, Art. 15, 18&23; see also Kechichian, *supra* note 144, at 120.

<sup>194</sup> Kechichian, *supra* note 144, at 26; see also Esmaili, *supra* note 112, at 29; see also Alseyat, *supra* note 192.

<sup>195</sup> Kechichian, *supra* note 144, at 28; see also Vogel, *supra* note 112, at 175, where the Vogel states that "when we pass to consider the reaction of the 'ulama' [Islamic scholars] to royal law-making, one certainly would expect the Saudi 'ulama' to favor the practice and lend the King their full support. Yet, it is a striking fact that the sharia courts of the kingdom generally refuse to enforce the nizams [laws]. When confronted with a case arising under a nizam [law], the sharia court judge will do as he himself thinks right. If he thinks that the case is governed by Fiqh, he

The Saudi Basic Laws,<sup>196</sup> such as the *Basic Law of Governance*, state that the Council of Ministers and the Consultative Council (*Shura Council*) are responsible for making and revising laws. None of these Basic Laws mentions any religious institutions in the country being engaged in the legislative process. These Basic Laws, instead, declare that the enactment and amendment of statutes must be done through issuing royal decrees, upon the approval of only the Council of Ministers and the Consultative Council.<sup>197</sup>

Doing so, however, does not mean that the enacted or revised statutes will go into effect. Even though the conservatives do not play a significant role in the legislative process, the majority of judges in Saudi Arabia are considered to be conservative.<sup>198</sup> This includes judges in both the General and Administrative Judiciary systems. If enacted civil statutes conflict with Shariah laws, then courts will not apply civil law due to the supremacy of Shariah law which trumps civil law

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proceeds to decide it according to the Fiqh without reference to the nizam. If instead he thinks it a proper exercise of siyasa law-making [public policy], he usually dismisses the case, leaving it for some administrative entity to enforce."

<sup>196</sup> Some statutes in Saudi Arabia are considered Basic Laws (Primary Laws), and therefore, they have supremacy and superiority over other enacted laws in the country. These statutes are the *Basic Law of Governance*, Council of Ministers Law, Consultative Council Law (*Shura Council Law*), Law of Allegiance, and Law of Regions. See BETCM website, First Folder, available at: <https://laws.boe.gov.sa/BoeLaws/Laws/Folders/2>.

<sup>197</sup> Basic Law of Governance, *supra* note 85, Art. 67; see also Shura Council Law, *supra* note 178, Art. 15; see also Al-Jarbou, *supra* note 101, at 208-09.

<sup>198</sup> Al-Jarbou, *supra* note 101, at 209; see also Esmaeili, *supra* note 112, at 40.

leading to a de facto invalidation of these laws, which can be considered as an informal system of judicial review in Saudi Arabia.<sup>199</sup>

In certain matters, including enacting civil laws, some religious institutions in Saudi Arabia, such as the Supreme Judicial Council and the Board of Senior Scholars (Ulama), might be consulted to provide their opinion about these matters according to Islamic rules. The reason for this consultation is to confirm the compliance of these matters with Shariah laws, which will encourage conservatives in the judiciary branch to apply them. These religious institutions still are not considered as part of the legislature but only as independent consultative entities.<sup>200</sup> Currently, many regulations are enacted in the Saudi legal system and come into effect without any engagement of these traditional bodies, the Supreme Judicial Council and the Board of Senior Scholars (Ulama). The potential reason for not consulting these bodies, in most cases is that the legislature is confident that the conservatives, including the judiciary, would not reject the application of these enacted regulations because these regulations had been examined by legal experts before enactment to ensure they comply with Shariah laws. The legislature, therefore, sees no need to consult any traditional or religious institutions before enacting most statutes or regulations.<sup>201</sup>

In sum, this subsection was a brief overview of the Saudi Arabia's three branches of authority doctrine and the practical process of formulating new laws through legislation in Saudi

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<sup>199</sup> Al-Jarbou, *supra* note 101, at 209; see also Vogel, *supra* note 112, at 305-06.

<sup>200</sup> Al-Jarbou, *supra* note 101, at 209; see also Vogel, *supra* note 112, at 331, 340, 353-56.

<sup>201</sup> Al-Jarbou, *supra* note 101, at 209.

Arabia. The next part discusses the role of the King of Saudi Arabia with particular examination of the King's actual power over the three branches of authority, especially the Islamic Law rules regarding the authority of the Islamic country Ruler over the judiciary.

### **2.2.2 The Monarch's Role in the Judiciary Branch**

The King of Saudi Arabia has the major power over all the authorities, including the legislative and judiciary branches. He is the Head of State and the Chairman of the Council of Ministers.<sup>202</sup> To make or amend any laws or regulations, there must be a Royal Decree issued by the King to activate the new or modified law in the legal system.<sup>203</sup> The King is not obligated to approve the laws or regulations passed to him for his approval by the Council of Ministers and the Consultative Council.<sup>204</sup> He may reject or reverse without formal justification any legal projects performed by the Council of Ministers or the Consultative Council, and he may also enact any law or regulation regardless of the standpoint of the legislature.<sup>205</sup>

No firm separation of powers exists among the branches of State in Saudi Arabia.<sup>206</sup> According to some Islamic scholars' opinions, the Head of an Islamic country has the power to

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<sup>202</sup> Basic Law of Governance, *supra* note 85, Art. 44, 55-58.

<sup>203</sup> *Id.* Art. 70.

<sup>204</sup> Basic Law of Governance, *supra* note 85, Art. 44, 48, 55, 67, 70; see also Ansary, *supra* note 98, at 16.

<sup>205</sup> Basic Law of Governance, *supra* note 85, Art. 44, 48, 55, 67, 70; see also Ansary, *supra* note 98, at 16.

<sup>206</sup> Esmaeili, *supra* note 112, at 29; see also Ansary, *supra* note 98, at 12; see also Kechichian, *supra* note 144, at 25-26; see also Alseyat, *supra* note 192.

appoint qualified scholars to work as judges in the state's courts of law and apply Islamic Law on cases they consider.<sup>207</sup> The Head of State also has the power to dismiss any judge if the judge is not performing his duties properly.<sup>208</sup> Even though the Head of State appoints and dismisses judges, he is not entitled under the Islamic Law to interfere in the judicial procedures to amend judicial decisions or reconsider cases.<sup>209</sup> Some legal scholars argue that the separation of powers principle does actually exist in the Saudi legal system since the separation is preserved between the King and the judiciary branch.<sup>210</sup>

Because Saudi Arabia adopts Islamic Law principles as the governing rules, the ruler of the country is the one who is essentially in charge of performing the judge's role, and who bears the duty of examining people's disputes since they are part of the ruler's responsibilities.<sup>211</sup> The ruler may assign whomever he believes to be qualified to work as a judge to help him performing his duty as the Chief of Judges in the country.<sup>212</sup> The King of Saudi Arabia is considered the Head of Saudi judges, and he, by royal orders, designates judgeship candidates and dismisses them through the same method upon the recommendations of the Supreme Judicial Council.<sup>213</sup> The King

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<sup>207</sup> Judiciary Law, *supra* note 86, Art. 67; see also Vogel, *supra* note 112, at 330-32; see also Ansary, *supra* note 98, at 12.

<sup>208</sup> Judiciary Law, *supra* note 86, Art. 67; see also Vogel, *supra* note 112, at 189.

<sup>209</sup> Ansary, *supra* note 98, at 65.

<sup>210</sup> *Id.*

<sup>211</sup> Zidaan, *supra* note 92, at 14; see also Vogel, *supra* note 112, at 170.

<sup>212</sup> Zidaan, *supra* note 92, at 33-34; see also Vogel, *supra* note 112, at 170.

<sup>213</sup> Basic Law of Governance, *supra* note 85, Art. 52; see also Judiciary Law, *supra* note 86, Art. 10&47.

also assigns each court's jurisdiction and obligation, including assigning competent authorities to organize the role of personnel working in courts. Furthermore, royal decrees pursuant to legislature recommendations can put into effect and modify all laws and regulations.<sup>214</sup>

Article 46 of the Saudi *Basic Law of Governance* and Article 1 of the Saudi Judiciary Law states that the judiciary branch in Saudi Arabia is independent and cannot be interfered with if its actions are in accord with the Qur'an and Sunnah. Such provisions assume that the King applies the rules of Quran and Sunnah as he is the ruler of an Islamic country, and he does not interfere in the judiciary practice without legitimate justifications. However, since the King of Saudi Arabia is the Islamic Ruler of the country, he can assign and dismiss judges only upon the recommendations of the judiciary branch.<sup>215</sup>

Islamic jurisprudence declares clearly that the Head of State, who is the King in Saudi Arabia, should not interfere in how judges apply Shariah (Islamic Law) in the cases they examine. Judges' diligence in applying Shariah laws must not be influenced by anything except the rules of

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<sup>214</sup> Basic Law of Governance, *supra* note 85, Art. 70; see also Dewidar, *supra* note 18, at 116.

<sup>215</sup> Basic Law of Governance, *supra* note 85, Art. 52; see also Judiciary Law, *supra* note 86, Art. 10&47; see also Al-Ghadyan, *supra* note 115, at 237; see also Vogel, *supra* note 112, at 170, where the author states "In Islamic doctrine and practice as well, the ruler and the state he creates is fundamental to law and legal system ... Islamic public law imposes on the ruler the responsibility to ensure that sharia is upheld in his realm, even to the point of declaring all other state functionaries, including qadis [judges], his delegates for that purpose. Today and throughout history the most visible of the instrumentalities that enforce the sharia is the ruler... In Saudi Arabia, the ruler is the King (Malik)."

Shariah law.<sup>216</sup> According to the Saudi *Basic Law of Governance* and the Judiciary Law, judges are independent in considering lawsuits, and no one has the power to interfere with their judgments or to modify their decisions unless they infringe upon Shariah law.<sup>217</sup> This rule confirms the legislation's intention to keep judicial practice outside the authority of the executive branch. Some may argue, therefore, that the Saudi *Basic Law of Governance* and the Judiciary Law maintain the principle of separation of powers between the King and executive branch, and the judiciary branch by blocking any potential interference in judges' judicial performance.<sup>218</sup>

In sum, Section 2.2 examined the branches of authority (including the principal of separation of powers in Saudi Arabia), the process of enacting new laws, and the King's role and his power over the branches of authorities especially the judiciary branch. The following section, Section 2.3, discusses the three types of legal education that currently exist in Saudi Arabia. It also provides an overview of the current educational requirements for scholars to be assigned as judges.

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<sup>216</sup> Basic Law of Governance, *supra* note 85, Art. 46&48; see also Vogel, *supra* note 112, at 91, stating: "Theoretically, above the supreme judicial authority is always the king himself. Inevitably, as will be discussed, an Islamic ruler is an ultimate court of appeal. In Saudi Arabia appeals may always be made to the highest authorities, meaning the king or the crown prince, against any decision. Saudi kings, however, have been scrupulous about a policy of avoiding interference in shari'a matters and of leaving these to the 'ulama'. As a result, appeals are heard only on claims that the usual procedures of justice have miscarried and lead merely to referral of the matter to the supreme judicial authority or to some other shari'a tribunal."

<sup>217</sup> Basic Law of Governance, *supra* note 85, Art. 46&48; see Judiciary Law, *supra* note 86, Art. 1.

<sup>218</sup> Judiciary Law, *supra* note 86, Art. 1-4; see also Basic Law of Governance, *supra* note 85, Art. 46&48; see also Al-Ghadyan, *supra* note 115, at 237; see also Kechichian, *supra* note 144, at 25.

Section 2.3 also considers some attempts to improve the legal education in Saudi Arabia and to develop judges' knowledge and familiarity with enacted civil laws.

## 2.3 Judicial Education in Saudi Legislation

### 2.3.1 Types of Legal Education in Saudi Arabia

Saudi Arabia has three types of institutions for legal education. One type consists of institutions that teach solely Shariah laws. The second type contains institutions that teach only modern enacted laws, most of which are compatible with Islamic Law. These institutions do not teach Islamic Law thoroughly. This makes students suffer from a lack of knowledge of Shariah laws, which are the main laws practiced in Saudi courts. The third type of institution of legal education is institutions that teach both Islamic Law and modern enacted laws.<sup>219</sup> Unfortunately, very few institutions adopt this approach to legal education in Saudi Arabia.

Most of the practicing judges in the General Judiciary System in Saudi Arabia are educated in institutions that adopt the first type of legal education and teach only the rules of Islamic Law and Islamic jurisprudence without sufficiently acquainting students with modern enacted laws and regulations.<sup>220</sup> This incomplete legal training is one of the main reasons that incorporating Saudi modern statutes in courts is currently problematic. Most judges are not accustomed to dealing with this type of law. This lack of proper training and familiarity with modern statutes leads also to a lack of efficiency not only for the judges themselves in considering cases, but also for the entire legal system since most judges, due to their meager understanding of modern enacted laws, often

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<sup>219</sup> Ayoub M. Al-Jarbou, *Judicial Independence: Case Study of Saudi Arabia*, 19 ARAB LAW QUARTERLY 5, 53 (2004); see also Kechichian, *supra* note 144, at 8.

<sup>220</sup> Al-Jarbou, *supra* note 219, at 53; see also Kechichian, *supra* note 144, at 8&40.

fail to apply them. Many judges believe that they must apply only Shariah laws and not man-made laws.<sup>221</sup> To have a comprehensive understanding of the core of this issue, the next part deliberates the current educational necessities that must be fulfilled by applicants to be eligible for judgeship candidacy.

### **2.3.2 Education Requirements for Judgeship in Saudi Arabia**

Until recently, the Saudi Judiciary Law required everyone who desired to work as a judge to hold at least an undergraduate degree in the specialty of Islamic Law from one of the certified Shariah schools in Saudi Arabia or another country.<sup>222</sup> The reason for this requirement was to ensure that judges are capable and qualified to apply Islamic Law to the cases they consider. This was because Saudi Arabia adopts Shariah Law as the basic source of its legislation, and judges must apply Shariah rules in all the matters they consider.<sup>223</sup> However, the legislation in Saudi Arabia has agreed recently to amend the Saudi Judiciary Law concerning the condition of holding a Shariah degree as a requirement for being assigned a judge. The new amendment makes it possible for individuals who are holding equivalent legal degrees from other schools, such as law

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<sup>221</sup> Al-Jarbou, *supra* note 219, at 53; see also Kechichian, *supra* note 144, at 8&40.

<sup>222</sup> Judiciary Law, *supra* note 86, Art. 31, Clause D.

<sup>223</sup> Basic Law of Governance, *supra* note 85, Art. 48.

schools,<sup>224</sup> to apply for the candidacy of judgeship only upon passing a special examination prepared by the Supreme Judicial Council.<sup>225</sup>

To ensure that judges get the best level of education and are highly trained in their fields, Saudi Arabia established some institutions to train judges when they are required to obtain knowledge about newly innovative matters in the judicial system. Examples of these institutions are the Higher Judicial Institute and the Institute of Public Administration. One aspect of these two institutions' duties is to formulate programs to educate and train judges about important legal matters for the purpose of developing their judicial skills and providing them with the necessary legal knowledge and experience to help them perform their job properly.<sup>226</sup> This development in the requirements of legal education is the result of strenuous efforts that have taken place during

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<sup>224</sup> An equivalent legal degree refers to obtaining an academic degree from a certified law school in Saudi Arabia or abroad. The law schools in Saudi Arabia are the schools that teach mainly modern laws and only limited sections of Shariah laws.

<sup>225</sup> Judiciary Law, *supra* note 86, Art. 31, Clause D.

<sup>226</sup> Ansary, *supra* note 98, at 58; see also Kechichian, *supra* note 144, at 28, where the author writes "King Abdallah approved these difficult functional approaches to the legal system, perhaps cognizant that most of them would need to go through long transition periods, as participants learned how to organize themselves and gradually transform the existing system into a modern institution. Although few publicly questioned the qualifications and performances of most individuals affiliated with the judiciary, most Saudis demanded better results, starting with more sophisticated training for judges who were overwhelmed by modernizing requirements. It may indeed be accurate to state that the monarch's efforts ensured the long-term independence and impartiality of judges, provided the latter adopted safeguards, which resulted in fair contributions to society."

the last decades to revamp legal education in Saudi Arabia. Some of these endeavors are discussed in the next part.

### **2.3.3 Efforts to Enhance Legal Education in Saudi Arabia**

The legislature represented by the Council of Ministers issued a resolution in 1980 (*No. 167*) concerning treating and resolving some existing legal problems. This resolution included a provision related to legal education in traditional Shariah schools. The fourth provision of this resolution facilitates overcoming some of the challenges of the education of judges in Saudi Arabia by stating that all Saudi enacted modern laws should be taught in the legal institutions that teach Shariah laws, including the Higher Judicial Institute and Shariah schools in Saudi universities. One of the intended reasons for this resolution was to push Shariah students to learn more about enacted laws and regulations so that they could become more open to applying such laws if these students are assigned as judges in future.<sup>227</sup>

Even though many years have passed since this resolution was issued, most of the Shariah schools are still hesitant to offer courses that teach their students enacted modern civil laws. Some of these schools, such as the Higher Judicial Institute, have complied slightly with this resolution and started teaching certain areas of modern law. However, teaching modern law in these institutions has been only used to show how Shariah laws are superior to man-made laws, not to

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<sup>227</sup> Al-Jarbou, *supra* note 101, at 215; see also Kechichian, *supra* note 144, at 40.

teach Shariah students to become familiar with these laws and able to apply them in the judicial system.<sup>228</sup>

Recently, to counter this issue in legal education, the Higher Judicial Institute and the Institute of Public Administration established academic legal programs targeting the graduates of Shariah schools to educate them more about enacted modern laws. Although there are distinct differences in the curriculums of the programs in these two institutions, the major purpose for establishing both is to teach Shariah graduates the Saudi enacted modern statutes and regulations. For the time being, the graduates of Shariah schools who would like to be appointed to work as judges must enroll in one of these two legal programs to learn about modern Saudi laws. This would give them a very important advantage when applying for judgeship candidacy.<sup>229</sup>

Mr. Joseph A. Kéchichian<sup>230</sup> in his book *Legal and Political Reforms in Saudi Arabia* states:<sup>231</sup>

In fact, Saudi scholars understood that the time was long overdue for students who joined Shariah colleges to have more than a basic secondary education. If institutions of higher learning admitted graduates with at least a bachelor's degree in

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<sup>228</sup> Al-Jarbou, *supra* note 101, at 216; see also Kechichian, *supra* note 144, at 40.

<sup>229</sup> Al-Jarbou, *supra* note 101, at 216.

<sup>230</sup> Joseph A. Kéchichian is the CEO of Kéchichian & Associates, LLC, a consulting partnership that provides analysis on the Arabian/Persian Gulf region, specializing in the domestic and regional concerns of Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, the United Arab Emirates and Yemen. He is also a syndicated columnist based at Gulf News in Dubai since 2003. Between 2006 and 2011, he served as the Honorary Consul of the Sultanate of Oman in Los Angeles, California, USA.

<sup>231</sup> Kechichian, *supra* note 144, at 41.

business, law, or any other specialized field, it was far more likely that their putative religious diplomas could only be enhanced beyond standardized qualifications. Shariah graduates were increasingly expected to be well-versed in current commercial laws and be familiar with cyberspace crime, copyright violations, or labor issues, to name just a few areas of relevance to contemporary affairs, if their potential 'opinions' were to be germane. King Abdallah and his advisors probably concluded that this was what the country needed because they also knew that current judges were inadequately prepared to render such pronouncements. Regrettably, the narrow breadth of knowledge that was all too prevalent among the clergy meant that most believers were probably better trained than the Doctor of Law, which meant that grievances increased, and justice was denied.

To sum up, Section 2.3 of Chapter One examined the current types of legal education in Saudi Arabia in addition to providing some information about the basic educational requirements for scholars to be eligible for judgeship candidacy. This section also discussed some efforts to develop the legal education in the Saudi system and hence to improve judges' skillfulness and expertise.

The following section, Section 2.4, provides some information about the entire Saudi civil litigation system. This includes some discussion about the recent overhauls in Saudi Arabia to reform the judiciary especially the developments accompanied by the establishment of King Abdullah Program for Judicial Reform in 2007 as well as including overviews of the two court systems and the other judicial bodies in Saudi Arabia.

## 2.4 The Civil Litigation System in Saudi Arabia

### 2.4.1 Overview of the Wave to Reform and Develop the Saudi Judicial System

Some commentators criticize the approach of stimulating incremental reforms in the Saudi judicial system. They believe that bolder and more revolutionary reforms would be more effective in eliminating the existing dilemmas in the Saudi legal system. An article prepared by the Middle East Institute states:<sup>232</sup>

Though the Saudi royal family still rules the realm, they have initiated a number of reforms over the past 30 years. Some of these reforms have been bolder and more successful than others. Some have been doomed from the very start — a few, perhaps, were intended to be stillborn. Judicial reform is one of the most recent and potentially one of the most important reform initiatives undertaken in the Kingdom... In late 2007, King ‘Abdullah bin ‘Abd al-Aziz allocated nearly \$2 billion to overhaul the Kingdom’s judicial system and upgrade its court facilities, ostensibly to streamline the legal process, which had been and remained a perennial source of dissatisfaction for many. Few perceived the move as being serious. Critics contended that spending a couple of billion dollars would not be effective as long as the ideological foundations on which the entire legal premise of the country continued to be embedded in Shari'a (Islamic law) ... Because all legal questions are interpreted through religious rulings

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<sup>232</sup> *Reforming the Judiciary in Saudi Arabia*, MIDDLE EAST INSTITUTE (Oct. 1, 2009), <https://www.mei.edu/publications/reforming-judiciary-saudi-arabia>; see also Kechichian, *supra* note 144, at 28-29, expressing that "[w]hen Abdallah bin Abdul Aziz allocated nearly \$2.8bn to overhaul the kingdom's judicial system and upgrade its court facilities, ostensibly to streamline the legal process that remained a perennial source of dissatisfaction for many, few perceived the move as a serious proposition. Most concluded that the very idea of modernizing the Saudi legal system was imaginary at best, a futile effort at worst. Critics contended that spending a couple of billion dollars would not be effective as long as the ideological foundations, on which the entire legal premise of the country was based, were embedded in Shariah law."

in Saudi Arabia, the very idea of 'reforms,' even if putative, will strike secularists as imaginary at best. Naturally, throwing money at a problem will not necessarily solve any of its intrinsic shortcomings, but the Kingdom of Saudi Arabia seems nevertheless to have embarked on one of its most sweeping legal changes in generations.

It should be noted here that a new spate of laws in Saudi Arabia, like the Saudi Judiciary Law of 2007, is the product of a period of great reform of the Saudi legal system. The Saudi legal system is currently under an ongoing reform process. This reform has accelerated during the last few decades, especially with the commencement of King Abdullah Program for Judicial Reform in 2007 to develop the judicial facilities in Saudi Arabia. In regard to this new development of the judicial system in Saudi Arabia, Professor Abdullah Ansary writes:<sup>233</sup>

On October 1, 2007, King Abdullah issued Royal Decrees approving an overhaul of Saudi Arabia's judicial system. The Law of the Judiciary established a High Court, which took over the functions of the Supreme Judicial Council as the highest judicial authority in the Kingdom. Another important change was the establishment of appellate courts in each province. The law made provision for specialized labor, commercial, criminal, personal status and civil courts, which are currently being established in areas, regions and centers as needed. Some of these courts are now hearing disputes that had previously been brought before special administrative committees ... The Law of the Board of Grievances ranks the Board's hierarchy in the following order: seniority is held by the High Administrative Court, followed by the Administrative Courts of Appeal and, lastly, the Administrative Courts. The High Administrative Court was established to hear objections to rulings of the administrative courts of appeal. The administrative courts have jurisdiction in cases involving administrative decisions, compensation, contracts and disciplinary measures. King Abdullah also approved a functional approach with a view to ensuring a successful transition between the old and new systems.

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<sup>233</sup> Ansary, *supra* note 98, at 20.

Joseph A. Kéchichian in his book *Legal and Political Reforms in Saudi Arabia* also writes about this new development in the Saudi judicial system, stating:<sup>234</sup>

[o]n 1 October 2007, Abdallah issued his epochal Royal Decree (M/78-19/09/1428H), which was intended to overhaul the country's judiciary ... The most important novelty was the establishment of a Supreme Court, which was slated to take over the functions of the Supreme Judiciary Council as the highest judicial authority in the kingdom. Under the new regulation, the existing Courts of Appeals were abolished, replaced with new Courts of Appeals in the kingdom's provinces. These were authorized to exercise their respective jurisdictions through Labor, Commercial, Criminal Circuits, Personal Status, and Civil Circuits. Moreover, First-Degree Courts were established in various parts of the country, according to local needs. Likewise, their jurisdictions were lined up through specialized Criminal, Commercial, Labor, Personal Status, and General Courts.

Attorney Ahmed Basrawi, a partner and head of litigation in Al-Tamimi & Co. law firm in Jeddah, Saudi Arabia, writes about this distinguished historical reform in the Saudi legal system, stating:<sup>235</sup>

The reform of the judicial system in Saudi Arabia started in 2007 when King Abdullah issued a number of royal decrees implementing an overhaul of Saudi Arabia's judicial system. The Law of the Judiciary issued by Royal Decree No. M/78 on 19 Ramadan 1428H (October 1st, 2007) established the Supreme Court as the highest judicial authority in the Kingdom. This law also established new Courts of Appeals in the Saudi Arabian provinces as well as courts of first instance for general, criminal, personal status (family), commercial and labor matters in each city... The Board of Grievances Law also issued through Royal Decree No. M/78 on 19 Ramadan 1428H (October 1st, 2007) established a Board of Grievances (BOG) which oversees the Administrative Court system. The BOG organized the Administrative Courts in the following order: The High Administrative Court, followed by the Administrative

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<sup>234</sup> Kechichian, *supra* note 144, at 27.

<sup>235</sup> Basrawi, *supra* note 126; see also Kechichian, *supra* note 144, at 9.

Courts of Appeals and, the Administrative Courts. The High Administrative Court's role is to look into cases objecting to the judgments issued by Administrative Appeal Courts. The Administrative Courts determine cases related to the rights of government employees, administrative decisions of public authorities, compensation awards, public contracts and disciplinary actions by public authorities... In the judicial overhaul, certain specialist commissions retained certain judicial powers/remit including: The commission for Labor Dispute Resolution (which will be replaced by the Labor Court when it is established); The commission for Banking Dispute Resolution; The commission for Securities Dispute Resolution; The commission for Insurance Dispute Resolution; The commission for Financial Market Dispute Resolution... The implementation of the above reforms was a complex process and required significant investment from the Saudi Government. Accordingly, the Government applied a pragmatic approach to implementing the new judicial system over the course of 10 years to ensure a smooth transition between the old and new systems.

This King Abdullah Program for Judicial Reform to overhaul the Saudi judicial system guided by late King Abdullah is still considered a revolutionary reform to the entire legal system in Saudi Arabia, even among critics. Some critics of the Saudi legal system state:<sup>236</sup>

Inasmuch as Abdullah is an innovator, his move to reinforce the standing of the country's courts and, more importantly, to introduce the idea that judges ought to make their rulings free from outside influence, stood out. His desire to "overhaul" — the term itself was revolutionary — the judiciary from the top down was equally bold. The Monarch proposed the establishment of a supreme court, one or more appeals courts, and a general courts system to replace the dated apparatus operating under the Supreme Judicial Council (SJC). While some of these measures were meant to expedite ongoing economic reforms, the creation of a supreme court was bound to have far-reaching consequences, including a marked improvement in civil liberties.

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<sup>236</sup> MIDDLE EAST INSTITUTE, *supra* note 232; see also Kechichian, *supra* note 144, at 29.

Many major purposes of King Abdullah Program for Judicial Reform to develop the judiciary exist.<sup>237</sup> Professor Ansary, writing about the impacts of this project on the Saudi judicial system, states:<sup>238</sup>

To pave the way for an effective national judicial system and overcome the obstacles facing judges and litigants, the Government annulled the Law of the Judiciary of 1975 and took the initiative to develop a “New Judicial System” comparable to those of other countries around the world in order to achieve sustainable development. On October 1, 2007, King Abdullah issued a Royal Decree approving a new body of laws regulating the judiciary and the Board of Grievances. The new laws replaced regulations that had been in force for more than 30 years in the case of the judiciary, and about 25 years in the case of the Board of Grievances. The Kingdom allocated a budget of 7 billion riyals (US\$ 1.8 billion) to revamp the judicial sector with a view to upgrading the judiciary and developing it in a comprehensive and integrated manner. These funds are being used to renovate and build new courts and train judges. The Saudi judiciary is now passing through a transitional period in which the “New Judicial System” is in the process of being fully implemented. The most important features of the new system are as follows: [m]ultiplicity of courts of general jurisdiction, and diversity within the Kingdom’s judicial system..., [s]tandardization of the various court judgments pursuant to the provisions of the Law of the Judiciary of 2007..., [a]doption of the judicial appeal system..., [i]mplementation of the principle of specialization in the courts of general jurisdiction and within a single court..., [m]ultiplicity of the same type of courts throughout the Kingdom to provide easy access to judicial services for all citizens.

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<sup>237</sup> Basrawi, *supra* note 126; see also Mobarak Alakkash, *William Hubbard: Kathirun Yajhalun Altatawur Alqadae Fi Al Mamlakat Wa Kunt Wahedaan Minhum [William Hubbard: Many Are Ignorant of the Judicial Development in the Kingdom, and I Was One of Them]*, AL RIYADH (Jan. 19, 2015), <http://www.alriyadh.com/1014478>. An interview with Mr. William Hubbard, the former president of the American Bar Association, about his visit to Saudi Arabia and to King Abdullah Program for Judicial Reform.

<sup>238</sup> Ansary, *supra* note 98, at 32-33; See also Kechichian, *supra* note 144, at 27.

Mr. Joseph A. Kéchichian in his book *Legal and Political Reforms in Saudi Arabia* expresses some of the Saudi Authority intentions of establishing King Abdullah Program for Judicial Reform. Mr. Kéchichian states:<sup>239</sup>

To his immense credit, the monarch appreciated the value of his religious judges, but understood that the brightest among them could not possibly display universal proficiency on every subject. Naturally, neither the talent of commercial magistrates nor their training would be accomplished immediately, but Riyadh was determined to embark on a long-term overhaul of its legal institutions, including bankruptcy legislation, shareholder protection, as well as the various regulations that governed access to lines of credit. Abdallah was aware that legal reforms were interconnected, which necessitated carefully studied adaptations of the financial sector, working and interacting with both commercial and industrial activities. His challenge was to introduce meaningful improvements in these areas without upsetting existing institutions that legitimized Al Saud rule. Nevertheless, the ruler was cognizant that the time was ripe to take a dramatic step towards that goal, which was the introduction of a Supreme Court worthy of the name.

Note here that many reforms to the current Saudi legal system were formulated under the recent Saudi 2030 Vision to revamp legal, social, economic, and cultural concepts of Saudi Arabia. Attorney Ahmed Basrawi states:<sup>240</sup>

The main goals of Vision 2030, amongst others, include enhancing interaction between public authorities and citizens, improving performance, productivity and flexibility of public authorities, creating an attractive environment for both local and international investors and enhancing their confidence in Saudi Arabia's economy. In order to achieve these goals, the Saudi government issued the National Transformation

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<sup>239</sup> Kechichian, *supra* note 144, at 30.

<sup>240</sup> Basrawi, *supra* note 126.

Program (NTP) 2020. Within this program, the Ministry of Justice has many initiatives to improve the judicial system in Saudi Arabia in order to support the Vision 2030 goals. The NTP set forth key performance indicators such as: reducing the average timeframe to conclude cases; increasing the percentage of concluded cases; increasing the percentage of those stakeholders in court cases who are satisfied with the process; reducing the average number of incoming cases per judge in the main courts; and improving Saudi Arabia's World Bank institution ranking.

The reason for this demonstration of the current wave to reform the Saudi legal system is to show how Saudi Arabia is working meaningfully to improve their legal practice to be more advanced to keep pace with the demanding legal developments worldwide. Proposing the discovery adoption in the Saudi legal system is part of these efforts to enhance the legal practice in Saudi Arabia and make it more sophisticated. This dissertation will be also submitted to the governing body of King Abdullah Program for Judicial Reform to provide them with a comprehensive idea about the advantages of discovery practice, and therefore the benefits discovery will most likely bring to the Saudi legal practice.

This subsection was an overview of some recent reforms in the Saudi judiciary system, particularly the developments in the judiciary established by King Abdullah Program for Judicial Reform. The next one addresses the courts' structure in the Saudi legal system in addition to the role of the extraordinary judicial bodies in the Saudi legal system.

## 2.4.2 The Judicial Structure of the Saudi Legal System<sup>241</sup>

In regards of the court system in Saudi Arabia, two systems of courts of law exist to make up the Saudi judicial structure: The General Judiciary System and the Administrative Judiciary System, each of which has different types of courts. In addition to these two systems, there are Quasi-Judicial Committees. These committees are not considered to be courts of law, even though they consider certain types of cases and issue judicial decisions.<sup>242</sup> Because of this unique classification, these committees' decisions are not within the authority and jurisdiction of the other two official court systems.<sup>243</sup> These committees also have their own procedural rules.<sup>244</sup>

The next subheadings examine which courts' structure under the General Judiciary System and the Administrative Judiciary System. There is also a discussion of the roles of the Quasi-Judicial Committees in the legal and economic systems of Saudi Arabia.

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<sup>241</sup> This subsection discusses mainly the role of the judicial branch in the Saudi system. The roles of the other branches of State in Saudi Arabia are addressed in Chapter Three where the discussion about the proposed methods to enforce the discovery process in the Saudi legal system takes place.

<sup>242</sup> Al-Ghadyan, *supra* note 115, at 235; see also Kechichian, *supra* note 144, at 27; see also Mansour Alkhazan, *Al-Lijan Shibh Al-Qadaeah ... Almushkelah wa Alhulool [Quasi-judicial Committees... The Problem and Solutions]*, AL RIYADH (Jun. 8, 2011), <http://www.alriyadh.com/639561>.

<sup>243</sup> Al-Ghadyan, *supra* note 115, at 235; see also Kechichian, *supra* note 144, at 27; see also Alkhazan, *supra* note 242.

<sup>244</sup> Al-Ghadyan, *supra* note 115, at 235; see also Kechichian, *supra* note 144, at 27; see also Alkhazan, *supra* note 242.

### 2.4.2.1 The General Judiciary System

The first system of courts in Saudi Arabia is the General Judiciary System. This system has general jurisdiction over all cases except for those excluded by law, such as cases withdrawn from courts' jurisdiction and awarded to the Quasi-Judicial Committees.<sup>245</sup> Five types of courts are under this system: criminal courts, commercial courts, family courts, labor courts, and general courts (general courts have jurisdiction over all matters not specified under another type of court).<sup>246</sup>

The Saudi Civil Procedure Law, the main Saudi law under examination in this dissertation, applies to all of these types of courts, except the criminal courts. The criminal courts follow the Saudi Criminal Procedure Law.<sup>247</sup> This law is not part of the discussion in this dissertation. However, the adoption of a discovery process in criminal law would be crucial to protecting the legal rights of defendants in criminal cases. Islamic Law allows conducting discovery in criminal cases, but the discovery practice must be conducted only in favor of defendants and not conducted to convict them of criminal actions.<sup>248</sup>

The General Judiciary System has two levels of legal proceeding: trial courts and appellate courts.<sup>249</sup> The Supreme Court is considered to be a part of this system as a third level of legal proceeding but only in limited incidents, such as cases in which the adjudication is the death

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<sup>245</sup> Judiciary Law, *supra* note 86, Art. 25.

<sup>246</sup> Judiciary Law, *supra* note 86, Art. 9-24.

<sup>247</sup> Criminal Procedure Law, *supra* note 151.

<sup>248</sup> Al-Zahaily, *supra* note 94, at 629-30.

<sup>249</sup> Judiciary Law, *supra* note 86, Art. 9.

penalty, or when an appellant claims that the verdict in its case has violated Shariah laws.<sup>250</sup> The Supreme Judicial Council, in this system, considers all judges' functional affairs such as promotions, transfers, and discipline....<sup>251</sup> The Supreme Judicial Council used to have jurisdiction over some cases as a third level of legal proceeding because there was not a Supreme Court in the Saudi legal system before enforcing the new Saudi Judiciary Law in 2007. The new Judiciary Law transfers this jurisdiction to the Supreme Court, leaving this council with no jurisdiction to consider cases.<sup>252</sup> This led the Supreme Judicial Council to restore its original managerial role in supervising judges' job performance.<sup>253</sup>

One of the improvements in the new Saudi Judiciary Law is that it establishes supreme courts in both the General Judiciary System and the Administrative Judiciary System. The new Judiciary Law establishes the supreme courts to monitor the application of Shariah and national laws when reviewing appellate courts decisions.<sup>254</sup> During this process, the supreme courts may

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<sup>250</sup> *Id.* Art. 11; see also Ministry of Justice, *supra* note 249.

<sup>251</sup> Judiciary Law, *supra* note 86, Art. 6; see also Al-Ghadyan, *supra* note 115, at 237.

<sup>252</sup> Judiciary Law, *supra* note 86, Art. 11; see also Al-Ghadyan, *supra* note 115, at 237; see also Kechichian, *supra* note 144, at 27&30.

<sup>253</sup> The new spate of laws in Saudi Arabia, like the Saudi Judiciary Law of 2007, are products of a period of great reform in the Saudi legal system. Currently, the Saudi legal system is under an ongoing reform process, and this reform has accelerated during the last few decades, especially with the commencement of King Abdullah's Program to develop the judiciary facilities in Saudi Arabia in 2007. See also Kechichian, *supra* note 144, at 27.

<sup>254</sup> Judiciary Law, *supra* note 86, Art. 11; see also Kechichian, *supra* note 144, at 27.

not consider the facts of the cases under examination.<sup>255</sup> The role of the supreme courts specified in the Judiciary Law has led some commentators to believe that the Saudi supreme courts should not be considered as a third level of legal proceeding.<sup>256</sup> The reason for this argument is that the supreme courts only affirm or reverse judgments of lower courts. Thus, the commentators argue that the Saudi supreme courts should be considered as Courts of Law since they examine only the right application of law<sup>257</sup> (and Shariah).<sup>258</sup>

#### **2.4.2.2 The Administrative Judiciary System**

The Saudi Law of the Board of Grievances establishes the other system of courts in Saudi Arabia that is instituted under the Administrative Judiciary System. This system has jurisdiction over all administrative cases to which a Saudi governmental entity is a party and where this entity appears as an official authority that has more influence than individual parties.<sup>259</sup> This is to distinguish administrative cases where a governmental authority acts as an official authority, and are considered by administrative courts, from cases under the General Judiciary System to which

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<sup>255</sup> Judiciary Law, *supra* note 86, Art. 11.

<sup>256</sup> *Id.*; see also Dewidar, *supra* note 18, at 47.

<sup>257</sup> The Supreme Courts in Saudi Arabia are similar to the constitutional courts found in some other countries in the region, but these courts have different names in Saudi Arabia.

<sup>258</sup> Judiciary Law, *supra* note 86, Art. 11; see also Dewidar, *supra* note 18, at 47.

<sup>259</sup> Board of Grievances Law, *supra* note 89, Art. 13; see also Al-Ghadyan, *supra* note 115, at 235&242; see also Kechichian, *supra* note 144, at 27.

governmental authorities may be parties, but in which they represent themselves as private parties, not governmental entities. An example of these cases is where a governmental authority is a party to a contract but which in the contract represents itself as a private entity, not as an official power.<sup>260</sup>

Two levels of legal proceedings are in this system as well: administrative courts, as first-degree courts, and administrative appellate courts. The Administrative Supreme Court, which is different from the general Supreme Court, is a third level of legal proceeding in this system but only in limited types of cases. For instance, if an appellant objects to a ruling of the appellate court on the basis that this ruling involves a violation of Shariah Law, the appellant may bring its case to the Administrative Supreme Court. If the Administrative Supreme Court finds that the ruling involves a violation of Shariah Law, the court must reverse this ruling to make it compliant with Shariah laws.<sup>261</sup> The Administrative Judicial Council plays in this court system the same role that the Supreme Judicial Council plays in the General Judiciary System. The Administrative Judicial

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<sup>260</sup> The Saudi legal system has adopted this differentiation between the public and private laws from the French legal system. Maren Hanson writes in her article *The Influence of French Law on the Legal Development of Saudi Arabia*: "French law distinguishes between public and private law with the belief that rules which have been devised to govern relations between private persons should not be held to apply automatically to relations in which the state or some public agency is party. Because of the inequality between the state and private citizens, another set of rules is necessary to protect the individual." See Hanson, *supra* note 112, at 289; see also Al-Ghadyan, *supra* note 115, at 243.

<sup>261</sup> Board of Grievances Law, *supra* note 89, Art. 8-15.

Council considers all administrative judges' functional affairs such as promotions, transfer, discipline, and supervises their job performances, but does not examine any cases.<sup>262</sup>

The Administrative Judiciary system has its own procedural law that governs all administrative litigations, the *Procedure Law before the Board of Grievances*.<sup>263</sup> *The Law of the Board of Grievances* governs all administrative cases in addition to other types of criminal and commercial cases. The main role of the Board of Grievances is to consider administrative cases. Therefore, the entire Administrative Judicial System is incorporated under the Board of Grievances system.

#### **2.4.2.3 The Quasi-Judicial Committees**

In addition to the two judiciary systems in Saudi Arabia, other judicial bodies exist as an extraordinary litigation system in Saudi Arabia. These judicial tribunals are called the Quasi-Judicial Committees. Surprisingly, the Saudi *Basic Law of Governance* does not recognize these committees as part of the judiciary branch even though they help considerably in reducing the caseload of the courts of law and help to overcome some obstacles in regard to new economic and

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<sup>262</sup> *Id.* Art. 5.

<sup>263</sup> Board of Grievances Procedure Law, *supra* note 90. This law refers (in Articles 4, 5, 43&60) to the Saudi Civil Procedure Law as a basic reference for matters not discussed in it. The Administrative Procedural Law is not under discussion in this dissertation, except in some matters related to the adoption of the discovery practice in the Saudi legal system.

social developments in the country.<sup>264</sup> Examples of these committees are the Banking Committees, the Insurance Committees, and the Customs Committees.

These committees are established and considered as a part of the executive branch, not the judiciary, even though they are conducting judicial work. The reason for this consideration is to draw these committees out from the jurisdiction of the judicial branch, and hence, the enforcement of applying Shariah laws on matters the committees consider.<sup>265</sup> These committees issue judicial decisions. However, these decisions are not considered as court judgments, but as judicial decisions issued by legal officers.<sup>266</sup> Most of these committees' decisions are final and cannot be appealed to a higher level since most of these committees consist of only one level of legal proceeding.<sup>267</sup> The members of these committees are not considered judges, but legal specialists. They do not enjoy the privileges of judges.<sup>268</sup> Because of the purviews of the Banking Committees,

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<sup>264</sup> Ansary, *supra* note 98, at 31; see also Molhem Almolhem, *Al-Lijan Shibh Al-Qadaeah [Quasi-judicial Committees]*, AL EQTESADIAH (Mar. 23, 2017), [http://www.aleqt.com/2017/03/23/article\\_1156206.html](http://www.aleqt.com/2017/03/23/article_1156206.html); see also Al-Ghadyan, *supra* note 115, at 235; see also Kechichian, *supra* note 144, at 27; see also Alkhazan, *supra* note 242.

<sup>265</sup> Al-Jarbou, *supra* note 219, at 32; see also Al-Ghadyan, *supra* note 115, at 247.

<sup>266</sup> Al-Ghadyan, *supra* note 115, at 248; see also Alkhazan, *supra* note 242.

<sup>267</sup> Al-Ghadyan, *supra* note 115, at 248; see also Adnan Alshebrawi, *Al-Kholi: La Dawabet le Amal Allejan Shebh Alqada'eyya [Al-Kholi: No Controls for the Work of Quasi-judicial Committees]*, OKAZ (Nov. 28, 2013), <http://okaz.com.sa/article/625036/>.

<sup>268</sup> Alkhazan, *supra* note 242.

the Insurance Committees, and the Customs Committees, they may consider cases that might not be with strict compliance with Shariah laws.<sup>269</sup>

One of the main reasons for the establishment of this uncommon litigation system is to accelerate litigation in some matters outside of courts of law due to existing delays in the courts of the General Judiciary System, which can lead to aggravating problems in some incidents.<sup>270</sup> Another reason for establishing these committees relates to the religious foundations of the judicial system in Saudi Arabia. Some of these committees may make judicial decisions on matters that are not with strict compliance with Shariah Law and may contradict some Islamic Law rules.<sup>271</sup> This includes deciding cases that involve granting interest and usury (*Riba*) for litigants, which are forbidden under Islamic Law.<sup>272</sup> Unlike the decisions of the courts, these decisions cannot be reversed.<sup>273</sup> If such cases went to the courts of the General Judiciary System, judges may (but most likely would not due to jurisdictional issues) consider the cases and make decisions on their merits, but they would not rule in favor of any forbidden rights, including interest or usury (*Riba*)

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<sup>269</sup> Al-Jarbou, *supra* note 101, at 203-05; see also Al-Ghadyan, *supra* note 115, at 250.

<sup>270</sup> Almolhem, *supra* note 264.

<sup>271</sup> Al-Ghadyan, *supra* note 115, at 247.

<sup>272</sup> The rules of Shariah Law prohibit any involvement of interest or usury in all the financial dealings and commercial transactions. People must not gain any financial benefits from loaning money or properties to others because these benefits are considered prohibited interests in Islam. Under Shariah Law, the individuals whose business transactions involve usurious interests of any kind are threatened to be punished in this life and in the hereafter because of their violation of God orders to refrain from engaging in any usurious dealings.

<sup>273</sup> Alshebrawi, *supra* note 267.

payable.<sup>274</sup> This is one of the reasons why it was necessary for some of the executive branch entities to establish other judicial bodies within their structural system to deal with such cases outside of the courts system. This is due to the courts' passive attitude toward considering these cases and applying some enacted regulations.<sup>275</sup> Many people practicing law in Saudi Arabia correspond that the authorities must abolish these committees due to their extraordinary existence in the legal system. This is, however, a very complicated issue due to the fact that most of these committees were founded to consider cases that may involve unallowable matters in Islamic Law yet rooted in the Saudi financial and economic systems.<sup>276</sup>

In short, this subsection was about the courts' structure in the Saudi legal system in addition to the role of the extraordinary judicial tribunals in the Saudi legal system. The following subsection examines the initial obligations (or so-called initial disclosure) that plaintiffs bear under the current Saudi Civil Procedure Law as well as the nature of service of process in Saudi civil litigations. The following subsection also addresses the tests that plaintiffs must confront to prove

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<sup>274</sup> Al-Jarbou, *supra* note 219, at 34.

<sup>275</sup> *Id.* at 30-31; see also Al-Ghadyan, *supra* note 115, at 246; see also Esmaeili, *supra* note 112, at 46, where Esmaeili states: "economic developments and modern world institutions necessary to run the country's affairs have caused the creation of a parallel modern system of law in matters not subject to specific Shariah rules, such as corporation law, media and broadcasting law, and international trade and business. The modern system of law requires institutions such as the legal profession and appellate structures in the court system. These institutions are emerging in Saudi Arabia and have positive influences on the legal system of the country."

<sup>276</sup> Al-Ghadyan, *supra* note 115, at 246.

their causes of action and allegations with no discovery regime existing to disclose information in other parties' possession, control, or custody.

### **2.4.3 Plaintiff's Initial Obligation, and the Challenges Plaintiffs Face without the Opportunity for Discovery**

#### **2.4.3.1 Introduction**

The Saudi Civil Procedure Law briefly states some initial disclosure requirements that plaintiffs must conduct at the time of filing lawsuits.<sup>277</sup> However, it does not mention a similarly required disclosure from defendants before or during trial, which makes this initial disclosure process quite different from the process required under Rule 26(a)(1) of the Federal Rules of Civil Procedure (FRCP) in the United States.<sup>278</sup> No discovery rules exist in the Saudi legal system equivalent to the rules of discovery in the United States.<sup>279</sup>

The regulations in the Saudi legal system do not contain formal discovery practice, and therefore, no rules or regulations related to discovery exist in the Saudi legal system. All the regulations are silent regarding the disclosure of evidentiary materials, including electronically

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<sup>277</sup> Civil Procedure Law, *supra* note 6, Art. 41; see also Awad, *supra* note 29, at 356.

<sup>278</sup> Civil Procedure Law, *supra* note 6, Art. 13&41; see also JEAN-BENOÎT ZEGERS & OMAR ELZORKANY, ARBITRATION GUIDE: SAUDI ARABIA, INTERNATIONAL BAR ASSOCIATION (2014), at 12-13.

<sup>279</sup> Civil Procedure Law, *supra* note 6, Art. 13&41; see also Zegers & Elzorkany, *supra* note 278, at 12-13; see also *The Judicial System of the Kingdom of Saudi Arabia*, BSA AHMAD BIN HEZEEM & ASSOCIATES (Mar. 2017), <https://www.bsabh.com/the-judicial-system-of-the-kingdom-of-saudi-arabia/>, at 5.

stored information. This silence dwells as well in the regulations that govern alternative dispute resolutions.<sup>280</sup>

Because no discovery process exists in the current Saudi legal system, a litigant seeking materials from another party must file a motion to the court, requesting it to compel the other party, or nonparty, to submit a specific piece of material in its possession or control.<sup>281</sup> Accordingly, any requested materials must exist and be precisely identified to the court to grant a motion to compel. As a restriction on the use of the disclosed evidentiary materials, if the court grants a motion to compel to submit a certain piece of material, all parties in the lawsuit can use this material by to prove their allegations.<sup>282</sup> The disclosed materials must be confidential and used merely by parties within the extent of that lawsuit.<sup>283</sup>

#### **2.4.3.2 Initial Disclosure in the Saudi Civil Procedure Law**

Since this dissertation focuses on adopting a discovery regime similar to civil discovery in the United States, analyzing the initial disclosure process is a major part of this research. The Saudi

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<sup>280</sup> Zegers & Elzorkany, *supra* note 278, at 12-13.

<sup>281</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 5; see also Zegers & Elzorkany, *supra* note 278, at 12-13.

<sup>282</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 5; see also Zegers & Elzorkany, *supra* note 278, at 12-13.

<sup>283</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 5; see also Zegers & Elzorkany, *supra* note 278, at 12-13.

Civil Procedure Law states some requirements that plaintiffs must follow when they file cases. These requirements are considered as preliminary disclosure.<sup>284</sup> However, they are not as comprehensive as the initial disclosure requirements in the Federal Rules of Civil Procedure (FRCP).<sup>285</sup>

The Saudi Civil Procedure Law requires very limited disclosure from plaintiffs with only some minimal penalties for failing to comply with the required disclosure. The law orders plaintiffs to submit all the evidentiary materials that support their allegations when they file the case, yet no legal penalty ensures that they do so.<sup>286</sup> Even though there are competent officers in court who consider plaintiffs' complaints to examine their contents against the legal requirements, these administrative officers cannot make certain that plaintiffs have submitted all the required documents to support their causes of action.<sup>287</sup> Judges examine the accuracy of plaintiffs' claims only when parties appear in first hearings.<sup>288</sup> It is crucial to expand the initial disclosure's scope in the Saudi Civil Procedure Law by adopting better initial disclosure requirements similar to the initial disclosure requirements stated in Rule 26(a) of the United States Federal Rules of Civil Procedure (FRCP).<sup>289</sup>

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<sup>284</sup> Civil Procedure Law, *supra* note 6, Art. 41; see also Awad, *supra* note 29, at 356.

<sup>285</sup> FED. R. CIV. P. 26(a)

<sup>286</sup> Civil Procedure Law, *supra* note 6, Art. 41; see also Awad, *supra* note 29, at 356.

<sup>287</sup> Civil Procedure Law, *supra* note 6, Art. 42.

<sup>288</sup> *Id.* Art. 65 & 66; see also Awad, *supra* note 29, at 356.

<sup>289</sup> FED. R. CIV. P. 26(a)

Article 41 of the Saudi Civil Procedure Law provides the main requirements of the current initial disclosure in the Saudi legal system. This article requires plaintiffs to submit, along with their complaints, some specific information about themselves and about their defendants.<sup>290</sup> This information is similar to the information required in the summons of United States civil proceedings mentioned in Rule 4(a) of the Federal Rules of Civil Procedure (FRCP).<sup>291</sup> Article 41 of the Saudi Civil Procedure Law requires as initial disclosure the following: First, it requires: plaintiff's full name, national ID number, occupation, place of residence and workplace, and the same information for its representative or attorney, if any.<sup>292</sup> Second, the plaintiff must provide the defendant's full name and available information about its occupation, place of residence and workplace. If any of this information is unknown, the plaintiff must provide information to the best of its knowledge to determine the defendant's location.<sup>293</sup> Article 41 does not require, as part of the initial disclosure, any information related to defendants' representatives, or any information about the representatives' role in the defendant's legal status. The importance of this information is greatest when the law requires defendants to be represented due to issues of minority or incompetency.<sup>294</sup> Third, plaintiffs must include in the forms they submit to court the exact date and time of submitting their complaints to the court of law. One reason for this is to authenticate

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<sup>290</sup> Civil Procedure Law, *supra* note 6, Art. 41.

<sup>291</sup> FED. R. CIV. P. 4(a)

<sup>292</sup> Civil Procedure Law, *supra* note 6, Art. 41 Clause (1)(A)&(E).

<sup>293</sup> *Id.* Art. 41 Clause (1)(B).

<sup>294</sup> Awad, *supra* note 29, at 357.

the date and time at which the legal effects of lawsuits commence.<sup>295</sup> Fourth, plaintiffs must provide in their complaints the name and location of the court before which their cases are brought.<sup>296</sup> The reasons for this requirement are to inform their defendants precisely about the court to which the lawsuits have been brought, and to allow the defendants to challenge whether this court has jurisdiction over the case or not.<sup>297</sup> Fifth, plaintiffs must state in the complaint the cause of action of the lawsuit, and the relief and protection they seek from bringing their lawsuit before courts of law. Plaintiffs must submit with their complaint all the evidentiary materials that support their allegations against their defendants.<sup>298</sup> These evidentiary materials must be shared with the defendants when they are served the summons so that the defendants can have the opportunity to examine these materials, prepare answers and submit their defenses to court before the first hearings.<sup>299</sup>

Even though it is in the plaintiffs' best interest to provide the court with all the materials they have, no criteria ensure that plaintiffs attach all their evidentiary materials with their complaints. The main purpose of this requirement is to safeguard defendants' right to prepare their defense, after they are served with copies of the complaints with the summons. Courts must grant defendants time limits specified in Article 44 and Article 207 of the Saudi Civil Procedure Law to

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<sup>295</sup> Civil Procedure Law, *supra* note 6, Art. 41 Clause (1)(C).

<sup>296</sup> *Id.* Art. 41 Clause (1)(D).

<sup>297</sup> Awad, *supra* note 29, at 357.

<sup>298</sup> Civil Procedure Law, *supra* note 6, Art. 41 Clause (1)(F).

<sup>299</sup> *Id.* Art. 45.

allow them to prepare their defense against plaintiffs' claims to avoid any delay caused by unprepared defendants. Even with granting the required time limits for defendants, some defendants appear in the first hearing without prepared answers and, surprisingly, no formal penalty is stated in the Civil Procedure Law for such behavior.<sup>300</sup>

Article 41 of the Civil Procedure Law does not specify any specific penalty on plaintiffs who do not fulfill the requirements of the initial disclosure and do not provide courts with all the required information along with their statements of claim.<sup>301</sup> The rules that apply, in this incident, are the general rules of sanctions specified in Article 5 of the Saudi Civil Procedure Law, which includes deeming the legal procedure null and void as a legal sanction according to the rules of the procedure invalidation.<sup>302</sup>

Incomplete complaints are not invalid unless they do not include parties' identity or the cause of action. Another reason for invalidating incomplete complaints and summons is if defendants object to them by claiming that the incomplete complaints cause ambiguity or are misleading since they do not provide the required information. However, if incomplete complaints accomplish their purpose by giving enough information to clearly identify the parties and the cause

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<sup>300</sup> Civil Procedure Law, *supra* note 6, Art. 44&207; see also Awad, *supra* note 29, at 357-58.

<sup>301</sup> Civil Procedure Law, *supra* note 6, Art. 41.

<sup>302</sup> *Id.* Art. 5. This article states that the procedure shall be null and void if the law stipulates that it is invalid, or if the procedure defect makes the purpose of the procedure left behind. Notwithstanding the rule of this article, a nullity shall not be rendered invalid if the purpose of the procedure is proved to have been achieved.

of action, then the complaints are adequate.<sup>303</sup> The defendant cannot challenge the complaint's invalidity so long as the defendant knows the identity of the plaintiff and the cause of action of the lawsuit, and the defendant appeared in the first hearing.<sup>304</sup>

Note here that part of the undergoing major improvements in all sectors is Saudi Arabia is the improvement in courts' services. One of these improvements is digitalizing the courts' services and permitting plaintiffs to file their cases (Statement of Claim) electronically with the option to attach any electronically stored materials that supports the plaintiffs' cases with no need to visit the court before the first hearings.<sup>305</sup> The next part, however, discusses some aspects of the process to serve statements of claims to defendants as well as the process to exchange and serve judicial documents between parties.

#### **2.4.3.3 Service of Process in the Saudi Legal System**

Service of process in the Saudi civil procedure system includes not only serving summons on defendants, but also serving all judicial documents between litigants including notices, warnings, adjudication, and appeal requests.<sup>306</sup> The Saudi Civil Procedure Law puts on courts the duty of serving litigants as well as the burden to prove that the notices were served to litigants

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<sup>303</sup> *Id.* Art. 5&41; see also Awad, *supra* note 29, at 360.

<sup>304</sup> Civil Procedure Law, *supra* note 6, Art. 5&41; see also Awad, *supra* note 29, at 360.

<sup>305</sup> Ministry of Justice website, e-Services, available at:

<https://www.moj.gov.sa/english/eServices/Pages/default.aspx#mahakem>

<sup>306</sup> Civil Procedure Law, *supra* note 6, Art. 13, 42, 43.

properly. There is an exception in the Saudi Civil Procedure Law on this general rule of service, contained in Article 11, which gives litigants the unique option to serve each other by themselves without the court's participation. Litigants who choose to serve any judicial documents themselves must provide written proof of service to the courts.<sup>307</sup> After adopting rules of discovery in Saudi Arabia, this exception that allows parties to work together out of court should be useful. Each party would be able to request evidentiary materials from the other party since one of the main purposes of the discovery process is to allow parties to cooperate by exchanging important legal materials out of court. The next part, therefore, examines the procedures to the disclosure of evidentiary materials under the current Saudi legal system where no formal discovery rules exist to help parties find facts and obtain needed materials that support their allegations against encounter parties.

#### **2.4.3.4 Disclosing Materials in the Saudi Legal System**

One result of the absence of a discovery regime in the Saudi Arabia legal system is that litigants, upon their own discretion, disclose whatever materials they believe will help to prove their arguments in courts of law. They, however, do not disclose other evidentiary materials that they assume are not in their favor since the law does not obligate them to do so.<sup>308</sup> If a litigant, during a proceeding, mentions a piece of material that supports its claims, then the opposing party may seek a court order to make this particular material available for consideration. This material

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<sup>307</sup> *Id.* Art. 13(e), 14, and the executive regulation of Article 11; see also Awad, *supra* note 29, at 365.

<sup>308</sup> Litigation Procedures and Strategies, *supra* note 126, at 4-5.

must be available for the opposing party's consideration unless there is a legitimate justification provided to court for not making this material available for another party.<sup>309</sup>

In regard to the written materials in the possession of litigants, the Saudi Civil Procedure Law requires courts in two circumstances to examine written documents to distinguish the authentic from those that are forged. One is when litigants have conflicting written documents to prove their legal rights that would entitle them to relief. The other circumstance is when a litigant denies its handwriting, signature, or fingerprint on a legal document.<sup>310</sup>

Courts of law, upon examining any written documents, may hire experts to help them investigate conflicting documents and may order the litigants to submit other legal documents in their possession to compare them with the documents under examination to discover any possible misleading information or forgery.<sup>311</sup> The court has wide discretion to decide whether it should hire experts to investigate the documents in question or not. This is also true even if the court cannot distinguish by itself the authenticity of documents and is in need of professional help to discover the correct documents or to prove the validation of any handwriting or signature.<sup>312</sup>

If a court of law finds that it is unnecessary to acquire professional help, then the judge may schedule a session for the examination of any conflicting documents. The judge may compare the documents in question and examine them himself to conclude the court's decision about any

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<sup>309</sup> Civil Procedure Law, *supra* note 6, Art. 65; see also Litigation Procedures and Strategies, *supra* note 126, at 4-5.

<sup>310</sup> Civil Procedure Law, *supra* note 6, Art. 142; see also Vogel, *supra* note 112, at 153.

<sup>311</sup> Civil Procedure Law, *supra* note 6, Art. 142.

<sup>312</sup> *Id.* Art. 142, Clause 1 of its executive regulation

legal document. Litigants must bring the documents in question to the assigned session for comparison and examination. If either litigant does not attend the session without previously notifying the court or having a valid reason, this litigant may lose its right to use the documents in question to prove that it is entitled to relief.<sup>313</sup>

Note here that part of what is considered disclosure rules in the current Saudi legal system are the rules of the Saudi Advocacy Law. These rules grant attorneys the right to examine all the legal materials in the possession of the courts or any other official entity in the country in order to use them in defending their clients in courts.<sup>314</sup> The Saudi Advocacy Law obligates courts of law and all official legal entities to help attorneys to perform their duties properly by allowing them to examine any available materials in the possession of courts that is relevant to their clients' cases.<sup>315</sup>

Even though the Saudi Advocacy Law maintains attorneys' right to examine such materials, the law does not grant attorneys the right to obtain copies of any of these documents. This applies to both print and digital documents and copies produced by other technological advances, including electronic documents. An attorney may only examine the documents where they physically exist, while a representative of the entity that has the documents is overseeing the

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<sup>313</sup> *Id.* Art. 145.

<sup>314</sup> NIZAM AL-MOHAMA [THE SAUDI ADVOCACY LAW], Royal Decree No. (M / 38) 28 Rajab 1422 H [10 October 2001] Cabinet Resolution (No. 199) 14 Rajab 1422 H [2 October 2001]. Art. 13, [hereinafter Advocacy Law].

<sup>315</sup> *Id.*

attorney's examination of the documents.<sup>316</sup> Attorneys may write down any notes or information they need about the examined materials so that they can use them during their clients' proceedings.<sup>317</sup> Courts also may, upon attorneys' requests, order a non-party or a governmental entity to make some documents available for the attorneys to review and use to defend their clients. Courts of law may not reject attorneys' disclosure requests without proper justification.<sup>318</sup>

This subsection described the current process to disclose or obtain materials from parties or nonparties in Saudi civil litigations without a formal discovery regime. The next subsection discusses the current rules that govern defendants' responses to plaintiffs' claims, and their appearance and representation in court under the existing rules of Saudi civil litigations. The next subsection also considers the system of civil judicial hearings in Saudi Arabia, including the rules that organize the procedures of interrogatories and depositions, and the process of advocacy in court.

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<sup>316</sup> Mohammed A. Alasmi, *Disciplinary Liability for Lawyers in Saudi Arabia*, (2015) (unpublished S.J.D dissertation, Indiana University) (on file with Robert H. McKinney School of Law), at 118.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 117.

## 2.4.4 Defendant's Response and Judicial Hearings

### 2.4.4.1 Defendant's Response to Plaintiff's Claims

Under the current Saudi Arabia Civil Procedure Law, defendants must submit their answers to plaintiffs' allegations no later than (3) days prior to the first judicial hearing, and (1) day prior to the first hearing in certain other cases.<sup>319</sup> No legal penalties, however, exist for defendants who fail to do so. If defendants appear and submit their answers in the first hearings, courts must consider their acts as legal by acknowledging and including their defenses to the cases.<sup>320</sup>

If a court decides that a litigant's attorney is acting in a way that the court considers to be causing undue extension of judicial hearings, the court may order the client of that attorney to appoint another attorney or to appear in the hearings in person as a legal consequence of its

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<sup>319</sup> Civil Procedure Law, *supra* note 6, Art. 45.

<sup>320</sup> *Id.*

attorney's misconduct.<sup>321</sup> This is in addition to the disciplinary sanctions that the Lawyers Disciplinary Committee in Saudi Arabia might apply on the neglected attorney.<sup>322</sup>

In some sensitive lawsuits, such as divorce, custody and alimony cases, if the court believes that the defendant's attorney is behaving in a manner that causes delay or obstruction of justice in favor of its client, or if the defendant refuses to appear voluntarily in court without a valid reason, the court may force the defendant to appear in person before the court of law upon a court order to

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<sup>321</sup> *Id.* Art. 53. Mr. Frank Vogel states in this regard that "[t]he courts oppose the use of advocates because they feel they would tend to expand, instead of simplify, the dispute and drive the parties apart instead of together. Lawyers would complicate and delay litigation now handled promptly and efficiently in direct and relatively informal proceedings, which so often end in sulh; Saudis already regard litigation as too prolonged and complex. Lawyers would inform parties of stratagems that would drive a wedge between the Fiqh's legal rules and mechanisms and their moral roots, thereby tending to divert the parties from their moral obligations and to subvert the moral mission of the trial. Some writers have even called parties' ignorance of the law and procedure advantageous, since it suppresses calculating or strategic behavior. Lawyers concentrate on their clients' narrow interests, and their representation inevitably inhibits the operation of sentiments of solidarity, tolerance, or forgiveness. In any case, in sharia the qadi [the judge] is the proper instrumentality for protecting the parties from any disadvantage they suffer and guiding them in the judicial process. (In fact, qadis [judges] do perform this function, such as by aiding each party to state its case, asking that particular evidence be brought, or informing a guarantor after judgment against him that he may sue the primary obligor.) A qadi [a judge] is supposed to determine when his protection is inadequate and appoint a wakil [attorney] to assist a party who seems incapable of defending his own interests." See Vogel, *supra* note 112, at 160-61.

<sup>322</sup> Advocacy Law, *supra* note 314, Art. 29.

the competent authority<sup>323</sup> to bring the defendant by force of constraint.<sup>324</sup> Along with its order to bring the defendant by force of constraint to court, the court may as well order to keep the defendant in custody until they appear before the court.<sup>325</sup> The competent authority (Police) must bring arrested defendants to the court of law immediately. If not possible, then the court may order the police department to keep the defendants in custody until the hearing day, but they must not be arrested more than (5) days before bringing them to court. Upon legitimate justification, courts may extend their orders to keep evasive defendants in custody until deciding their cases to prevent them from obstructing justice.<sup>326</sup>

#### **2.4.4.2 The System of Judicial Hearings in Saudi Arabia**

Under the Saudi Civil Procedure Law, judges during hearings, have the exclusive right to question parties, witnesses, and others about any related matters to cases.<sup>327</sup> The law also states that, if parties have any questions or requests for each other or for witnesses or nonparties, the interested party can only ask the judge to direct its questions or requests for documents or information to the other party or a nonparty. Judges may permit litigants to cross-examine each

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<sup>323</sup> The police department must cooperate with courts in bringing defiant defendants for coerced appearance in court.

Some police officers are currently on duty in courts to perform such services.

<sup>324</sup> Civil Procedure Law, *supra* note 6, Art. 57, Clause 4, Clauses 10&11 of its executive regulation.

<sup>325</sup> *Id.* Clause 12-13 of the executive regulation of Art. 57.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* Art. 74; see also Vogel, *supra* note 112, at 152.

other during hearings, but they must also answer before the judge during the same or another judicial hearing to consider their answers legitimate.<sup>328</sup> In other words, if the judge permits the parties to cross-examine each other directly during the judicial hearing, and the parties need time to prepare their answers to a cross-examination, the responding party must provide its answer in court and before the judge to be valid. This indicates that judges have much work to do during hearings and must be present all the time to authenticate litigants' legal actions.

The following are some general rules stated in the Saudi Civil Procedure Law that organize the application of interrogatories and depositions in the judicial system. The purpose for discussing these rules is to better understand the way these procedures function in the Saudi civil court system. First, courts of law may, on their own or by a motion, request an admission or interrogate any litigant during judicial hearings without any previous notice.<sup>329</sup> Litigants must comply with such court orders, or the court might penalize them for their misconduct.<sup>330</sup> Courts may permit a litigant to postpone its answer to another judicial hearing, or another venue, whenever justice requires it, or where the court finds it is necessary for a litigant's legitimate interests.<sup>331</sup> Second, if a litigant refuses to appear in court for questioning or refuses to answer a question without a valid reason, the court may infer the defiant party's answer from the surrounding circumstances and may impose

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<sup>328</sup> Civil Procedure Law, *supra* note 6, Art. 74; see also Vogel, *supra* note 112, at 152.

<sup>329</sup> Civil Procedure Law, *supra* note 6, Art. 104.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* Art. 105-06; see also Vogel, *supra* note 112, at 152.

a proper penalty on this litigant.<sup>332</sup> Third, the law requires litigants to conduct depositions before judges in order to consider these depositions legitimate. They must relate to the case's subject matter to admit them into the proceeding.<sup>333</sup> Finally, the Saudi law requires individuals who conduct interrogatories and depositions to be qualified to do so by the Rules of Eligibility (*Rules of Ahlia*) in Islamic Law and the Saudi legal eligibility rules.<sup>334</sup>

If any allegations were raised during hearings, Article 104 of the Civil Procedure Law requires litigants to answer to these allegations in the same judicial hearings in which the allegations were raised if the judge orders them to do so.<sup>335</sup> Otherwise, the judge may apply

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<sup>332</sup> Civil Procedure Law, *supra* note 6, Art. 107.

<sup>333</sup> *Id.* Art. 108-109.

<sup>334</sup> Civil Procedure Law, *supra* note 6, Art 108-109; see also The Blog of Man-made Laws, *Ouyub Alnizam Alqanunii Li Awarid Al-ahlia -Derasa Muqarana- Ma Bayn Al-fiqh Alislami Wa Alqawanin Al-Arabia [The defects of the legal system for the symptoms of eligibility - a comparative study - between Islamic jurisprudence and Arab laws]*, THE BLOG OF MAN-MADE LAWS, [https://qawaneen.blogspot.com/2018/03/blog-post\\_66.html](https://qawaneen.blogspot.com/2018/03/blog-post_66.html); see also Saeed Alheresain, *Kamal Alahleyya wa Taqyeedaha Nezaman be Sen Alroshd [The Full Eligibility and Connecting it to Majority by Law]*, AL RIYADH (Jan. 21, 2011), <http://www.alriyadh.com/596803>; see also Khloid Alseraihy, *Sen Alboloog' Wefqan le Anzemat Almamlakah Alarabia AlSaudia [Puberty According to the Regulations of the Kingdom of Saudi Arabia]*, MOHAMAH (Sep. 9, 2017), <https://www.mohamah.net/law/%D8%B3%D9%86-%D8%A7%D9%84%D8%A8%D9%84%D9%88%D8%BA-%D9%88%D9%81%D9%82%D8%A7%D9%8B-%D9%84%D8%A3%D9%86%D8%B8%D9%85%D8%A9-%D8%A7%D9%84%D9%85%D9%85%D9%84%D9%83%D8%A9-%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A/>.

<sup>335</sup> Civil Procedure Law, *supra* note 6, Art. 104.

sanctions on defendants who refuse to answer without a valid reason.<sup>336</sup> This implies that tribunals may grant litigants time limits to prepare their defenses if they have valid reasons to postpone their answers.<sup>337</sup> From my prior experience as a lawyer in Saudi courts, plaintiffs do not meet judges before the first hearings. However, on a case-by-case basis with valid reasons, they may encounter the judges earlier before the first hearing and without the defendant's attendance.

All the Saudi procedural laws require litigants' advocacy in court be conducted orally in open court.<sup>338</sup> The rules, however, do not prevent parties from using writing to submit their allegations to courts of law or to exchange any information between each other.<sup>339</sup> The law encourages tribunals to provide litigants with reasonable periods of time, if needed, to examine any written documents and to prepare answers on allegations.<sup>340</sup> Note that these periods of time granted for parties to examine written documents could be preserved, and therefore save courts' and litigants' time and resources if a discovery regime existed in the Saudi legal system, through

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<sup>336</sup> *Id.* Art. 67; see also Vogel, *supra* note 112, at 152.

<sup>337</sup> Civil Procedure Law, *supra* note 6, Art. 65; see also Vogel, *supra* note 112, at 152.

<sup>338</sup> "The qadi's (the judge's) first acts are to ask the plaintiff to state his claim and then to require the defendant to reply. Oral proceedings, not written pleadings, are the focus of the trial, although written statements akin to letters to the court are increasingly used in commercial cases. After each party's oral statement, the qadi [the judge] will dictate the statement into the record but distilled greatly into concise briefs of the party's position. There can be a kind of advocacy of each party's position." See Vogel, *supra* note 112, at 152.

<sup>339</sup> Civil Procedure Law, *supra* note 6, Art. 65; see also Vogel, *supra* note 112, at 152.

<sup>340</sup> Civil Procedure Law, *supra* note 6, Art. 65; see also Vogel, *supra* note 112, at 152.

which parties would be able to examine these written documents during an earlier stage of proceedings.<sup>341</sup>

This subsection discussed the obligations defendants bear to respond to plaintiffs' allegations as well as their appearance and representation in court. It also examined the nature of judicial hearings in Saudi civil proceedings. The next part examines the rules that govern the oath performance and witnesses' testimonies as main methods of proof in the Saudi Civil Procedure Law and in Islamic Law in addition to addressing these methods' consideration as conclusive evidence before Saudi courts. The following part also discusses some aspects of presenting materials in Saudi courts according to the rules of Saudi laws that are based on some rules adopted from different Islamic schools of thought, especially in terms of witnesses' testimonies as a major method to prove allegations in court.

## **2.4.5 The Oath Performance and Witness Testimony Procedures**

### **2.4.5.1 Litigant Oath Performance as Conclusive Evidence in the Saudi Legal System**

The Saudi Civil Procedure Law, like Islamic Law, considers oath performance before a court as a certified legal method to prove or deny litigants' allegations. Performing the oath before the tribunal to prove or deny a party's allegations ends the parties' dispute before courts of law

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<sup>341</sup> Vogel, *supra* note 112, at 152, expressing that "[i]n general, the exchange seems little concerned with formal procedure and the rules of evidence, and directed instead at finding out in common-sense fashion what is at the heart of the dispute."

permanently because this method of proof is considered in Islamic Law, as well as Saudi law, as conclusive evidence that can end litigants' disputes where no other legal method of proof exists to prove or deny a party's allegations.<sup>342</sup>

As a brief overview of the rules of taking oaths in the Saudi Civil Procedure Law guided by the rules of performing oaths in Islamic Law, the following are some general aspects about the religious oath taking in the Saudi legal system as a product of the Islamic Law rules of oath taking.

First, Civil Procedure Law requires litigants who request to direct oaths to other litigants to specify the elements on which they want the oaths to be performed.<sup>343</sup> Second, performing or refusing to perform an oath is valid only if the action occurs in court, before the judge overseeing the case, and upon the judge's permission or order to perform the oath; otherwise, the court will not take the oath into consideration to finalize the dispute. The oath, therefore, must be performed in court and in front of a judge to be considered certified.<sup>344</sup> Third, if there is no dispute about the essence of the oath, the litigant who the court orders it to perform the oath must perform it

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<sup>342</sup> Oaths in Islamic Law, as conclusive evidence to end disputes where no other method of proof exists, must be performed in the presence of judges to be considered valid. This principle is mandatory in Shariah, and litigants cannot concur to override this rule by reaching agreements to perform oaths out of court because such legal action will not be considered legally valid without the tribunals' approval. The reason for this compulsion is Islamic Law considers oath performance as a legal right for judges upon the request of litigants to end their dispute and not a legal right for litigants solely to prove or deny their allegations. See MOHAMMED AL-ZAHAILY, *WASAYEL AL ETHBAT FI AL SHARIAH AL ISLAMIAH [THE MEANS OF PROOF IN ISLAMIC LAW]* (1982), at 54.

<sup>343</sup> Civil Procedure Law, *supra* note 6, Art. 111.

<sup>344</sup> *Id.* Art. 112.

immediately in the same judicial hearing; otherwise, the court will consider this litigant's action as a refusal to perform, and the court may impose a penalty on it or rule against its best interests.<sup>345</sup> Fourth, the litigant, who the court orders it to perform the oath, has the right to redirect the oath to the party who requested it, asking the party to perform the oath on the same specified elements.<sup>346</sup> If one of the parties performs the oath, the court will issue its judgment in favor of this party, which will permanently end the litigants' dispute about the specified elements before this court of law. The fifth and last aspect regarding the rules of oath performance in the Saudi Civil Procedure Law is that, if a litigant from whom the oath is requested cannot come to a court of law to perform the oath for a legitimate reason, the judge who oversees the case must move to that litigant's venue to authenticate its oath performance. If this litigant's venue is out of the geographical jurisdiction of the judge overseeing the case, the judge must authorize another judge to authenticate an oath performance or to go to the venue of a performing litigant.<sup>347</sup>

The litigant who must perform the oath must do so in the presence of the other litigant who requested the oath. Two exceptions to this are when the litigant waives in writing its right to attend the session of oath performance, and when the litigant does not appear in the performance session without a valid reason submitted to the court before performing the oath.<sup>348</sup>

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<sup>345</sup> Civil Procedure Law, *supra* note 6, Art. 113.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* Art. 114.

<sup>348</sup> *Id.* Art. 115.

Article 110 of the old Saudi Civil Procedure Law permitted the performance of oaths, which are performed out of court due to some litigants' valid reasons, to be performed in the presence of a judge.<sup>349</sup> If this is not possible, then it must be performed in the presence of a judicial lieutenant, in which case it is still authentic and has the legal effect to finalize litigants' disputes.<sup>350</sup> Surprisingly, Article 114 of the new Civil Procedure Law, which is the revised version of Article 110 of the old law, omitted the relevant phrase that allows the authentication of oaths by judicial lieutenants.<sup>351</sup> The new Civil Procedure Law intends to restrict the job of authenticating oaths to judges only. Limiting the authentication of oaths, which are performed out of court, to be in the presence of judges only imposes more practical responsibilities on judges in Saudi Arabia who already suffer from being responsible for examining significant numbers of caseloads.<sup>352</sup>

Upon adopting a formal discovery regime to be part of the Saudi civil procedure system, Article 114 of the current Saudi Civil Procedure Law needs to be revised to grant judicial lieutenants the authority to authenticate the oath's performance out of courts. This amendment to

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<sup>349</sup> NIZAM AL-MORAFAT AL-SHARI'AH AL-KADEEM [THE OLD SAUDI CIVIL PROCEDURE LAW], Royal Decree No. (M / 21) 20 Jomada Al-Awal 1421 H. [20 August 2000] Cabinet Resolution (No. 115) 14 Jomada Al-Awal 1421 H. [14 August 2000], Art. 110, [hereinafter Old Civil Procedure Law].

<sup>350</sup> *Id.*

<sup>351</sup> Civil Procedure Law, *supra* note 6, Art. 114.

<sup>352</sup> Ansary, *supra* note 98, at 31.

the article provides judges with the opportunity to concentrate their efforts on matters occurring within courtrooms while having the authority to monitor the judicial lieutenants' performance.<sup>353</sup>

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<sup>353</sup> Judicial lieutenants are considered in the Saudi legal system as judges' assistants who oversee judicial hearings and consider with judges the litigants' claims and defenses. Such training is the beginning of the independence of the judicial lieutenant in the judiciary field since he will be promoted to a judicial position after a specified period. Some of the duties of the judicial lieutenants during their qualification period include: accompanying judges in courtrooms; understanding the types of courts and their specialties; identifying the judges' aides in court and their duties; knowing the ethics of the judge in courtrooms; knowing the judges rights and duties; knowing the stages of the case from filing the case in court until the issuance of a final judgment; understanding the modern laws and circulars and how to deal with them in case they contradict with Islamic Law or other more superior regulations; and finally, knowing how to deal with official correspondence. According to the Regulation of the Work of the Judicial Lieutenants, the duration of judicial lieutenancy in court is (3) years from the date of appointment of the judicial lieutenant by the Supreme Judicial Council. Accordingly, judicial lieutenants are not legally qualified to consider and decide all cases before the end of these (3) years. In practice, however, judicial lieutenants begin to decide some minor cases (3) months after the commencement of their work, but their decisions are not considered valid and effective until these decisions are affirmed by the judges who oversee the judicial lieutenants' work. *See* SUPREME JUDICIAL COUNCIL, TANZEEM AAMAAL ALMULAZMEEN ALQADAEEN [THE REGULATION OF THE WORK OF THE JUDICIAL LIEUTENANTS], Resolution No. (31/8/805) 12 Jomada Al-Thani 1431 H. [25 May 2010], [hereinafter Judicial Lieutenants Regulation]. The issuance of this regulation was instructed by Clause (i) of Article 6 of the Saudi Judiciary Law to organize all judicial lieutenants' affairs and responsibilities. See an Arabic version of this regulation at <https://www.moj.gov.sa/Documents/Regulations/pdf/04.pdf>; See also Al-Ghadyan, *supra* note 115, at 241.

It is notable that Mr. Frank Vogel in his book *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* summarizes the procedure of oath performance under the Islamic Law as follows:<sup>354</sup>

If the plaintiff fails to prove his case by witnesses, then the qadi [the judge] asks him whether he demands the exculpatory oath of the defendant. If he declines this right, he loses his case. If he does demand the oath, then the defendant (in civil cases) must either take the oath or himself lose the case. If the defendant agrees to take the oath, the qadi [the judge] dictates to him an oath that categorically denies the facts at issue. Or, if the defendant has no means to know the facts at issue, the qadi [the judge] may allow him to take an oath as to his knowledge. On taking the oath, the defendant wins the case at once. Again, religious texts emphasize the sinfulness of a false oath, and stories abound of pious and innocent persons refusing to take the oath, fearing its enormity, and of the prompt sickness and death of those who take it with a guilty conscience.

#### **2.4.5.2 Witness Testimony under Oath in the Saudi Legal System<sup>355</sup>**

The process of testimonies in the Saudi Civil Procedure Law is in accordance with the following aspects. The first aspect is similar to litigants' performance of oaths. As a binding rule, the law imposes that, if a witness cannot come to a court of law to perform its testimony for a valid reason, the judge who oversees the case must move to that witness's venue to hear and authenticate the testimony, or he must authorize another judge to do so if the witness's venue is out of the

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<sup>354</sup> Vogel, *supra* note 112, at 148.

<sup>355</sup> This subheading is only an overview of the rules of testimony in the Saudi Civil Procedure Law. Further discussion about the impact of discovery on witnesses' testimony takes place within the discussions about the impact of discovery on the United States legal system.

geographical jurisdiction of the judge overseeing the case.<sup>356</sup> The second aspect is when a litigant requests a grace period to bring its witnesses to court. The court must grant this litigant the shortest reasonable time to bring its witnesses and assign another hearing to hear and authenticate the witnesses' testimonies.<sup>357</sup> If the party does not bring its witnesses to the assigned judicial hearing, the litigant might be granted another grace period to bring the witnesses in if there was a valid reason for not bringing them to the assigned hearing, and the judge must assign another hearing for the testimony. If the litigant does not bring its witnesses to the second assigned hearing for the testimony, then the court, upon its discretion, can grant the party a third grace period if there is a valid reason, or it can proceed in the case and may issue its verdict without hearing from these witnesses.<sup>358</sup>

If the litigant moving to hear the witnesses' testimonies decides that it is unable, for a valid reason, to bring its witnesses to court, or the litigant requests a very long grace period to bring witnesses to court, then the court, upon issuing its verdict without hearing from these witnesses, must inform this litigant that it can file a new lawsuit in court when this litigant becomes able to bring its witnesses.<sup>359</sup> If this happens, the court resumes the case and considers the witnesses as new available proofs, which may drive the court to revise its original verdict.<sup>360</sup> Judges are the

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<sup>356</sup> Civil Procedure Law, *supra* note 6, Art. 122.

<sup>357</sup> Civil Procedure Law, *supra* note 6, Art. 126.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* Clause 1 of its executive regulation.

<sup>360</sup> *Id.*; see also Vogel, *supra* note 112, at 146.

ones who are in charge of questioning witnesses to clarify the truth, and they should direct any litigants' questions to the witnesses to answer them.<sup>361</sup> Judges have wide discretion to reject directing the litigants' questions to witnesses if the judges believes that the question is unproductive and would not help to clarify the truth.<sup>362</sup> This process of bringing witnesses to court demonstrates that it is a litigant's responsibility to bring its witnesses to court. The law does not mention any role of the court to interfere in this process by ordering witnesses through subpoenas to appear in court of law to testify. Generally, witnesses should not be compelled to appear in court against their will to give their testimony.<sup>363</sup> If they decide to appear in court, however, they must be truthful; otherwise, they will be penalized.<sup>364</sup> Mr. Frank Vogel writes about witnesses' obligations.<sup>365</sup>

Witnesses are enjoined to be utterly certain and truthful about what they say, and hadiths tell of the horrible divine punishment for false testimony. Ultimately, whether witnesses are untruthful can be known only in the batin [inside oneself]; they will be punished only in the batin, i.e., by God. But if their dishonesty is exposed in the zahir [apparent], the qadi [the judge] has the discretion to punish it as a sin.<sup>366</sup> The

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<sup>361</sup> Civil Procedure Law, *supra* note 6, Art. 125; see also Vogel, *supra* note 112, at 146.

<sup>362</sup> Civil Procedure Law, *supra* note 6, Art. 125; see also Vogel, *supra* note 112, at 146.

<sup>363</sup> Vogel, *supra* note 112, at 147.

<sup>364</sup> Civil Procedure Law, *supra* note 6, Art. 121-122; see also Vogel, *supra* note 112, at 146.

<sup>365</sup> Vogel, *supra* note 112, at 146.

<sup>366</sup> Courts may impose several kinds of punishments on false witnesses. Since these punishments are disciplinary punishments, courts have wide discretion to impose whatever punishment they find appropriate. These punishments include imprisonment, fines, flogging, and defamation, and never accepting these false witnesses' testimonies in courts of law.

witnesses, if honest, need not be concerned religiously with what the parties or the judge do based on their testimony. The other actors may rely on the external correctness of a witness's testimony, once the witness is accepted by the judge. The notion that witnesses "find" the facts is fundamental. This relieves the judge of some part of the dire moral danger of his function.

### **2.4.5.3 Aspects in Islamic and Saudi Laws Related to Presenting Materials in Court**

The legislature in Saudi Arabia does not stick to the opinions of one Islamic school of thought to govern litigation procedures. It recognizes Islamic scholars' opinions from various Islamic schools of thoughts (Hanbali, Shafi'i, Maliki and Hanafi). The Hanbali school of thought, however, provides the fundamental approach that the Saudi legal system follows in legislation and judicial rulings.<sup>367</sup> These scholarly opinions are practically adopted as part of the legal system by including them as formal provisions in the Civil Procedure Law and other related laws.<sup>368</sup> This subsection discusses the opinions of the Islamic schools of thought adopted in the Saudi legal system and how they are applied in Saudi courts, specifically their methods of presenting evidentiary material before courts of law in civil cases. Out of many, two circumstances are considered here to distinguish their approaches.<sup>369</sup>

The first circumstance is when a plaintiff possesses materials supporting its claims, yet the plaintiff decides to ask the court to direct the defendant to perform an oath refuting the plaintiff's

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<sup>367</sup> Hanson, *supra* note 112, at 274; see also Esmaeili, *supra* note 112, at 30&33.

<sup>368</sup> Related laws to the Civil Procedure Law are the Board of Grievances Procedure Law and the Criminal Procedure Law. *See* Board of Grievances Procedure Law, *supra* note 90; see also Criminal Procedure Law, *supra* note 151.

<sup>369</sup> El Ghamdi, *supra* note 96, at 79.

allegations without examining the plaintiff's materials. The court in this case may or may not grant the plaintiff this request. If the court grants this request, and the defendant performs the oath and denies the plaintiff's allegations, then the plaintiff, since it was its own choice to rely on the defendant's righteousness, loses its legal right to use the materials in its possession that support its claims, and the court must rule in favor of the defendant.<sup>370</sup> This approach is the approach adopted by the Saudi Civil Procedure Law. Some other Islamic scholars in different schools of thoughts, however, have adopted a different approach.<sup>371</sup>

The other circumstance occurs when the plaintiff does not possess, at the time of the hearing, enough proof to support its allegations or cannot bring enough witnesses to testify in its favor in the court of law. In this case, the court may order the defendant, upon the plaintiff's request, to perform an oath denying the plaintiff's allegations due to it being the sole remaining legal method to prove or deny the plaintiff's claims. Performing the oath and ruling for the defendant, in this particular case, does not prevent the plaintiff from filing a request later in court to reconsider the same dispute if the plaintiff comes across any crucial materials that support its claims and prove that the plaintiff is entitled to relief.<sup>372</sup>

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<sup>370</sup> *Id.*; see also Vogel, *supra* note 112, at 147.

<sup>371</sup> El Ghamdi, *supra* note 96, at 47-48.

<sup>372</sup> El Ghamdi, *supra* note 96, at 80.

According to the majority of Islamic scholars and the Saudi Civil Procedure Law,<sup>373</sup> if a plaintiff brings its witnesses to testify in its favor in court, the defendant may seek from the court a time limit by which the defendant must prove that the witnesses are biased. The court of law should grant the defendant a reasonable time limit to prove its allegations regarding the witnesses. If the defendant does not prove during the granted time limit that the witnesses are biased, not impartial, or not objective, the court may listen to the witnesses' testimonies regarding the disputed matter.<sup>374</sup> The court may rule in favor of the plaintiff, based on these testimonies, unless the defendant submits to court, in a timely manner, another admissible piece of evidence to prove its denial of the plaintiffs' allegations. The defendant may ask the court to grant another time limit to permit the defendant to provide the proof for its denial.<sup>375</sup> The defendant, in this incident, is

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<sup>373</sup> The majority of scholars in the various schools of thoughts (Hanbali, Shafi'i, Maliki and Hanafi) agreed on this issue with no major dissent. The legislation in Saudi Arabia accordingly adopts the scholars' opinion in this regard in Article 62 and Article 65 of the Saudi Civil Procedure Law. *See* El Ghamdi, *supra* note 96, at 72, in addition to the several cited publications in this paper about the opinions of some Islamic Law scholars from different schools of thoughts regarding this issue; see also Vogel, *supra* note 112, at 146.

<sup>374</sup> "The testimony must be at root plausible, and the witness must have directly experienced what he testifies to. Testimony may comprise expert witnesses, by means of whom much knowledge about real or circumstantial evidence can enter the court. A witness must not have any bias from relationship to the parties or interest in the suit. The defendant is allowed to raise any point impugning the witness's qualifications, supporting this with his own witnesses as necessary. The requirement that the witness be morally certain of his or her testimony demands that the testimony be voluntary, ruling out subpoenas." *See* Vogel, *supra* note 112, at 147.

<sup>375</sup> Civil Procedure Law, *supra* note 6, Art. 124; see also El Ghamdi, *supra* note 96, at 81.

conducting disclosure of evidence (or discovery by accident of circumstance since it is not a formal discovery process). The reason for this perspective is that defendants are granted time limits to investigate the witnesses' integrity to prove their prejudice in favor of the plaintiff. In some cases, the court may order the plaintiff itself to be on the stand to give its testimony under oath and answer questions about the disputed matter asked by the court or directed from the court upon the defendant's cross-examination request.<sup>376</sup>

To sum up, this subsection discussed the oath procedure in the Saudi Civil Procedure Law as well as the procedure of witness testimony according to the rules of some schools of thought in Islamic Law. It also considered some methods to present materials before Saudi courts with special consideration to witnesses' testimonies to prove allegations in court, according to the rules of Islamic Law. The next part presents some problems that exist in the Saudi legal system due to its sole reliance on oaths as a conclusive method of proof to end civil disputes before courts of law in addition to addressing some undesirable impacts caused by the absence of a discovery regime. The following part also discusses the issue of abandoning civil lawsuits in Saudi Arabia as well as discussing unreasonably increased reconsideration requests submitted to courts to review final judgments and how adopting a discovery regime in Saudi legal system would most likely help to eliminate these problems.

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<sup>376</sup> Civil Procedure Law, *supra* note 6, Art. 104-105; see also Vogel, *supra* note 112, at 146.

## 2.4.6 Problems with Relying Exclusively on the Oath Procedure: Consequences of a Lack of Discovery

### 2.4.6.1 Abandonment of Lawsuits in the Saudi Legal System

As a permissible legal act, plaintiffs in the Saudi judicial system, as in many comparative judicial jurisdictions, can abandon their lawsuits without providing excuses. The Saudi Civil Procedure Law describes such action as the *Abandonment of Lawsuits*. This term is defined as the plaintiff's declaration of its intention to abandon the lawsuit and waive its right to proceed in the case prior to the court's final decision on the subject matter of the lawsuit.<sup>377</sup> However, Executive Regulation of Article 92 of the Civil Procedure Law states that a plaintiff's waiver of its legal right to consider its claims in court does not waive its right over the claimed subject matter. The plaintiff can bring the same allegations to a court of law anytime later with a valid reason to do so.<sup>378</sup> The law permits plaintiffs to abandon their lawsuits whenever they believe it is in their best interest.<sup>379</sup> Note here that Rule 41(a)(1) of the Federal Rules of Civil Procedure in the United States also permits plaintiffs to dismiss their actions voluntarily. According to Rule 41(a)(1)(B), if the plaintiff

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<sup>377</sup> Civil Procedure Law, *supra* note 6, Art. 92-93; see also Awad, *supra* note 29, at 436.

<sup>378</sup> In typical civil case situations, a plaintiff may dismiss its lawsuit with or without prejudice at any time before the defendant joins issue and sometimes even after the defendant joins issue, with permission of the court or the defendant or both.

<sup>379</sup> Civil Procedure Law, *supra* note 6, Art. 92.

voluntarily dismisses its action twice, then this plaintiff is barred from bringing the claim again to court, which means that dismissal of a second suit operates as an adjudication on its merits.<sup>380</sup>

According to Article 92 of the Saudi Civil Procedure Law, abandoning lawsuits must not breach defendants' right to proceed with lawsuits. The defendant's permission for the plaintiff to abandon a lawsuit is required if the defendant submits its defense to the plaintiff's allegations to court; otherwise, the plaintiff cannot abandon a lawsuit.<sup>381</sup> One of the reasons that a plaintiff abandons its lawsuit is because the plaintiff realizes that it filed the case before having collected enough materials to support its claims and that proceeding with the lawsuit may lead to the granting of judgments against its advantage.<sup>382</sup>

One disadvantage of the absence of a discovery practice in the Saudi legal system is that plaintiffs may abandon their lawsuits to avoid the risk of losing their rights because they realize that they do not have sufficient admissible pieces of evidence to support their cause of action against their defendants. The abandonment of lawsuits, because of the lack of admissible evidence, would most likely be eliminated in the Saudi legal system after the adoption of a discovery regime. This is because plaintiffs would be able to file cases by providing only some documents supporting

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<sup>380</sup> FED. R. CIV. P. 41(a)(1); see also *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518; see also Danielle Calamari, *Voluntary Dismissal of Time-Barred Claims*, 85 *FORDHAM L. REV.* 789 (2016); see also Howard M. Wasserman, *Jurisdiction and Merits*, 80 *WASH. L. REV.* 643 (2005); see also Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 *U. MICH. J. L. REFORM* 367 (2003).

<sup>381</sup> Civil Procedure Law, *supra* note 6, Art. 92.

<sup>382</sup> Awad, *supra* note 29, at 436.

their cause of action, and then through the required initial disclosure and permitted discovery, they would have the opportunity to find facts and obtain any supportive materials in the possession or control of adverse parties. In other words, one of the reasons why plaintiffs abandon their lawsuits is because they realize they lack sufficient materials to prove their allegations in court. Discovery allows them to obtain materials in the possession or control of defendants, which would reduce the number of abandoned lawsuits.

#### **2.4.6.2 Reconsideration Requests in the Saudi Legal System**

If a judgment is granted and an appellate court affirmed the judgment, or the grace period to appeal has passed, the Saudi law considers the judgment as final, and the parties cannot challenge the final judgment.<sup>383</sup> However, Article 200 of the Saudi Civil Procedure Law permits, in limited instances, parties to submit to court a petition for reviewing a judgment even after the judgment becomes final. This is equitable and supports the parties' right to achieve justice.<sup>384</sup>

One of the instances in which a litigant can submit a petition for review to court is when the litigant who seeks the review of a judgment has obtained decisive material after the judgment became final. Decisive material refers to any document or information that is crucial in the case and will affect the verdict substantially if this material is submitted to the court before it issues its judgment. To submit a petition to review this material, the petitioner must prove that because of the improper behavior of another party, the petitioner was unaware of the existence of such

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<sup>383</sup> Civil Procedure Law, *supra* note 6, Art. 187.

<sup>384</sup> *Id.* Art. 200.

decisive material at the time the final judgement was granted.<sup>385</sup> Note here that Rule 60(b) of the FRCP in the United States also considers the reason for obtaining a new piece of evidence as a valid reason to relieve a party from a final judgment, order, or proceeding. This rule states that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."<sup>386</sup>

Another incident stated in Article 200 where a party is allowed to submit a petition to review a final judgment is when another party in a case misleads a court of law by fraud that affects the court's judgment and makes the court rule in favor of the fraudulent party. The petitioner who seeks the review of the judgment must prove the fraud and its lack of awareness of it at the time of the ruling. The court then has wide discretion to evaluate the petitioner request for review.<sup>387</sup> Rule 60(b) of the FRCP also considers this reason as a valid reason to relieve a party from a final judgment, order, or proceeding. The rule states that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."<sup>388</sup>

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<sup>385</sup> Civil Procedure Law, *supra* note 6, Art. 200, Clause 1.

<sup>386</sup> FED. R. CIV. P. 60(b)

<sup>387</sup> Civil Procedure Law, *supra* note 6, Art. 200; see also Awad, *supra* note 29, at 585.

<sup>388</sup> FED. R. CIV. P. 60(b)

Adopting a formal regime to practice discovery in the Saudi legal system would most likely decrease the number of submitted petitions to review final judgments because litigants would be obliged by law through initial disclosure and discovery to provide each other any relevant materials to the case and any requested information or documents. This would maintain tribunals' and litigants' resources. With the discovery regime, bad faith litigants, who attempt to hide crucial materials, might be exposed and sanctioned for their improper behavior early on during proceedings. The discovery practice also helps to reduce forgery and fraud conducted by some bad faith litigants since during the discovery stage, each party would have access to relevant original documents in the possession, control or custody of other parties, which would make forgery or fraud very difficult.

In short, this subsection examined some existing legal problems in Saudi Arabia that are a result of exclusively relying on an oath taken as a legal method to end some disputes. It also mentioned some legal consequences caused by discovery absence, including discussion about the issues of abandoning civil lawsuits and reconsideration petitions submitted to review final judgments.

The final subsection of Section 2.4 of Chapter One presents different legal problems that exist in the Saudi legal system. It also addresses current leniency in judicial hearings, and how this leniency affects the best interest of some litigants. The next subsection also shows how adopting a discovery regime to be part of Saudi civil litigations would positively impact litigants' best interests and improve the efficiency of the process of civil litigations. The next subsection also addresses the nonappearance of the concept of binding judicial precedents in Saudi Arabia, as it is

applied in the United States, as well as addressing the absence of summary judgment and the jury trial system such as the ones that exist in the United States legal system.

## **2.4.7 Other problems in the Saudi Legal System**

### **2.4.7.1 Leniency in Judicial Hearings**

Judicial hearings in the Saudi legal system are one of the main required procedures in any case. Hearings are groups of meetings between judges and litigants during which other judicial procedures take place, including conducting oral arguments, providing evidentiary materials, and issuing verdicts. Hearings have special importance, because they are the only formal way for litigants in the Saudi judicial system to communicate with each other and communicate with judges. The hearings are also the best way for judges to collect the cases' facts provided by parties, and therefore enable judges to examine these facts and issue their final judgments.<sup>389</sup>

In contrast with some other comparative legal systems, the Saudi Civil Procedure Law seems to be lenient with parties who do not properly follow the rules for appearing at hearings.<sup>390</sup> As an example of this leniency, Article 59 of the Civil Procedure Law states that any litigant who does not appear at a hearing on time should not be considered absent so long as the litigant does appear in court (30) minutes before the end of the assigned time for the hearing. This is true even if the hearing session does not start until that time because of this litigant's tardiness. The court

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<sup>389</sup> Awad, *supra* note 29, at 396.

<sup>390</sup> *Id.*

will also consider the litigant present from the beginning of the scheduled time for that hearing session with no sanction imposed for being late.<sup>391</sup>

One problem that exists as a result of this leniency is that the law prevents any party from providing judges with any requests, defenses or evidentiary materials if the other party is not present in the hearing, as a protection for litigants' privileges. This problem, on the other hand, should also be considered as a breach of rights for the party who acts properly and appears in timely manner in the assigned hearing. The absence of or delay in appearing at hearings caused by some defiant litigants wastes tribunals' time and resources because the main purpose of hearings is to listen to both parties' claims and defenses.<sup>392</sup>

Adopting a discovery regime in the Saudi legal system preserves courts' and litigants' resources by minimizing the number of hearings, because litigants would have had the chance to communicate with each other and exchange any relevant materials out of court and prior to hearings. This would allow litigants to identify the facts of the case, leading to solving their dispute out of court without wasting resources. During the discovery stage, judges should be aware of all the results of the discovery practice, including interrogatories, depositions, cross-examinations, requests for production or admission and subpoenas, because they have had considerable authority to oversee the discovery practice between litigants and to supervise the discovery magistrates' job.

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<sup>391</sup> Civil Procedure Law, *supra* note 6, Art. 59.

<sup>392</sup> *Id.*; see also Awad, *supra* note 29, at 396.

Judges also should interfere in discovery whenever they believe it is necessary, or when parties are seeking the tribunals' interference for relief.<sup>393</sup>

#### **2.4.7.2 Judicial Precedents in the Saudi Legal System**

Unlike the United States judicial system, the Saudi Arabia legal system does not recognize the principle of binding judicial precedents of tribunals' rulings. The principle of stare decisis also does not exist in the legal system.<sup>394</sup> Judges in the lower courts have wide discretion in deciding cases. They may make their judgments based on their own interpretations of Shariah Law with no obligation to follow the higher courts' rulings in similar cases.<sup>395</sup> Judges, however, are advised by

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<sup>393</sup> The "Saudi legal practice seems systematically to choose from among possible interpretations or implementations of relevant Fiqh doctrine those that are relatively microcosmic-tending, those that align with the idea that the judge ought to achieve substantive justice in the case before him. This is particularly evident in the system's relative neglect of rules that could render the judge's duty less substantive and more formal. One instance of this is that the system encourages the judge to participate actively in fact-finding so that the true facts are brought to light, this despite the fact that Fiqh's structuring of the trial puts the moral and legal burden of factfinding on the witnesses and the parties. Another instance is the Saudi practice by which judges strongly advocate and actively facilitate sulh or reconciliation, a practice shifting their function from one of adjudicating by general Fiqh rules to one of seeking ad hoc, substantive justice for each case." See Vogel, *supra* note 112, at 162.

<sup>394</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 1; see also Vogel, *supra* note 112, at 16.

<sup>395</sup> Al-Hejailan, *supra* note 117, at 340; see also Vogel, *supra* note 112, at 15-16.

the Saudi Judiciary Law to consult the higher courts' rulings while considering cases to develop their judicial knowledge and experience.<sup>396</sup>

Litigants may submit to courts of law, during proceedings and along with their allegations, copies of previous higher courts' decisions that support their cases. These decisions are considered only as persuasive reference for the courts.<sup>397</sup> Tribunals' wide discretion still causes uncertainty and disparity since a matter adjudicated by a judge might not be adjudicated the same way if another judge considers the case. The reason for this is that each judge has his own interpretations and points of view regarding the application of Shariah Law rules.<sup>398</sup>

The new Saudi Judiciary Law (enacted in 2007) demands that the Ministry of Justice establish a research department within the ministry for the purpose of providing judges with any updates and modifications in regulations and laws.<sup>399</sup> One of the duties of this research department is to summarize, index and publish remarkable judgements and judicial principles of the Supreme

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<sup>396</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 1; see also Vogel, *supra* note 112, at 15-16.

<sup>397</sup> "Note three differences between this system and one in which appellate courts' decisions do prospectively bind the courts under them. First, here the power of appeal court precedent is not formal or doctrinal, but only practical. A qadi [a judge] who deliberately flouts an appellate opinion does not act improperly. Second, because it sees its own decisions as microcosmic law, the appellate court has less need to rationalize its various results and avoid changing or overturning an earlier opinion. Third, the appellate courts take conclusive decisions only in the cases detailed above, chiefly those involving basic conflict with shari'a. This means that any general rule-making it does is infrequent." See Vogel, *supra* note 112, at 112; see also Litigation Procedures and Strategies, *supra* note 126, at 5.

<sup>398</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 1; see also Al-Hejailan, *supra* note 117, at 340.

<sup>399</sup> Judiciary Law, *supra* note 86, Art. 71, Clause 3.

Court and appellate courts in order to help judges and other legal entities to refer to these judgments as persuasive precedents while considering cases in the same or lower level courts.<sup>400</sup> This new legal approach might be considered an attempt to diminish the disparity between judicial decisions by courts of law when deciding lawsuits that have similar facts and increase consistency in judicial rulings.<sup>401</sup> The legislators of the Saudi Judiciary Law intended another purpose for establishing this research department, conducting research to provide formal responses to any tribunals' inquiries regarding newly enacted statutes and regulations in the judicial system.<sup>402</sup>

Upon adopting a formal discovery regime in the Saudi legal system, this research department in the Ministry of Justice should be responsible for conducting research related to any potential problems raised in the judicial system resulting from the discovery practice. The purpose of such research would be to enable the appropriate and smooth adoption of the discovery practice in the Saudi judicial system, and to reform the discovery practice, when needed, to attain the best advantages of allowing the practice of discovery.

### **2.4.7.3 Summary Judgments in the Saudi Legal System**

The concept of summary judgment, as it is applied in the legal system of the United States, is not recognized in the Saudi legal system. Nevertheless, as an urgent motion, litigants may

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<sup>400</sup> *Id.*; see also Ansary, *supra* note 98, at 70; see also Al-Hejailan, *supra* note 117, at 340.

<sup>401</sup> Al-Hejailan, *supra* note 117, at 340.

<sup>402</sup> Ansary, *supra* note 98, at 70.

request that the court issue a temporary decision on the merits of the case as temporary relief.<sup>403</sup> This temporary decision must be enforceable on the other litigants because of the urgency of the case. As an example of matters on which courts of law should issue temporary judgements is urgent matters in labor disputes, such as ordering salary payments. Another example of these temporary decisions is the court's decisions about ordering payments of alimony and deciding on child custody or visitation.<sup>404</sup>

Note that the jury trial system, similar to the one in the United States, also does not exist in the Saudi legal system. There is no opportunity for a jury even in major criminal cases.<sup>405</sup>

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<sup>403</sup> Civil Procedure Law, *supra* note 6, Art. 169; see also BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 7.

<sup>404</sup> Civil Procedure Law, *supra* note 6, Art. 169.

<sup>405</sup> Vogel, *supra* note 112, at 29, 100.

## 2.5 Conclusion

Chapter One mainly discussed the legal system of Saudi Arabia as well as the rules of Islamic Law and its application in Saudi Arabia. Chapter One examined the civil procedure aspects in Saudi Arabia and in Islamic Law in addition to the effects of Shariah on the Saudi civil procedural principles. It discussed the main principles of Islamic Law and their role in the Saudi legal system. In addition, this chapter discussed the nature of the Saudi legal system with some examinations of the influence of Shariah on the sources of legislation, the adopted laws, and the branches of authority and on the nature of the legal system. It also addressed the concepts of civil procedure in both Islamic and Saudi laws.

Chapter One also considered the structural arrangement of government in Saudi Arabia, the separation of powers, the enactment of new laws, the King's role, and the approaches to judicial education in Saudi Arabia. Chapter One provided an overview of the branches of authority and the process of formulating new laws in Saudi Arabia. Chapter One examined the branches of authority and the role of the King over these branches. It also identified the three types of legal education in Saudi Arabia and the educational requirements for judgeship candidacy. This chapter also addressed some attempts to develop the Saudi legal education and hence to improve judges' skillfulness and expertise.

This chapter also provided an overview of the Saudi civil litigation system, including overhauls to reform the judiciary especially establishing King Abdullah Program for Judicial Reform in 2007. It also provided an overview of the Saudi courts' structure and the other extraordinary judicial bodies in Saudi Arabia.

Furthermore, Chapter One examined the initial disclosures that plaintiffs bear under the Civil Procedure Law and the service of process in civil litigations. It addressed the tests as well that plaintiffs must confront to prove their causes of action and allegations with no discovery regime existing to disclose information in other parties' or non-parties' possession, control, or custody. This Chapter considered the rules that govern defendants' responses, appearance, and representation in Saudi civil courts. It also considered the Saudi civil hearings system, including the rules of interrogatories, depositions, and the process of advocacy.

Chapter One also addressed the rules of the oath performance and witnesses' testimonies and the rules that consider them as conclusive evidence in Saudi laws according to some Islamic schools of thought. It discussed the methods to present materials in court under the Saudi Civil Procedure Law as well.

This chapter also addressed some problems that exist because of the sole reliance on oaths as conclusive evidence to end civil disputes in Saudi courts. It also considered some impacts of the absence of a discovery regime in Saudi Arabia, including the abandonment of lawsuits and the increased reconsideration petitions, and how adopting a discovery regime would most likely help to eliminate these problems.

The final section of Chapter One addressed certain problems that exist in the Saudi legal system, including the leniency in judicial hearings, and how this leniency affects the best interest of litigants. This section showed how adopting discovery similar to the United States discovery regime would positively affect litigants' best interests and improve the efficiency of the civil litigation process. This section also addressed the nonappearance of binding judicial precedents in Saudi Arabia, as well as the absence of the summary judgment and the jury trial systems.

The next chapter, Chapter Two, mainly discusses the rules to practice discovery under the Federal Rules of Civil Procedure in the United States. It addresses the purposes, limits, and scopes of discovery practice in the United States. Chapter Two also considers the sanctions and other consequences imposed on defiant parties upon violating the discovery rules. Chapter Two also discusses the advantages and disadvantages of discovery in terms of time and cost in addition to addressing some consequences of the discovery practice in the United States, supported by statistical and empirical studies. The last section of Chapter Two considers the judges' role in the pretrial discovery process in civil litigation. It also mentions some arguments regarding the judges' reluctance to impose sanctions on parties who violate discovery rules.

### **3.0 Chapter Two: The Discovery Regime in the Federal Rules of Civil Procedure in the United States**

#### **3.1 The Purposes, Limits, and Scope of Discovery and E-discovery Practice in the United States**

In the beginning of this chapter, note that this dissertation discusses the discovery rules under the Federal Rules of Civil Procedure and focuses only on the federal practice of discovery in the United States since discovery practices may vary in the state courts. The federal trial courts are district courts, and discovery in all of them will be governed by FRCP.

The first section in this chapter discusses the limits, scope and purposes of practicing document discovery and E-discovery of ESI. It also provides an overview of the discovery rules in the Federal Rules of Civil Procedure (FRCP), in addition to examining discoverable legal materials under the discovery rules. This section then discusses the purposes of establishing the discovery rules under the FRCP. It also discusses the scope of document discovery practice and electronic discovery under the FRCP. This section then examines the time limit of discovery practice under the FRCP. It also considers the principle of privilege in the United States legal system regarding discovery. This section then discusses the protective orders submitted to courts in the United States related to discovery matters. The last subsection in this section addresses some amendments to the FRCP to alter or narrow the scope of discovery practice.

### 3.1.1 The Discovery Regime in the United States

The United States legal system differs from civil law jurisdictions in terms of evidence regulations. For instance, the United States system is adversarial, and thus, the parties are responsible for gathering evidence as there will be no independent evidentiary investigation by the court. Discovery has a key role in the modern United States litigation system. The United States civil procedural system considers that the full and comprehensive knowledge of all relevant facts collected by parties is necessary for appropriate litigation.<sup>406</sup> The intended purpose of the discovery process is to provide each litigant with necessary information and documents to identify the issues at stake precisely. Securing access by the parties to all relevant facts ensures that important objectives of the procedural justice system are fulfilled.<sup>407</sup> Discovery in the United States legal system assists in satisfying the fairness standards since "[b]road discovery allows a plaintiff who knows merely that he has been wronged to leverage the power of the courts to gain access to the information that will allow him to prosecute a successful case."<sup>408</sup>

The discovery process in the United States is defined as "the formal process of obtaining facts, documents, and evidence in your lawsuit in order to evaluate and prepare your case."<sup>409</sup> It can also be defined as "the process through which the parties to a lawsuit formally exchange

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<sup>406</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>407</sup> *Id.*; See also Koppel, *supra* note 70, at 248.

<sup>408</sup> Koppel, *supra* note 70, at 248.

<sup>409</sup> Public Counsel, *supra* note 42, at 4.

evidence and information before a case goes to trial."<sup>410</sup> One more definition of discovery is "the process of uncovering relevant facts through identifying witnesses, documents, and other items that can lead to establishing those facts as admissible evidence."<sup>411</sup>

Unlike the discovery system in the United States, the legal systems in most civil law countries, including Saudi Arabia, limit discovery of evidence to tribunals only. The fact finding and collecting of materials by litigants themselves or their attorneys, as is the case in United States civil proceedings, is not permitted in most civil law jurisdictions.<sup>412</sup> This makes the United States' party-based discovery mechanism unique. Rule 1 of the Federal Rules of Civil Procedure states that both courts and parties must employ with the Federal Rules of Civil Procedure to secure "the just, speedy, and inexpensive determination of every action and proceeding."<sup>413</sup>

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<sup>410</sup> Aaron Larson, *Conducting Discovery in a Civil Lawsuit*, EXPERT LAW, (May 7, 2018), <https://www.expertlaw.com/library/civil-litigation/conducting-discovery-civil-lawsuit>. Aaron Larson is an attorney in the United States and author of books, articles, and legal reference materials. He is also the owner of the Law Offices of Aaron Larson.

<sup>411</sup> JEFFREY S. GUTMAN, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS 6.2 (2015), Section 6.2.A.

<sup>412</sup> Ogden & Rapawy, *supra* note 68, at 1.

<sup>413</sup> FED. R. CIV. P. 1. To fulfill this purpose of the Federal Rules of Civil Procedure and to develop their function, many amendments to the FRCP took place. One example of these amendments is the 2015 amendment of the FRCP that limited the scope of the discoverable electronic evidentiary materials to only the proportional materials to the case. The amendment of 2015 also contains provisions related to shortening the time limit during which complaints must be served, and the time limit during which courts must issue their orders for case managements.

The scope of discovery practice is also much more restricted in civil law jurisdictions than it is in the United States pretrial discovery practice. Some experts in these civil law jurisdictions consider the pretrial discovery practice in the United States as an undue "fishing expedition."<sup>414</sup> In the United States civil justice system, courts usually decide which witnesses are going to testify, what claims and defenses are going to be tried, and what exhibits are going to be considered at trial during the pretrial stage. Trial by ambush and surprise adverse parties with materials in court is not acceptable in the United States except for proper impeachment purposes.<sup>415</sup> Parties in the United States do not anticipate that they would be able to bring up new issues or present any new materials at trial since they had the opportunity to do so earlier in the proceeding during the discovery stage.<sup>416</sup> Parties may not use at trial or in support of a motion any material that should have been disclosed as part of the pretrial disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure.<sup>417</sup>

The main rules that govern the discovery practice in the United States are Rule 16, Rules 26 to 37, and Rule 45 of the Federal Rules of Civil Procedure. These rules include some mandatory disclosure obligations that parties in a lawsuit must perform. Any local rules regarding discovery in a certain jurisdiction should be also considered part of the discovery process in that

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<sup>414</sup> Ogden & Rapawy, *supra* note 68, at 1.

<sup>415</sup> William W. Schwarzer, GUIDELINES FOR DISCOVERY, MOTION PRACTICE AND TRIAL, 117 F.R.D. 273 (10,1987). at 7.

<sup>416</sup> Schwarzer, *supra* note 415, at 7.

<sup>417</sup> FED. R. CIV. P. 37(c)(1).

jurisdiction.<sup>418</sup> Accordingly, three sources for discovery rules exist in the United States legal system: The Federal Rules of Civil Procedure (FRCP), the local rules, and tribunals' orders regarding discovery practice. This dissertation, however, focuses mainly on the discovery methods stated under in the Federal Rules of Civil Procedure (FRCP) and their potential applicability to the Saudi Arabia legal system.

The pretrial discovery process is designed to find facts and "encourage an exchange of information that will help narrow the issues being litigated, eliminate surprise at trial, and achieve substantial justice."<sup>419</sup> Parties in a lawsuit may obtain discovery regarding non-privileged subjects that are pertinent to the parties allegations and proportional to the case's need, "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."<sup>420</sup>

The relevant document or information, however, does not need to be in admissible form at trial to be discoverable, so long as the discovery is proportional.<sup>421</sup> If a party determines that a discovery request is not proportional and exceeds the scope of to the claims or defenses, it must inform the requesting party of the unproportionally and hence may not produce the requested information.

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<sup>418</sup> Public Counsel, *supra* note 42, at 4.

<sup>419</sup> Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 2012 RAND 1, xiii.

<sup>420</sup> FED. R. CIV. P. 26(b)(1); see also Gutman, *supra* note 411, at Section 6.2.A.

<sup>421</sup> FED. R. CIV. P. 26(b)(1); see also Gutman, *supra* note 411, at Section 6.2.A.

The initial scope of discovery practice is set by the parties (or their counsel), and not the court, when they arrange their claims or defenses.<sup>422</sup> Rule 26 (a) of the FRCP puts demand on the court that it must confine discovery "to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."<sup>423</sup> Rule 26(b)(1) of the FRCP also "grants courts the discretion to weigh the burden or expense of proposed discovery against an assessment of its likely benefit, considering the needs of the case and the importance of the discovery in resolving the issues."<sup>424</sup> The purpose of this rule is to "promote judicial limitation of the amount of discovery on a case-by-case basis to avoid abuse or overuse of discovery through the concept of proportionality."<sup>425</sup>

The discovery phase officially commences after the conference of the parties required by Rule 26(f).<sup>426</sup> Under Rule 26(f), the parties must meet and confer to discuss a host of specific matters related to their dispute, including the nature of their allegations, the possibility of settling their dispute,<sup>427</sup> the time of conducting the initial disclosures required by Rule 26(a)(1) and issues

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<sup>422</sup> FED. R. CIV. P. 26(b)(1); see also Gutman, *supra* note 411, at Section 6.2.A.

<sup>423</sup> The 2000 Amendments to FED. R. CIV. P. 26(a), advisory committee's notes

<sup>424</sup> FED. R. CIV. P. 26(b)(1)

<sup>425</sup> Wright et al, *supra* note 41, at 81; See also Gutman, *supra* note 411, at Section 6.2.A.

<sup>426</sup> FED. R. CIV. P. 26(d)(1)

<sup>427</sup> Note that "most matters settle before reaching the trial stage. Settlement can be discussed by any party at any time during litigation and is often a cost-effective alternative to trial." Rule 26(f)(2) requires parties to "consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case." However,

regarding preservation of discoverable legal materials, and to set a proposed discovery plan.<sup>428</sup> Under Rule 26(f)(2), the court may order the parties to confer in person. The conference may be initiated by any party whether it is the plaintiff or the defendant, yet according to Rule 26(f), the parties are "jointly responsible" to hold this conference.<sup>429</sup> During this conference, parties should agree on the matters in dispute and develop a timeline for the discovery phase of the litigation.<sup>430</sup>

In terms of the timing of discovery, Rule 26(d)(1) of the FRCP states that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."<sup>431</sup> Before holding Rule 26(f) conference, parties may not submit any discovery requests to each other since one of the goals of setting this conference is to discuss discovery matters and set a schedule for the discovery. Parties are encouraged to initiate this conference so that they can afterward enter the discovery phase.<sup>432</sup>

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the court usually "does not require the parties to discuss or attempt settlement, but most courts have procedures by which a party can request the court's assistance in settlement." *See How Does a Lawsuit Work? Basic Steps in the Civil Litigation Process*, STOEL RIVES (Jan. 24, 2012), <https://www.stoel.com/legal-insights/article/how-does-a-lawsuit-work-basic-steps-in-the-civil-litigation-process>.

<sup>428</sup> FED. R. CIV. P. 26(f)

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* 26(d)(1)

<sup>432</sup> *Id.* 26(f)

Some attorneys, however, state that, in cases in which discovery is permitted without the court's approval, parties can conduct discovery earlier and before the parties' conference.<sup>433</sup> They proclaim that plaintiffs may conduct discovery immediately after filing their cases in courts, and defendants may submit their discovery requests right after officially appearing in the cases against their counterparties.<sup>434</sup> Some practitioners also state that "after the complaint has been filed and the defendant has entered his response, the attorneys on both sides will enter into the discovery phase of the lawsuit."<sup>435</sup>

During the discovery phase, attorneys should find facts and gather materials about the dispute that are proportional to the needs of their case, as required by Rule 26(b)(1). This is because the discovery phase serves certain crucial purposes: "it can be used to preserve evidence of witnesses who may not be available at trial; to reveal facts; and, to aid in formulating the issues to be litigated."<sup>436</sup> The time at which the discovery phase comes to an end is different from one case to another because the deadline is determined by the court in its scheduling order.<sup>437</sup> The discovery process may take an extended amount of time depending on the complexity of the case. This is because the more complex the case is, the more materials are subject to be discovered, which

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<sup>433</sup> Larson, *supra* note 410.

<sup>434</sup> *Id.*

<sup>435</sup> *Stages of a Lawsuit*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/stages-of-a-lawsuit.html> (last updated Mar. 26, 2008).

<sup>436</sup> *Id.*

<sup>437</sup> FED. R. CIV. P. 16(b)(3)(A).

naturally takes more time.<sup>438</sup> Note, however, that the length of discovery is sometimes not related to the complexity itself, but rather it becomes part of a litigation strategy (of delay).

According to Rule 26(e) of the FRCP regarding the duty to supplement and to correct disclosures and responses, parties in a lawsuit have a continuous obligation to complete or fix any previous discovery responses. A party must correct any wrong information, such as interrogatories or depositions, provided to another party as soon as it realizes that any of these materials contains any inaccurate or incorrect information.<sup>439</sup>

### **3.1.2 The Difference between the Mandatory Disclosures and Discovery under the FRCP**

The Federal Rules of Civil Procedure differentiate between the mandatory disclosures required by Rule 26(a), and the discovery process controlled by the rest of the discovery rules, Rules 26 - 37. The mandatory disclosures must be made whether or not they are requested by a party; they are required by the Rules themselves. The rest of discovery is initiated by the attorneys for the parties.

Judge Anthony Battaglia categorizes the discovery practice into two categories. The first category is what Battaglia refers to as "court-controlled" discovery practice (it is more accurate to be called rules-controlled since these disclosures are required by the discovery rules in the FRCP and not by the courts themselves).<sup>440</sup> This discovery practice is mainly governed by the discovery

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<sup>438</sup> FINDLAW, *supra* note 435.

<sup>439</sup> FED. R. CIV. P. 26(e)

<sup>440</sup> Battaglia, *supra* note 53, at 1.

rules in the FRCP which limit interactions among parties. This category includes not only the initial disclosure requirements, which parties must fulfill before the courts. but also, the expert and pretrial disclosures.<sup>441</sup> The second category of discovery practice is what Judge Battaglia refers to as "attorney-controlled" discovery. Under this type of discovery, parties can practice discovery between themselves to locate facts about their cases that may support their claims or defenses. The discovery methods that parties can use under this category of discovery practice to find facts are requests for production, requests for admission, interrogatories, depositions, physical and mental examinations, and subpoenas.<sup>442</sup>

### **3.1.3 The Scope of Discovery Practice under the FRCP**

The scope of discovery includes any non-privileged information, documents, or any other materials that are relevant to a party's claims or defenses.<sup>443</sup> In 2015, the scope of discovery under

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<sup>441</sup> Battaglia, *supra* note 53, at 1.

<sup>442</sup> *Id.*

<sup>443</sup> FED. R. CIV. P. 26(b)(1). What is discoverable depends entirely on the type of case and the allegations made. The documents and information requested must not be protected from disclosure under any law, such as being protected under the attorney-client privilege; otherwise, these documents and information may not be able to be disclosed without special permission from the court upon a valid reason. Examples of the documents and information that litigants may obtain to prepare their case are the names and the crucial information and backgrounds of all parties and witnesses in the case, any governmental records that support a litigant's claim, and any business records related to the case.

the Federal Rules of Civil Procedure was narrowed to only material relevant to the parties' claims or defenses that is "proportional to the needs of the case."<sup>444</sup>

To set the general rule for the scope of discovery, Rule 26(b)(1) of the Federal Rules of Civil Procedure states:<sup>445</sup>

[u]nless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 26(b)(2) mentions some exceptions to the general rule regarding discovery. These exceptions are stated in Rule 26(b)(2) as follows:<sup>446</sup>

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> FED. R. CIV. P. 26(b)(2)

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Materials within the scope of discovery may be obtained from both parties in a lawsuit as well as from nonparties whether they are individual or entities.<sup>447</sup> The legal procedure to find facts and obtain materials from a party is not the same as the procedure to obtain them from a nonparty.<sup>448</sup> To depose a nonparty, a subpoena is required, and to obtain documents or Electronic Stored Information (ESI) from a nonparty, a subpoena is also required. Interrogatories, however, may not be served on nonparties.

Discovery from a party is much broader and permissive than from a nonparty. A party to a lawsuit, for instance, can acquire a written admission related to a certain matter from another party through submitting a request for admission to that party, and this party is obligated by Rule 36 to answer by admitting or denying the matter stated in the written request.<sup>449</sup> Likewise, a party can cross-examine another party to secure a written answer to a written question by submitting an interrogatory to that party. Rule 33 of the FRCP requires the party served to answer these questions

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<sup>447</sup> Public Counsel, *supra* note 42, at 5.

<sup>448</sup> *Id.*

<sup>449</sup> Public Counsel, *supra* note 42, at 5.

under oath.<sup>450</sup> Nevertheless, these last two discovery methods cannot be used to find facts and obtain information from nonparties under the Federal Rules of Civil Procedure.<sup>451</sup>

A party or nonparty served with a discovery request may seek a protective order from the court to limit the amount of discovery.<sup>452</sup> Such requests exist mostly in cases where the amount of money in controversy is fairly minor, which makes the broad discovery practice unreasonable.<sup>453</sup> Note, however, that not only in these cases protective orders may be granted; there are several kinds of circumstances that may justify a protective order.<sup>454</sup> As privilege limits the discoverability of material otherwise within the scope of discovery, the following subheadings address the principle of privilege and protective orders in the United States legal system concerning discovery.

### **3.1.3.1 Amendments to the FRCP to Alter the Scope of Discovery**

The 2015 amendments of the Federal Rules highlighted the "proportionality" analysis and removed language that previously had permitted discovery of material that was "reasonably calculated" to result to discover admissible materials. This amendment narrowed the scope of

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<sup>450</sup> FED. R. CIV. P. 33(b)

<sup>451</sup> Public Counsel, *supra* note 42, at 5.

<sup>452</sup> FED. R. CIV. P. 26(c)

<sup>453</sup> Larson, *supra* note 410.

<sup>454</sup> Rules about when to permit discovery should also be applied in Saudi Arabia upon adopting a discovery regime. Discovery, therefore, should be permitted always in cases that involve large amounts of money, but should not be permitted in small cases without the tribunal's approval upon showing admissible reasons for conducting discovery. This is to avoid any unnecessary expenses or delays in small cases due to the discovery practice.

discovery, and therefore, sought to reduce the drain on resources and considerable costs of discovery practice.<sup>455</sup> The proportionality language had been included in Rule 26(b)(2)(C) in the pre-2015 Rules, but in 2015, it was moved into the central scope provision 26(b)(1).

The proportionality factors, set in Rule 26(b)(1), formulate the new narrowed scope of discovery. This amended rule obligates litigants to consider these proportionality factors<sup>456</sup> in all of their discovery requests and matters as within the scope of discoverable legal materials.<sup>457</sup> Accordingly, discovery must be limited only to proportional information and documents related to the litigant's case and may not exceed the limit set by the amended rules. Parties should discuss any issue that arises related to whether their discovery requests are proportional to their case. If a dispute exists among the parties about this, the court should decide whether the requested information or documents are proportional to their case, and therefore, discoverable or not.<sup>458</sup>

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<sup>455</sup> Meadows, *supra* note 46, at 1-2.

<sup>456</sup> FED. R. CIV. P. 26(b)(1) states regarding proportionality factors that "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

<sup>457</sup> Meadows, *supra* note 46, at 1.

<sup>458</sup> *Id.*

Courts, ordinarily, do not have much information about the costs and time consumed by parties during discovery since parties most of the time are not obligated to report such information to the court. Nevertheless, where the court is aware of the costs and time consumed, it may limit the waste of these resources in the parties' future discovery practice.<sup>459</sup>

One of the crucial judicial guides regarding the proportionality issue is the recommendation of Judge Paul W. Grimm in *Mancia v. Mayflower Textile Servs. Co.*<sup>460</sup> In this case, Judge Grimm offered the following guidance:<sup>461</sup>

I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b)(2)(C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients' positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of the adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting

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<sup>459</sup> Hodges, *supra* note 64, at 760.

<sup>460</sup> 253 F.R.D. 354 (D. Md. 2008).

<sup>461</sup> *Id.*; see also Hodges, *supra* note 64, at 760-61.

the time when the case may be resolved on its merits, or settled. This clearly is advantageous to both Plaintiffs and Defendants.

Note here that the main purpose of the 2015 amendments to the Federal Rules of Civil Procedure was to fulfill the following three goals: 1) to reduce considerable discovery costs and the drain on resources; 2) to set rules to help parties and courts concentrate on the actual claims and defenses in dispute; and 3) to speed up the resolution of cases.<sup>462</sup> Based on the 2015 amendment of the FRCP, courts should evaluate whether parties' discovery requests are proportional to the need of the cases.<sup>463</sup>

### **3.1.3.2 Privilege Regarding Discovery**

The principle of privilege<sup>464</sup> applies to all discovery materials, including ESI. Privilege materials cannot be discovered using the formal discovery methods.<sup>465</sup> Certain privileges are recognized in the United States legal system, such as attorney-client privilege and doctor-patient

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<sup>462</sup> Ellsworth, *supra* note 45, at 2&8.

<sup>463</sup> *Id.* at 5-6.

<sup>464</sup> "Black's Law Dictionary defines 'privilege' as 'a special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty.' Black's Law Dictionary 1215 (7th ed. 1999). Basically, privileges are rights to withhold information, from any legal proceeding, without suffering legal consequences (being held in contempt of court). Privileges can either be created by statute or developed through the common law." *See* Electronic Privacy Information Center, Privileges, EPIC, <https://epic.org/privacy/privileges/>.

<sup>465</sup> Battaglia, *supra* note 53, at 84-85.

privilege.<sup>466</sup> These privileges mean that the information or materials that the attorney or the doctor obtained from the client or patient because of their confidential relationship are protected from discovery.<sup>467</sup> In addition to the above-mentioned privileges, there is also the work product privilege codified in Rule 26(b)(3), which also protects work products from being discovered.<sup>468</sup>

Rule 26(b)(1) clearly excludes privileged information from discovery.<sup>469</sup> Rule 30 also provides that "a person may instruct a deponent not to answer [a question in a deposition] . . . when necessary to preserve a privilege."<sup>470</sup> The policy rationale for this restriction on discovery for all kinds of privileges are almost the same, which is free and open discussion with the service provider to help the client or the patient and provide them with the effective legal advice or treatment.<sup>471</sup> In order to protect peoples' privileged confidential information, Rule 26 grants litigants the right to submit protective orders to court to exclude certain information from discovery. These protective orders related to discovery matters are discussed in the following subheading.

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<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> FED. R. CIV. P. 26(b)(3)

<sup>469</sup> *Id.* 26(b)(1)

<sup>470</sup> *Id.* 30(c)(2)

<sup>471</sup> Electronic Privacy Information Center, Privileges, EPIC, <https://epic.org/privacy/privileges/>.

### 3.1.3.3 Protective Orders Regarding Discovery

If a party or a witness believes that a discovery request is inappropriate, this party or witness may seek a protective order from the court to protect the requested information from discovery.<sup>472</sup> For some information that is considered secret or sensitive and only with permission of the court, a party may respond to a discovery request regarding this information but submit its response directly to the court and not to the requesting party.<sup>473</sup>

Parties may seek protective orders for different purposes to prevent the discovery of information. Rule 26(c) states regarding protective orders:<sup>474</sup>

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

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<sup>472</sup> FED. R. CIV. P. 26(c)

<sup>473</sup> Larson, *supra* note 410.

<sup>474</sup> FED. R. CIV. P. 26(c).

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery*. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses*. Rule 37(a)(5) applies to the award of expenses.

In some circumstances, parties may seek protective orders to "avoid producing responsive information completely, often in the context of seeking to protect information asserted to be privileged or attorney work product." In terms of discovery of documents or ESI, parties may also seek protective orders, not to prevent discovery, but to "prohibit further disclosure, limit use of the information to the case at hand or require return of documents at the end of the litigation."<sup>475</sup>

In regard to depositions, a party may file a motion to the court seeking a protective order to prohibit the deposition from being conducted altogether or to only limit the duration or scope of the deposition.<sup>476</sup> Protective orders seeking to block depositions entirely are quite rare since the party is required to show extraordinary circumstances that demand blocking depositions completely.<sup>477</sup>

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<sup>475</sup> Gutman, *supra* note 411, at Section 6.2.I.

<sup>476</sup> FED. R. CIV. P. 26(c)(1).

<sup>477</sup> Gutman, *supra* note 411, at Section 6.2.I.

### 3.1.4 Discovery Time Limit under the FRCP

No discovery may be conducted before parties hold the Rule 26(f) conference.<sup>478</sup> However, Rule 26 allows discovery before this conference if the court orders it, or if the case is excluded from this condition.<sup>479</sup> On a case-by-case basis, courts may permit discovery before the Rule 26(f) conference. Upon a valid reason, a party may ask the court to grant it permission to direct depositions to another party even before the parties confer as required by Rule 26(f).

Courts have granted requests to take discovery before the parties' conference when the early discovery would help the parties settle their dispute, if a litigant needed to authenticate testimony or maintain crucial materials, or in support of a preliminary injunction or a temporary restraining order.<sup>480</sup>

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<sup>478</sup> FED. R. CIV. P. 26(d). Starting December 1, 2015, the FRCP permit parties to submit Rule 34 requests more than 21 days after serving summons and complaints. In this case, the rules consider the service date to be the first Rule 26(f) conference.

<sup>479</sup> *Id.* 26(d)(1). Rule 26(a)(1)(B) identifies the kinds of cases that are excepted from the initial disclosure requirement. This rule states that "[t]he following proceedings are exempt from initial disclosure: (i) an action for review on an administrative record; (ii) a forfeiture action in rem arising from a federal statute; (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (v) an action to enforce or quash an administrative summons or subpoena; (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a student loan guaranteed by the United States; (viii) a proceeding ancillary to a proceeding in another court; and (ix) an action to enforce an arbitration award."

<sup>480</sup> Battaglia, *supra* note 53, at 3.

Under Rule 29, the parties may, by stipulation, change the procedures that govern or limit discovery.<sup>481</sup> Parties, however, cannot agree without court approval to exceed the discovery cut-off date set by the court. Also, if the parties' stipulation involves extending the time limits stated in Rules 33, 34 and 36 of the Federal Rules of Civil Procedure, they must grant the court's approval if the extension "would interfere with the time set for completing discovery...".<sup>482</sup>

During the discovery phase and before the cut-off date, parties must complete all the discovery of information they need by using the discovery methods set forth in Rules 30 to 36 and in Rule 45 of the Federal Rules of Civil Procedure.<sup>483</sup> After the cut-off date, parties cannot conduct any kind of discovery except with leave of court, which is granted based on the showing of a valid reason, as parties already should have had sufficient time to conduct discovery.<sup>484</sup>

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<sup>481</sup> FED. R. CIV. P. 29(b)

<sup>482</sup> *Id.*

<sup>483</sup> The time limit for the discovery phase must be reasonable for all parties to practice the needed discovery against other parties. The reasonable time limit varies from case to case depending on the type and complexity of the case. Parties in their Rule 26(f) conference must work cooperatively to set reasonable time limits for the discovery of evidence. Upon the parties' agreement and based on the nature of the case, the court must issue its order for the discovery cut-off date, as obligated by Rule 16(b) of the Federal Rules of Civil Procedure. It is important to mention that courts, upon issuing their order for discovery cut-off dates together with consulting parties, should consider the time needed for notice, serving other parties, and responding to the other parties' discovery requests. *See* Schwarzer, *supra* note 415, at 3.

<sup>484</sup> Schwarzer, *supra* note 415, at 3.

### 3.1.5 Specific Rules Governing Discovery of Electronically Stored Information

Electronically stored information (ESI) has become more significant in people's lives because of the increased usage of technology to produce, store, preserve and transfer information.<sup>485</sup> Conducting discovery on ESI has increased tremendously over the past years and has occupied a large volume of discovery practice in the United States.<sup>486</sup> In fact, "ESI has become a fact of life for all courts, at every level. Every kind of civil action, from complex commercial litigation to domestic relations cases, has been influenced by the increased use of ESI."<sup>487</sup> Some practitioners claim that currently about 99.9% of all cases in the United States involve ESI.<sup>488</sup>

The 2015 amendments to the Federal Rules of Civil Procedure set forth the duty of parties to preserve ESI in their possession, control, or custody by addressing the consequences of failing to preserve ESI under Rule 37(c).<sup>489</sup> The rule, indirectly, obliges parties to take reasonable steps to protect the documents and information in their possession in anticipation of litigation.<sup>490</sup> This obligation includes all types of ESI relevant to parties' claims and defenses. Some of the ESI that is subject to this obligation is "electronic mail ('e-mail'), text messages memoranda, spreadsheets,

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<sup>485</sup> Gutman, *supra* note 411, at Section 6.2.E.

<sup>486</sup> *Id.*

<sup>487</sup> Rebecca Love Kourlis, *Navigating the Hazards of E-Discovery: A Manual for Judges in State Courts Across the Nation*, 2012 IAALS 1, 3.

<sup>488</sup> *Id.*

<sup>489</sup> FED. R. CIV. P. 37(c)

<sup>490</sup> Allman et al, *supra* note 65, at 3.

photographs, videos, and the like. It also extends to ESI contained in databases, as well as information related to or contained in systems and applications ('metadata')."<sup>491</sup>

Parties must preserve materials, including ESI, when they know or should know that it "may be relevant to pending or reasonably anticipated litigation."<sup>492</sup> As one court stated, "as a general matter, it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI, when that party has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation."<sup>493</sup>

Courts have also determined the scope of the evidence that parties must preserve upon their anticipation of litigation. The court in *Zubulake IV* declared:<sup>494</sup>

[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. While a litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, ..., is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

To sum up, Section 3.1 of Chapter Two addressed the limits, scope and purposes of practicing document discovery and E-discovery of ESI. It also provided an overview of the rules

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<sup>491</sup> *Id.*

<sup>492</sup> Gutman, *supra* note 411, at Section 6.2.E.1.f.

<sup>493</sup> *Id.* Citing *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008); *Accord Scalera v. Electrograph Systems*, 262 F.R.D. 162, 171 (E.D.N.Y. 2009); *Zubulake v. UBS Warburg*, 220 F.R.D. 216 (S.D.N.Y. 2003); *Silvestri v. General Motors Corporation*, 271 F.3d 583, 591 (4th Cir. 2001).

<sup>494</sup> *Zubulake*, *supra* note 493, at 217; see this quotation also in Gutman, *supra* note 411, at Section 6.2.E.1.f.

of discovery in the FRCP, in addition to examining discoverable legal materials under the discovery rules. This section also included a discussion about the purposes of establishing the discovery rules under the FRCP and a discussion about the scope of document and electronic discovery under the FRCP. It addressed the discovery time limits under the FRCP and considers the principle of privilege regarding discovery. Section 3.1 also discussed the protective orders related to discovery matters in the United States and addressed amendments to the FRCP to overhaul the scope of discovery practice.

The next section of this chapter discusses the federal rules of discovery in the United States including the types and the stages of discovery and E-discovery. The next section then provides a detailed discussion about the initial disclosure rules under the FRCP, including initial disclosure time and format as well as exclusions from the initial disclosure. The next section then considers the discovery phase under the Federal Rules of Civil Procedure, including holding the conference of the parties under Rule 26(f) and preparing a joint discovery plan. It then examines the methods of taking discovery under the FRCP and examines each discovery method available under the discovery rules and shows how each method is used to find facts and obtain information from adverse parties in the United States civil proceedings. These methods include depositions, interrogatories, requests for production, requests for admission, physical and mental examinations, and subpoenas. The next section also addresses the discovery of electronically stored information (ESI) and considers the legal approaches for parties to supplement their initial disclosure and discovery responses. It lastly discusses the process of pretrial disclosure as well as the burden of the cost of litigation in the United States, including discovery expenses.

## **3.2 Practicing Discovery under the Federal Rules of Civil Procedure**

Section 3.2 of Chapter Two provides overviews of the discovery methods specified under the Federal Rules of Civil Procedure and taken in the United States legal system to find facts and obtain relevant materials from other parties or nonparties in a lawsuit to support a litigant's allegations. This discussion includes overviews of the initial disclosure requirements, requests for production, requests for admission, written interrogatories, depositions via oral examination, physical and mental examinations of parties, and subpoenas. These discovery methods are the most commonly utilized discovery methods in the United States legal system.<sup>495</sup>

### **3.2.1 Initial Disclosure under the Federal Rules of Civil Procedure**

Initial disclosures in the United States civil procedural system refer to information, documents and materials that a party in a lawsuit must disclose or provide copies of to the court and the other parties in the beginning of the lawsuit and without being asked to disclose or provide them.<sup>496</sup> Rule 26 requires initial disclosures from all parties whether they are plaintiffs or defendants in the case. The required disclosures from both parties are the same. These disclosures

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<sup>495</sup> Ogden & Rapawy, *supra* note 68, at 1.

<sup>496</sup> FED. R. CIV. P. 26(a)(1). The initial disclosures in the United States legal system, required under the FRCP, considerably differs from the initial disclosures required in the Saudi legal system. The initial disclosures in the United States legal system are much deeper and more comprehensive.

are governed by Rule 26(a)(1).<sup>497</sup> One of the main purposes of requiring initial disclosure is to "accelerate the exchange of basic information about the case that is needed in most cases to prepare for trial or make an informed decision about settlement."<sup>498</sup>

Rule 26 requires parties to provide directly to each other the names of the witnesses and copies or a description of documents, ESI, or tangible things in their possession, control, or custody that support their allegations. Rule 26(a)(1)(A) requires litigants to provide specific information about all the individuals who the litigants believe have discoverable information that will help the litigants to prove their claims or defenses in court.<sup>499</sup> The specific information required in this rule includes reasonably available information about the names, the phone numbers and, if known, the addresses of those individuals. It also includes reasonably available information about the nature of the information or materials in the possession, custody, or control of those individuals.<sup>500</sup> Rule 26(a)(1)(A), which governs parties' initial disclosures, states:<sup>501</sup>

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; (ii) a copy—or a description

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<sup>497</sup> *Id.*

<sup>498</sup> 1993 Amendments to FED. R. CIV. P. 26(a), advisory committee's note; see also Gutman, *supra* note 411, at Section 6.2.B.

<sup>499</sup> FED. R. CIV. P. 26(a)(1)(A)(i)

<sup>500</sup> *Id.*; see also Public Counsel, *supra* note 42, at 48.

<sup>501</sup> FED. R. CIV. P. 26(a)(1)(A)

by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

In terms of the scope of initial disclosure, parties are not obligated to disclose any information or documents that they do not intend to present in court to support their claims or defenses.<sup>502</sup> Rule 26(a) also requires litigants to submit to court copies or descriptions of all the documents, ESI, and tangible things that the litigants possess, or have control or custody over, and may use during their lawsuit as proof to support their claims or defenses.<sup>503</sup> Litigants may file a motion in court to compel initial disclosure required by Rule 26(a) of the FRCP if a party refuses or fails to make these initial disclosures appropriately.<sup>504</sup>

The disclosing party must provide calculations of the damages that this party claims.<sup>505</sup> This party must also make the legal materials that were used to perform these calculations available

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<sup>502</sup> FED. R. CIV. P. 26(a)(1)(A)(ii); see also Battaglia, *supra* note 53, at 16.

<sup>503</sup> FED. R. CIV. P. 26(a)(1)(A)(ii); see also Public Counsel, *supra* note 42, at 48-49; see also Gutman, *supra* note 411, at Section 6.2.B.

<sup>504</sup> FED. R. CIV. P. 37(a)(3)

<sup>505</sup> *Id.* 26(a)(1)(A)(iii)

for inspection and copying. Rule 26(a)(1)(A)(iv) also states that the disclosing party must disclose any insurance agreements that may help in gratifying a judgment in the legal action.

If a party fails to provide an initial disclosure, the party will be prevented from using the material not disclosed "on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."<sup>506</sup> Rule 37(c)(1) also states that:<sup>507</sup>

in addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

The rule makers who formulated these rules sought to limit the formal pretrial discovery practice, reduce the litigation's expenses caused by discovery, and increase the possibility of going to settlement sooner during the proceeding.<sup>508</sup> A study about the impacts of initial disclosure on civil litigations, conducted by the Federal Judicial Center, confirms that:<sup>509</sup>

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<sup>506</sup> *Id.* 37(c)(1)

<sup>507</sup> *Id.*

<sup>508</sup> The Advisory Committee note that "[t]he 1993 amendments added two factors to the considerations that bear on limiting discovery: whether 'the burden or expense of the proposed discovery outweighs its likely benefit,' and 'the importance of the proposed discovery in resolving the issues.' Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that '[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery...'"

<sup>509</sup> Thomas E. Willging et al., *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases*, 1997 FEDERAL JUDICIAL CENTER 1, 5-6.

[f]ar more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them. At the same time, many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them.

The participating attorneys in this study also reported that initial disclosure was one of the least expensive discovery activities in their cases, with the median cost of \$750.<sup>510</sup> This median initial disclosure cost is much lower than the median costs of depositions and document production. In cases involving depositions or document production, the median costs were \$3,500 and \$1,100, respectively.<sup>511</sup>

One of the Federal Judicial Center studies on attorneys' discovery practice concludes that the initial disclosures are broadly utilized and apparently employed sufficiently as intended. This study shows, based on practicing attorneys' reports, that conducting the initial disclosure properly results in better and more fair resolutions of cases and decreased delays and legal expenses of litigation.<sup>512</sup> About 58% of the participating attorneys in this study said that initial disclosure took place in their cases.<sup>513</sup> About 89% of the attorneys who said that initial disclosure took place in their case also said that other forms of discovery were used to find facts and collect further

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<sup>510</sup> *Id.* at 8.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at 2.

<sup>513</sup> Willging et al., *supra* note 509, at 3-5.

information related to their cases. Thus, initial disclosure can rarely substitute altogether for the discovery methods.<sup>514</sup>

### **3.2.1.1 The Initial Disclosure Time and Format**

Rule 26(a)(1)(C) requires parties to make the initial disclosures within (14) days from the date of the parties' conference under Rule 26(f).<sup>515</sup> This time limit to complete the initial disclosures may be increased or decreased upon the parties' stipulation or by a court order.<sup>516</sup> Rule 26 states that the parties' initial disclosures must be in writing and signed by the producing party and also must be served directly to the other party in a timely manner.<sup>517</sup> Upon legitimate justification, the court may alter the obligation to make initial disclosures.<sup>518</sup>

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<sup>514</sup> *Id.* at 5.

<sup>515</sup> FED. R. CIV. P. 26(a)(1)(C)

<sup>516</sup> *Id.*

<sup>517</sup> *Id.* 26(a)(4)

<sup>518</sup> *Id.*

### 3.2.1.2 Exclusions from the Initial Disclosure

The mandatory initial disclosures do not apply in some situations. These situations include when the parties stipulate not to make such disclosures; when directed by a court order otherwise; and in certain types of proceedings that are exempted by Rule 26(a)(1)(B).<sup>519</sup>

The proceedings exempted from initial disclosures include actions to review administrative records and actions to enforce administrative summons or subpoenas.<sup>520</sup> Excluding these types of cases from the initial disclosure does not exclude them from being subject to discovery using any of the discovery methods that are discussed in the following subsections.

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<sup>519</sup> FED. R. CIV. P. 26(a)(1)(A). Note that FED. R. CIV. P. 26(a)(1)(B) mentions certain types of proceedings that are exempted from initial disclosure requirements. Rule 26(a)(1)(B) states: "[t]he following proceedings are exempt from initial disclosure: (i) an action for review on an administrative record; (ii) a forfeiture action in rem arising from a federal statute; (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (v) an action to enforce or quash an administrative summons or subpoena; (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a student loan guaranteed by the United States; (viii) a proceeding ancillary to a proceeding in another court; and (ix) an action to enforce an arbitration award."

<sup>520</sup> FED. R. CIV. P. 26(a)(1)(B); see also Battaglia, *supra* note 53, at 21.

## 3.2.2 The Discovery Phase Under the Federal Rules of Civil Procedure

### 3.2.2.1 Conference of the Parties under Rule 26(f)

As stated in Rule 26(f) of the Federal Rules of Civil Procedure, parties must hold their conference early on during their lawsuit.<sup>521</sup> This conference must be held no later than (21) days before the scheduling conference required by Rule 16(b). The parties' conference' mandated under Rule 26(f) is mandatory in all cases except those proceedings exempted from initial disclosures by Rule 26(a)(1)(B) or by court order.<sup>522</sup>

In the parties' Rule 26(f) conference, all parties are obligated to participate whether they are represented by counsel or not. This conference may or may not be a face-to-face meeting; It can take place by phone or any other modern communication method so long as parties have agreed to use it as a method to hold this conference.<sup>523</sup> In some cases, courts may order in-person conference.<sup>524</sup> This would occur when the court believes that it would be beneficial to do so to facilitate a more expeditious resolution to the parties' dispute.

In a Rule 26(f) conference, parties must "make or arrange for the disclosures required by Rule 26(a)(1)."<sup>525</sup> This includes the time and format for producing the initial disclosures.<sup>526</sup> In

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<sup>521</sup> FED. R. CIV. P. 26(f)

<sup>522</sup> *Id.* 26(f)(1) and 26(a)(1)(B); see also Battaglia, *supra* note 53, at 7-8.

<sup>523</sup> FED. R. CIV. P. 26(f)(2)

<sup>524</sup> *Id.*

<sup>525</sup> *Id.* 26(f)(2)-(3)

<sup>526</sup> *Id.*; see also Battaglia, *supra* note 53, at 10.

addition to discussing the initial disclosures, parties must also address in this conference the discovery matters, and the time needed for discovery of evidence.<sup>527</sup> It is also important to discuss the initial disclosures and discovery of ESI that is proportional to the parties' dispute and subject to discovery.<sup>528</sup>

Parties, especially attorneys, should be aware of the significance of an early well-organized discovery plan to avoid future discovery problems that may arise during their proceedings. Judge Shiva Hodges<sup>529</sup> in this regard writes that attorneys should be quite aware that:<sup>530</sup>

the court is typically at a disadvantage with respect to discovery issues; the parties have had the benefit of working on the case for far longer than the judges, who is necessarily dependent on the attorneys' presentation and articulation of the issues. Early planning and compromise by the attorneys on the nature and scope of discovery avoids the costs, burdens, fee-shifting and privacy issues that can become troublesome down the road.

### 3.2.2.2 Joint Discovery Plan

The parties' discovery plan set in Rule 26(f) conference must state the parties' proposals and perspectives on:<sup>531</sup>

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; (B) the subjects on which discovery may be needed, when

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<sup>527</sup> FED. R. CIV. P. 26(f)(3)

<sup>528</sup> Battaglia, *supra* note 53, at 12.

<sup>529</sup> Magistrate Judge, United States District Court of South Carolina

<sup>530</sup> Hodges, *supra* note 64, at 759.

<sup>531</sup> FED. R. CIV. P. 26(f)(3)

discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; (C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502; (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

Rule 26(f) of the Federal Rules of Civil Procedure requires parties to file a report on their joint discovery plan in the case, after their conference.<sup>532</sup> This requirement helps the court set deadlines<sup>533</sup> for discovery and summary judgment and arrange the dates for the trial and other important matters in the case.<sup>534</sup> This report should include the parties' agreements or demands in certain matters regarding initial disclosure and discovery.<sup>535</sup> The discovery plan should share their views on any changes to the form, requirements or date of the initial disclosures; the discovery deadlines and the type of documents and information that will or will not be disclosed during the discovery practice.<sup>536</sup> Parties and courts should encourage early discussion of discovery requests

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<sup>532</sup> *Id.*; see also Public Counsel, *supra* note 42, at 9.

<sup>533</sup> The deadlines for discovery and summary judgment are very crucial deadlines in the United States civil litigations.

<sup>534</sup> Public Counsel, *supra* note 42, at 9; see also Hodges, *supra* note 64, at 760.

<sup>535</sup> FED. R. CIV. P. 26(f)(3); see also Hodges, *supra* note 64, at 760.

<sup>536</sup> FED. R. CIV. P. 26(f)(3); see also Public Counsel, *supra* note 42, at 9-10; See also Allman et al, *supra* note 65, at 6.

and seek to come to an agreement on the scope, timing and quantity of the documents and information, including ESI, that will be sought in discovery phase.<sup>537</sup>

Since parties' views on a particular issue may differ, they must submit a report that states the parties' views and proposals to court. They must submit their joint plan to the court within (14) days from the date of their conference.<sup>538</sup> If any disagreement emerges among parties about matters discussed in their discovery plan, such as a disagreement about the limits, they must mention this disagreement in their joint discovery plan submitted to court, so the court can resolve it upon meeting with the parties in the case management conference required by Rule 16.<sup>539</sup> The court's scheduling order "must limit the time to . . . complete discovery" and may "modify the timing of [pretrial] disclosures," "modify the extent of discovery," and "provide for disclosure, discovery, or preservation of [ESI]."<sup>540</sup>

If a material is not protected or privileged under any law and a party in the case would like to examine this piece to support its allegations, this party may obtain the desired document or information to find the facts through submitting a discovery request to the other party who

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<sup>537</sup> Allman et al, *supra* note 65, at 6.

<sup>538</sup> FED. R. CIV. P. 26(f)(2); See also Hodges, *supra* note 64, at 759.

<sup>539</sup> FED. R. CIV. P. 26(f)(3)(C-D); see also Battaglia, *supra* note 53, at 14; See also Hodges, *supra* note 64, at 759.

<sup>540</sup> FED. R. CIV. P. 16(b). After the parties file their joint discovery plan with the court, the court will issue a scheduling order and provide each party with a copy of it. This scheduling order contains crucial information for parties regarding their case. Part of this information is the proceeding's final deadlines set by the court, including discovery and motions deadlines as well as any instructions about certain documents that must be submitted to court by a specific date.

possesses it or has control or custody over it. The party who is asked to make certain information available for examination must not object to doing so without legitimate justification.<sup>541</sup> The following subsection address the available methods to take discovery in the United States civil proceedings.

### **3.2.3 The Methods of Taking Discovery under the Federal Rules of Civil Procedure**

#### **3.2.3.1 Depositions under the FRCP**

Rule 30 of the Federal Rules of Civil Procedure allows parties to find facts and take oral depositions under oath from any individual, including persons who are not parties in the case.<sup>542</sup> Depositions can be defined as a formal session during which a party's attorney orally cross-examines another party or a witness in the case under oath.<sup>543</sup> The answers of the other party or witness are recorded and authenticated by an official court reporter.<sup>544</sup> The deposition, theoretically, is "a conversation between an attorney and a witness that probes his or her knowledge, perceptions, understandings and opinions about the case under oath."<sup>545</sup>

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<sup>541</sup> Public Counsel, *supra* note 42, at 13-15; see also Gutman, *supra* note 411, at Section 6.2.B.

<sup>542</sup> FED. R. CIV. P. 30(a); See also Gutman, *supra* note 411, at Section 6.2.C.4.

<sup>543</sup> STOEL RIVES, *supra* note 427.

<sup>544</sup> *Id.*

<sup>545</sup> Gutman, *supra* note 411, at Section 6.2.C.4.

The main purpose of using depositions is to find facts and gather more information about the facts of the case and to record the witnesses' testimony.<sup>546</sup> Depositions are taken "to discover facts and opinion and to preserve testimony for trial."<sup>547</sup> Deposition records may be used by both parties at trial "to show inconsistencies in a witness's story or to question the witness's credibility."<sup>548</sup>

Depositions are a very useful method to "learn facts and opinions, memorialize witness perceptions and opinions through testimony taken under oath, and develop evidence needed for summary judgment and trial."<sup>549</sup> Recorded testimonies from depositions could be utilized in some circumstances at trial to substitute witnesses appearance who are unable to appear at trial in person.<sup>550</sup> Like the other discovery methods, depositions may not be conducted before the parties' conference required under Rule 26(f).<sup>551</sup> For depositions to be authenticated, they must be performed in the presence of a person appointed or designated under Rule 28 and authorized to administer oaths.<sup>552</sup>

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<sup>546</sup> STOEL RIVES, *supra* note 427.

<sup>547</sup> Gutman, *supra* note 411, at Section 6.2.C.4.

<sup>548</sup> STOEL RIVES, *supra* note 427.

<sup>549</sup> Gutman, *supra* note 411, at Section 6.2.C.4.

<sup>550</sup> FED. R. CIV. P. 32; see also FED. R. EVID. 804(b)(1) Former Testimony Exception to hearsay

<sup>551</sup> FED. R. CIV. P. 26(d)(1). Parties may request leave of court to depose a party or a witness before holding the Rule 26(f) conference if the deponent will most likely leave the United States and therefore would not be available for deposition beyond that point. See FED. R. CIV. P. 30(a)(2)(A)(iii).

<sup>552</sup> FED. R. CIV. P. 28&30(b)(5).

In terms of the duration of the depositions, Rule 30(d)(1) of the Federal Rules of Civil Procedure provides "unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination."<sup>553</sup> This duration of depositions does not mean continuous questioning for (7) hours because "this limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition."<sup>554</sup> The limit of the duration of depositions may be altered upon the court's permission for additional time, or if the parties agree to extend the deposition time since this durational limitation is presumptive.<sup>555</sup>

### **3.2.3.2 Interrogatories under the FRCP**

Rule 33 of the Federal Rules of Civil Procedure covers interrogatories as part of the civil discovery process. Interrogatories are one of the most common discovery methods, and entail written questions directed from a party in a case to another party as cross-examination to acquire

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<sup>553</sup> *Id.* 30(d)(1).

<sup>554</sup> 2000 Amendments to FED. R. CIV. P. 30(d), advisory committee's note; see also Gutman, *supra* note 411, at Section 6.2.C.4.

<sup>555</sup> FED. R. CIV. P. 30(d)(1); See also Gutman, *supra* note 411, at Section 6.2.C.4.

answers to specific questions related to the lawsuit.<sup>556</sup> The party to whom an interrogatory is directed must answer all the questions in writing under oath within (30) days of service.<sup>557</sup>

Interrogatories as a discovery method are best taken to obtain direct answers to questions related to specific persons, places, times, calculations, or the meaning or nature of certain things.<sup>558</sup> The rationale for having interrogatories as a discovery method is to allow parties to use the answers to interrogatories as supportive evidence. This is to show that the adverse party does not have sufficient evidence to prove its allegations, and therefore, the requesting party may file a motion for summary judgment.<sup>559</sup> Rule 56 of the FRCP provides for the standards of how interrogatories and other discovery methods can support a party's motion for summary judgment. Rule 56(c) states concerning the procedures for filing such motions that:<sup>560</sup>

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

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<sup>556</sup> Harrison, *supra* note 47, at 6; see also Public Counsel, *supra* note 42, at 29.

<sup>557</sup> FED. R. CIV. P. 33(b)(2); see also Harrison, *supra* note 47, at 6.

<sup>558</sup> Public Counsel, *supra* note 42, at 30.

<sup>559</sup> *Id.*

<sup>560</sup> FED. R. CIV. P. 56(c)

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Interrogatories may help to obtain "the addresses and names of persons having knowledge of relevant matters, the identity of people having certain authority or occupying certain offices, the existence, location, accuracy and authenticity of documents and reports, statistical data or summaries, and other objective facts underlying the claims or defenses of the action."<sup>561</sup> Interrogatories are a helpful discovery method for two reasons. First, interrogatories may be used to discover foundational information to establish a legal ground for discovery by deposition or a request for admission or production. Second, interrogatories may be utilized to question parties to show their assertions and the factual basis for these contentions. Contention interrogatories may be a quite helpful discovery method to identify and investigate the theories of the opponent party's case or defense.<sup>562</sup>

Rule 33 of the Federal Rules of Civil Procedure limits the number of interrogatories that one party may serve on another party to (25) interrogatories, including all discrete subparts. This

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<sup>561</sup> Gutman, *supra* note 411, at Section 6.2.C.1.

<sup>562</sup> *Id.*

limit includes questions to which the interrogated party objects. Upon a valid reason, parties may seek also leave of the court to exceed this limit of interrogatories.<sup>563</sup>

Similar to other discovery methods, a party must send its interrogatories or its responses to interrogatories directly to the other party or its counsel and not to the court.<sup>564</sup> The party should also obtain and retain proof of service of the interrogatory or response as proof that the interrogatory was sent or answered in a timely manner. Interrogatories must be served within (30) days before the cut-off date of the discovery phase.<sup>565</sup>

Upon receiving an interrogatory, the interrogated party must answer or object to the interrogatory within (30) days of service.<sup>566</sup> This time limit may be amended either by the parties' agreement to extend or reduce it, or if the court orders a different time limit.<sup>567</sup> The answer to the interrogatory must be made under oath and be based on the best knowledge of the interrogated party; otherwise, the party risks penalty of perjury.<sup>568</sup>

A party may object to answering a question if it has a valid reason for not providing an answer.<sup>569</sup> It would be considered a valid reason to not answer if the interrogatory is overly broad,

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<sup>563</sup> FED. R. CIV. P. 33(a)(1); see also Public Counsel, *supra* note 42, at 30.

<sup>564</sup> FED. R. CIV. P. 5(d)(1)

<sup>565</sup> Public Counsel, *supra* note 42, at 31-33

<sup>566</sup> FED. R. CIV. P. 33(b)(2)

<sup>567</sup> *Id.*; see also Public Counsel, *supra* note 42, at 32-33.

<sup>568</sup> Public Counsel, *supra* note 42, at 32.

<sup>569</sup> FED. R. CIV. P. 33(b)(4)

ambiguous, or exceeds the (25) interrogatory limit.<sup>570</sup> The party also may elect to not answer an interrogatory if the question is irrelevant to the subject matter of the lawsuit or answering it would infringe on privileged information.<sup>571</sup> If a party objects to answering an interrogatory without a valid reason, or if the party does not answer it in a proper or timely manner, the party who requested the interrogatory may file a motion to compel in court.<sup>572</sup> The court may grant this motion to compel the defiant party to respond to the interrogatory.<sup>573</sup> The court may also sanction this party for its misconduct by requiring payment of the legal expenses and attorneys' fees associated with bringing the motion to compel to the court.<sup>574</sup>

In terms of interrogatories related to ESI, Rule 33(d) of the Federal Rules of Civil Procedure permits parties to seek the disclosure of ESI if consulting this ESI is substantial to prepare the responses to the interrogatories.<sup>575</sup> This disclosure of the ESI includes examining, auditing and inspecting this information to formulate proper answers to interrogatories.<sup>576</sup> If a party would have to spend time or money to calculate the answer to a question and the burden of doing so would be roughly the same for the requesting party, the responding party can provide the

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<sup>570</sup> *Id.*

<sup>571</sup> *Id.*

<sup>572</sup> Public Counsel, *supra* note 42, at 33.

<sup>573</sup> *Id.*

<sup>574</sup> FED. R. CIV. P. 37(a)(5)(A).

<sup>575</sup> *Id.* 33(d)

<sup>576</sup> FED. R. CIV. P. 33(d)

business records from which the answer may be derived to the requesting party and shift the burden of deriving the answer onto the requesting party.

### 3.2.3.3 Requests for Production under the FRCP

The request for production is one of the most important discovery methods. This discovery method is governed mainly under Rule 34 of the Federal Rules of Civil Procedure. This rule allows a party to request that a party produce legal documents. Rule 34(a) also allows the requesting party or its representative to inspect, copy, test, or sample documents or ESI and tangible things that are in the possession, control, or custody of the responding party.<sup>577</sup>

By serving a formal request for production on another party, parties can find facts and obtain information or documents or any nonprivileged materials in the possession, control or custody of another party in order to examine it and use it as proof to support the requesting parties' allegations in court.<sup>578</sup> The concept of "control" in this regards does not mean actual physical possession or legal ownership.<sup>579</sup> Documents and information are considered to be under a party's control when this party has the authority, right, or ability to find facts and get those materials upon demand.<sup>580</sup>

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<sup>577</sup> *Id.* 34(a)(1)

<sup>578</sup> Harrison, *supra* note 47, at 6; see also Public Counsel, *supra* note 42, at 13.

<sup>579</sup> Gutman, *supra* note 411, at Section 6.2.C.2.

<sup>580</sup> Colon v. Blades, 268 F.R.D. 129, 132 (D.P.R. 2010); see also Accord Collins v. Barth, No. 12-CV-6022G (W.D.N.Y. May 30, 2013); see also Gutman, *supra* note 411, at Section 6.2.C.2.

Requests for production do not have numerical limits like depositions and interrogatories since Rule 34 of the Federal Rules of Civil Procedure does not limit the requests for production to a specific number except by parties' stipulation or court order.<sup>581</sup> The party that serves the request for production must identify with particularity the materials that it seeks to obtain. This facilitates the process for production and allow providing the exact requested materials in a timely manner.<sup>582</sup> Requests for production are supposed to specify with particularity the title and description of information, documents or records requested.<sup>583</sup> Requests for production are sent to the other party or its counsel directly and not to the court.<sup>584</sup> The requesting party should keep proof of service.<sup>585</sup>

Upon receiving a request for production, the responding party must answer the request within (30) days of service by either making the requested materials available for inspection or by stating with specificity the grounds on which it objects to the request, such as if the material is privileged or otherwise protected under the law.<sup>586</sup> In response to requests for production, the requested documents or ESI should be produced either with labels that distinguish the exact requests to which they respond or in the form in which they are reserved in the normal course of

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<sup>581</sup> FED. R. CIV. P. 34

<sup>582</sup> Public Counsel, *supra* note 42, at 14-15; see also Schwarzer, *supra* note 415, at 5.

<sup>583</sup> Schwarzer, *supra* note 415, at 5.

<sup>584</sup> FED. R. CIV. P. 5(d)(1).

<sup>585</sup> *Id.*

<sup>586</sup> *Id.* 34(b)(2); see also Public Counsel, *supra* note 42, at 13-15.

business.<sup>587</sup> This indicates that "opening a warehouse for inspection by the requesting party, burying documents, and similar procedures do not meet the good faith requirements of the rules."<sup>588</sup> The 30-day time limit to respond to a request for production may be modified by the parties' agreement or a court order.<sup>589</sup>

The responding party must respond to the request within 30 days or risks sanctions.<sup>590</sup> These sanctions could include payment of the requesting party's legal expenses and attorney's fees if the requesting party files and succeeds on a motion to compel.<sup>591</sup> By failing to respond to a request for production within 30 days, the responding party waives its right to object to the

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<sup>587</sup> Schwarzer, *supra* note 415, at 5.

<sup>588</sup> Schwarzer, *supra* note 415, at 5.

<sup>589</sup> Public Counsel, *supra* note 42, at 15.

<sup>590</sup> FED. R. CIV. P. 37(a)(3)(A); see also Public Counsel, *supra* note 42, at 17; see also Harrison, *supra* note 47, at 5-6; see also Gutman, *supra* note 411, at Section 6.2.J. where the authors write: "should you encounter late, incomplete, evasive, or ambiguous responses, or improper objections to discovery requests, you should write opposing counsel a demand for compliance, specifying a short time limit for a reply. If a satisfactory reply is not forthcoming within your specified time limit, move under Rule 37(a)(3) to compel disclosures or discovery responses and, when appropriate, for sanctions."

<sup>591</sup> FED. R. CIV. P. 37(a)(1) states that "[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."

production of the material in question.<sup>592</sup> This waiver includes any objection based on privileges and relevance.<sup>593</sup>

One of the main purposes of using requests for production is to obtain evidence potentially for use in support of a motion for summary judgment or at trial.<sup>594</sup> Even though parties must assure the genuineness of the materials they produce, genuineness might be questionable in some circumstances. Thus, the requesting party sometimes submit to the responding party a request for admission to establish the authenticity of documents. The requesting party may also use depositions to assure the authenticity of documents.<sup>595</sup>

In terms of requests for production of ESI, Rule 34(a) includes within its scope requests to produce ESI as a discovery method. This rule allows discovery requests for ESI to be the same as discovery requests for paper documents.<sup>596</sup> Rule 34(a) equalizes ESI with paper documents in

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<sup>592</sup> FED. R. CIV. P. 37(a)(3)(B) states that "[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: (i) a deponent fails to answer a question asked under Rule 30 or 31; (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); (iii) a party fails to answer an interrogatory submitted under Rule 33; or (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34."; See also FED. R. CIV. P. 37(a)(4), which states, regarding compelling disclosure and discovery, that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond."

<sup>593</sup> Public Counsel, *supra* note 42, at 17.

<sup>594</sup> Gutman, *supra* note 411, at Section 6.2.C.2.

<sup>595</sup> Gutman, *supra* note 411, at Section 6.2.C.2.

<sup>596</sup> FED. R. CIV. P. 34(a)

terms of the requests for production of documents as a formal discovery method. This equality exists in all kinds of production of documents and ESI. This includes discovery requests for inspecting, copying, attesting or sampling any document or ESI as part of the discovery practice.<sup>597</sup> The requesting party may "specify the form or forms in which electronically stored information is to be produced."<sup>598</sup> If the request for production does not specify a form for producing ESI, the production must be in a form or forms in which the ESI is "ordinarily maintained or in a reasonably usable form or forms."<sup>599</sup> A party does not need to produce the same ESI in more than one format.<sup>600</sup>

#### **3.2.3.4 Requests for Admission under the FRCP**

Other primary discovery methods are the requests for admission, which is governed by Rule 36 of the Federal Rules of Civil Procedure. Requests for admission are written requests that another party admit or deny the fact of any substance within the scope of Rule 26(b)(1).<sup>601</sup> These matters include: "(A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents."<sup>602</sup> Requests for admission are used as "an economical

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<sup>597</sup> *Id.* 34(a)(1)

<sup>598</sup> *Id.* 34(b)(1)(C)

<sup>599</sup> *Id.* 34(b)(2)(E)(ii)

<sup>600</sup> *Id.* 34(b)(2)(E)(iii)

<sup>601</sup> *Id.* 36(a)(1)

<sup>602</sup> FED. R. CIV. P. 36(a)(1)

and efficient means of making a record of informal exchanges of information, stipulations, matters subject to judicial notice, and of narrowing issues."<sup>603</sup>

Requests for admission are supposed to be "brief, clear, simple, addressed to a single point and stated in neutral, non-argumentative words."<sup>604</sup> They should only relate to objective facts since Rule 36 permits them to seek an admission of the truth of the application of law to fact or opinions as well as the genuineness of documents. Requests for admission may also be accompanied with an interrogatory to distinguish the adverse party's admission or denial to a piece of fact.<sup>605</sup> The request for admission is a discovery method that is not intended to detect facts about the parties' dispute, but rather to limit the matters in controversy among the parties.<sup>606</sup> Requests for admission are also intended to conserve parties' resources spent to prove facts that will not be disputed at trial.<sup>607</sup>

The requesting party must send the request for admission directly to the other party or its counsel and not to the court and must keep proof of service for its records.<sup>608</sup> Similar to requests for production, and unlike depositions and interrogatories, Rule 36 of the FRCP does not limit the

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<sup>603</sup> Schwarzer, *supra* note 415, at 5.

<sup>604</sup> *Id.*

<sup>605</sup> *Id.*

<sup>606</sup> Gutman, *supra* note 411, at Section 6.2.C.3.

<sup>607</sup> *Id.*

<sup>608</sup> Public Counsel, *supra* note 42, at 22.

number of requests for admission.<sup>609</sup> The number of requests for admission may also be restricted by local rules or by a court order.<sup>610</sup>

The party to whom the request is directed must comply and respond to this request within (30) days after being properly served with the request.<sup>611</sup> If the responding party cannot answer within this time limit, it must seek an agreement from the requesting party to extend the time limit.<sup>612</sup> If the requesting party refuses, the party can seek an extension to answer from the court.<sup>613</sup> The responding party may either admit the fact in question, deny it, or object to a request, or state why the answering party cannot either admit or deny this fact.<sup>614</sup> This party may also admit only a specific part of the fact in question and deny the others.<sup>615</sup>

In addition to the complaint and answers, the request for admissions serves also as a formal method to clarify the parties' dispute. The major goal of the request for admission is to determine the issues in dispute among the parties to make it easier to present the issues for a summary judgment.<sup>616</sup> The failure of a party to respond to a request for admission in a timely manner will

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<sup>609</sup> FED. R. CIV. P. 26(b)(2)(A); see also FED. R. CIV. P. 36

<sup>610</sup> FED. R. CIV. P. 26(b)(2)(A); see also FED. R. CIV. P. 36; see also Gutman, *supra* note 411, at Section 6.2.C.3.

<sup>611</sup> FED. R. CIV. P. 36(a)(3); see also Public Counsel, *supra* note 42, at 23.

<sup>612</sup> FED. R. CIV. P. 36(a)(3); see also Public Counsel, *supra* note 42, at 23

<sup>613</sup> FED. R. CIV. P. 36(a)(3); see also Public Counsel, *supra* note 42, at 23

<sup>614</sup> FED. R. CIV. P. 36(a)(4-5); see also Public Counsel, *supra* note 42, at 21-23.

<sup>615</sup> FED. R. CIV. P. 36(a)(4-5); see also Public Counsel, *supra* note 42, at 21-23.

<sup>616</sup> Public Counsel, *supra* note 42, at 21.

result in considering the fact in question in the request of admission as admitted.<sup>617</sup> If the specified time limit passes without a response, the responding party loses its right to deny the fact in question or to object to the request.<sup>618</sup> If the court grants a motion to compel filed by the requesting party, the responding party may be sanctioned by making it responsible for paying the requesting party's attorney's fees and the legal expenses incurred in filing this motion to compel in court.<sup>619</sup>

### **3.2.3.5 Physical and Mental Examinations under the FRCP**

Physical and mental examinations are primary discovery methods. Rule 35 of the Federal Rules of Civil Procedure provides for these types of examinations. Rule 35 authorizes a party to request that a person whose mental or physical condition is in controversy undergo a physical or mental examination. The person to be examined may be a party in the case or a person who is under the legal control or custody of a party.<sup>620</sup> This examination must be made by a "suitably

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<sup>617</sup> *Id.* at 23.

<sup>618</sup> *Id.*

<sup>619</sup> FED. R. CIV. P. 37(a)(5)(A) states that "[i]f the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust."

<sup>620</sup> FED. R. CIV. P. 35(a)(1)

licensed or certified examiner."<sup>621</sup> Unlike other discovery methods, which may be invoked by an attorney for a party without leave a court, only a court may order a physical or mental examinations upon a party's motion.<sup>622</sup> Rule 35(a)(2) states that a court's orders for physical or mental examinations "may be made only on motion for good cause and on notice to all parties and the person to be examined; and ... must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it."<sup>623</sup>

The party supported by a court order who moves for an examination must, upon request, submit to the party against whom the examination order was issued, or to the person examined a copy of the examiner's report about the health condition in question together with all previous medical reports about the same condition.<sup>624</sup> If the requesting party delivers these reports, then the examined party, upon request, must deliver "like reports of all earlier or later examinations of the same condition." If either party does not provide the court with the report of an examination, the court may exclude the testimony of the examiner at trial.<sup>625</sup> The report provided by the examiner must be in writing and must specify in detail the examiner's findings, including their diagnoses

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<sup>621</sup> *Id.*

<sup>622</sup> *Id.*

<sup>623</sup> *Id.* 35(a)(2)

<sup>624</sup> *Id.* 35(b)(1)

<sup>625</sup> FED. R. CIV. P. 35(b)(5)

and conclusions, as well as the result of any medical tests.<sup>626</sup> Rule 35(b)(3) provides further instructions about the requested reports.<sup>627</sup>

Note that if the examined party requests and receives a copy of the examiner's report, the examined party waives its right to assert to doctor-patient privilege concerning testimony about the same condition.<sup>628</sup> This waiver applies only to the testimonies related to this medical examination or any other examinations about the same medical condition in this action pending in court and any other legal action involving the same controversy.<sup>629</sup>

### **3.2.3.6 Subpoenas – Discovery from Non-Parties under the FRCP**

Rule 45 of the Federal Rules of Civil Procedure governs subpoenas, means by which parties can find facts and obtain information or documents relevant to the case in the possession, control,

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<sup>626</sup> *Id.* 35(b)(2)

<sup>627</sup> *Id.* 35(b)(3) states "[a]fter delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them."

<sup>628</sup> FED. R. CIV. P. 35(b)(4)

<sup>629</sup> *Id.*

or custody of non-parties.<sup>630</sup> Parties may submit subpoenas to third parties to produce documents or ESI, or to inspect premises.<sup>631</sup> Rule 45(a)(1)(C) states that:<sup>632</sup>

A command in a subpoena to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

The party who serves a subpoena on a third party does not need to depose the third party, or the custodian of the third party's documents and records who provides documents and ESI.<sup>633</sup> Some commentators write that "a deposition may be unnecessary if the third party is prepared to stipulate<sup>634</sup> to the authenticity of the documents provided and the thoroughness of the search performed to generate them."<sup>635</sup> If the requesting party needs to depose the third party, any legal

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<sup>630</sup> *Id.* 45(a)(1)(A)(iii)

<sup>631</sup> *Id.* 45(a)(1)(C)

<sup>632</sup> *Id.*

<sup>633</sup> Gutman, *supra* note 411, at Section 6.2.D.

<sup>634</sup> Stipulations have a special evidentiary importance in the discovery process. FED. R. CIV. P. 29 provides for stipulations about discovery procedure. This rule states "[u]nless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and (b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."

<sup>635</sup> Gutman, *supra* note 411, at Section 6.2.D.

materials or tangible things requested from the third party should be incorporated in the subpoena requesting the third party appearance at the deposition session.<sup>636</sup>

Regarding subpoenas to discover ESI in the possession, control or custody of nonparties, Rule 45 of the Federal Rules of Civil Procedure, which mainly discusses subpoenas as a formal discovery method, includes within its scope using subpoenas as a tool to discover ESI.<sup>637</sup> The ESI requested through subpoenas must be related to the requesting party's case and in the possession, control, or custody of a nonparty.<sup>638</sup> Similar to the requests for production of ESI, ESI produced in response to subpoenas must be produced in the form in which this ESI was ordinarily maintained or in a reasonably usable form unless the subpoenas specified the form in which the ESI should be produced.<sup>639</sup>

### **3.2.3.7 Supplementing the Initial Disclosure and Discovery Responses**

Parties must disclose all pieces of evidence that they intend to use in court to support their claims or defenses. Rule 26(e)(1) obligates parties to inform each other if a party realizes, after its initial disclosure or response, that "in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been

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<sup>636</sup> *Id.*

<sup>637</sup> FED. R. CIV. P. 45(a)(1)(A)(iii)

<sup>638</sup> *Id.*

<sup>639</sup> Battaglia, *supra* note 53, at 74-75.

made known to the other parties during the discovery process or in writing..."<sup>640</sup> In this incident, the party must correct the previously provided information, or it must provide a supplement to the initial disclosure or response with the required information in a reasonably timely manner.<sup>641</sup> Otherwise, the defiant party will be subject to sanctions for its failure to correct or supplement the information.<sup>642</sup> Sanctions for this failure to disclose may include the exclusion of the information or materials from trial or in support of a motion.<sup>643</sup>

The amendment of an initial disclosure or a response to a discovery request is not subject to the discovery cutoff date set by the court. If a party finds out, after the discovery cutoff date, that its disclosure or response to discovery needs to be amended because it is incorrect or incomplete, this party must amend the disclosure or response and resubmit it to the other party in

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<sup>640</sup> FED. R. CIV. P. 26(e)(1)(A). The supplement must be an amendment of a party's disclosure or answer and an updated version of the disclosure or response. As a further explanation of Rule 26(e), the rule gives two incidents in which the party must supplement its disclosure or response to a discovery request. One incident is when a party finds facts and obtains information after its disclosure or response to a discovery request, and this information affects the disclosure or response substantially, and therefore, it needs to be amended. The other incident is when a party realizes that part of its disclosure or its response to a discovery request is incorrect or incomplete, and therefore, the disclosure or response must be amended.

<sup>641</sup> *Id.*

<sup>642</sup> *Id.* 37(c)(1)

<sup>643</sup> *Id.*

a timely manner. This duty to supplement applies even if the discovery phase has been concluded; otherwise, the defiant party may be sanctioned for its misconduct.<sup>644</sup>

### 3.2.3.8 Electronic Discovery (Discovery of ESI)

Electronic discovery is the discovery practice that governs ESI that is in the possession, control, or custody of another party in the case. Rule 34(a)(1)(A) of the Federal Rules of Civil Procedure defines electronic documents and ESI, that litigants may obtain from other parties through discovery, as follows:

any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.<sup>645</sup>

This definition is intentionally flexible to include within its scope electronic forms that may exist in the future that contain information, which may be discoverable under the rules of electronic discovery.<sup>646</sup>

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<sup>644</sup> Battaglia, *supra* note 53, at 95.

<sup>645</sup> FED. R. CIV. P. 34(a)(1)(A)

<sup>646</sup> Battaglia, *supra* note 53, at 56.

There are several features that distinguish ESI from paper documents. These features may be classified under (6) categories, each with practical implications for discovery. The features that distinguish ESI are:<sup>647</sup>

(1) 'Volume and Duplicability' – large amounts of information can be replicated without the data being degraded; (2) 'Persistence' – 'deleting' a file doesn't actually erase the data, until written over by the computer; (3) 'Dynamic, changeable content' – information can be modified by moving or accessing the data in ways that are hard to detect without computer forensic techniques; (4) 'Dispersion and searchability' – many types of ESI can be quickly and accurately searched. However, the ability to trace its origin, completeness and accuracy can be obstructed, when transmitted in multiple versions to many locations. Many forms of ESI can, however, be quickly and accurately searched; (5) 'Environment dependence and obsolescence' – database information can become incomprehensible when removed from its original structure, and data migrates to different platforms, making it difficult to access this 'legacy' data from outdated systems; (6) 'Metadata' – this involves potentially important, often-hidden information about the document or file that the computer records to assist in storing and retrieving, such as create and edit dates, who the authors of the document are, comments, and edit history.

Other essential characteristics that distinguish ESI from paper documents are "(1) the impossibility of identifying the 'what, where, and how' of ESI without involving an IT [information technology] person; (2) the volume and haphazardness of ESI compared to paper; (3) the necessity to use technology to see ESI; and (4) the risk of the opposing party employing superior technology, potentially allowing it to analyze searchable ESI."<sup>648</sup>

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<sup>647</sup> Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018); see also Gutman, *supra* note 411, at Section 6.2.E.

<sup>648</sup> Gutman, *supra* note 411, at Section 6.2.E.

### **3.2.3.9 Pretrial Disclosure**

In addition to the disclosures required by Rule 26(a)(1) and (2) of the FRCP, Rule 26(a)(3) requires parties to make certain pretrial disclosures after the discovery cutoff date and before proceeding to the trial stage. Parties must make the pretrial disclosures at least (30) days before trial unless the court sets a different time limit.<sup>649</sup>

Pretrial disclosure must include the identification of the materials that the parties intend to use at trial to support their allegations. This includes witnesses, documents, or other evidence that is going to be part of a party's claim or defense. One exception to this is materials that are intended to be used only for impeachment.<sup>650</sup>

Pretrial disclosures must be in writing and signed by the party who prepared them. The pretrial disclosures must be served directly on the other party.<sup>651</sup> Any objection to the pretrial disclosure must be filed within (14) days after receipt of the pretrial disclosure.<sup>652</sup>

### **3.2.4 The Burden of the Cost of Litigation, Including Discovery Expenses, in the United States**

In terms of allocating the costs of litigation, and discovery expenses, three approaches exist in legal systems around the globe. At one end of the spectrum, the legal system shifts almost all

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<sup>649</sup> FED. R. CIV. P. 26(a)(3)

<sup>650</sup> *Id.*

<sup>651</sup> FED. R. CIV. P. 26(a)(3)

<sup>652</sup> *Id.*

legal expenses to the losing party; in the middle, the system shifts only substantial costs and fees to the losing party, but not all of them; and at the other end of the spectrum, the legal system permits the prevailing party to recover from the losing party only a small portion of its costs.<sup>653</sup> Litigation costs in most cases are not shifted to the losing party until the case is concluded, not during litigation.<sup>654</sup>

The legal system in the United States shifts very few litigation costs onto the losing party. For example, Section 1920 of Title 28 of the United States Code permits the judge or clerk to require the losing party to pay certain specified fees and costs, but this statute does not authorize the shifting of attorneys' fees onto the losing party. In a limited number of cases, the prevailing party's attorney's fees are shifted to the losing party if there is a federal or state rule requiring this shifting.<sup>655</sup>

Unlike most other legal systems, the rules in the United States make each party responsible for its own attorney's fees irrespective of the case's outcome, and this includes attorney's fees

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<sup>653</sup> Brittany Kauffman, *Allocating the Costs of Discovery: Lessons Learned at Home and Abroad*, 2014 IAALS 1, 22.

<sup>654</sup> *Id.*

<sup>655</sup> Kauffman, *supra* note 653, at 23; see also Gutman, *supra* note 411, at Section 6.2.H. where the authors state: "both Federal Rule of Civil Procedure 54(d)(1) and 28 U.S.C. § 1920 permit the recovery of certain litigation costs and expenses to the prevailing party, following a successful settlement or verdict. In the absence of such a cost-shifting statute, however, Federal Rule of Civil Procedure 54(d)(1) permits the court to award limited costs to the prevailing party."

incurred while finding facts and gathering materials to support the parties' allegations and conducting discovery, which often are tremendously high.<sup>656</sup>

According to the Federal Rules of Civil Procedure, the responding party to a discovery request is responsible to pay the expenses of producing the requested information or documents, including ESI. The responding party bears the costs of production so long as the requested documents or information are reasonably accessible without undue burden or expense.<sup>657</sup> However, "[w]here the requesting party continues to request information from sources that are not reasonably accessible, and the parties cannot come to agreement regarding the production, the court will make a good-cause determination regarding whether to allow such discovery."<sup>658</sup> Ordinarily, the responding party will bear discovery costs of producing the requested information unless it proves that the information is not reasonably accessible without undue burden or cost.<sup>659</sup> If the court finds that the information is not reasonably accessible, the court may order its production but the court may order certain conditions for the discovery of this material, including

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<sup>656</sup> Kauffman, *supra* note 653, at 25.

<sup>657</sup> Advisory committee's note on Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure; see also Kauffman, *supra* note 653, at 11.

<sup>658</sup> Kauffman, *supra* note 653, at 11.

<sup>659</sup> *Id.* at 11-12; see also *Zubulake*, *supra* note 493, at 309, 322; see also *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002)

cost shifting.<sup>660</sup> The responding party may seek a protective order from the court to avoid the discovery of this information or to shift the burden of discovery costs to the requesting party.<sup>661</sup>

In summary, Section 3.2 of Chapter Two discussed the federal discovery rules including the types and the stages of document discovery and E-discovery. It also discussed the initial disclosure rules, including initial disclosure time, format, and exclusions. This section examined the discovery phase under the FRCP, including holding the Rule 26(f) conference and the joint discovery plan. It also examined each discovery method available under the discovery rules in the FRCP and shows how each method is taken to find facts in civil proceedings. The examined methods in this section included depositions, interrogatories, requests for production, requests for admission, physical and mental examinations, subpoenas as well as the discovery of ESI. This section also considered the legal approaches to supplement initial disclosures and discovery

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<sup>660</sup> *Zubulake*, *supra* note 493, at 309, 322; see also *Rowe Entm't, Inc.*, *supra* note 659; see also *Bills v. Kennecott Corporation*, 108 F.R.D. 459, 460-64 (D. Utah 1985); see also *Kauffman*, *supra* note 653, at 5-6, where *Kauffman* also states "[i]n determining whether it was appropriate to shift costs to the requesting party, the court in *Bills v. Kennecott Corporation* set forth (4) factors for consideration: 1) the total cost of production, 2) the relative expense and burden to each party, 3) whether the requesting party will be substantially burdened by the expense, and 4) whether the responding party is benefitted from producing the data. While the court did not shift costs in that case, the factors that were considered went on to become the predominant test utilized by courts in these early years."

<sup>661</sup> *Kauffman*, *supra* note 653, at 11-12; see also *Zubulake*, *supra* note 493, at 309, 322; see also *Rowe Entm't, Inc.*, *supra* note 659.

responses. It also discussed the pretrial disclosure process and the burden of the litigation costs in the United States, including discovery expenses.

The following section of Chapter Two discusses the legal consequences and sanctions that United States courts may apply on defiant litigants upon committing violations of the rules of discovery. This discussion includes sanctions related to the discovery of ESI.

### 3.3 Sanctions and Legal Consequences of Violating Discovery Rules in the United States

Rule 37 of the Federal Rules of Civil Procedure identifies sanctions for violating the discovery rules or court orders regarding discovery.<sup>662</sup> Rule 37 permits sanctions in a variety of different circumstances. Rule 37(b) permits sanctions for failure to comply with a court order. Rule 37(c) provides sanctions for failure to make disclosures required by Rule 26(a) or for failure to supplement under Rule 26(e) or for failure to admit what is requested under Rule 36. Rule 37(d) permits sanctions for certain behavior even in the absence of a court order such as failing to attend one's own deposition or even responding to interrogatories or requests for production. Lastly, Rule 37(e) addresses failure to preserve ESI. This section addresses these different kinds of sanctions to provide further explanations.

Some practitioners write that "Rule 37 sanctions serve several purposes: (1) to ensure that the offending party will not profit from its failure to comply; (2) to provide a strong deterrent effect to the offending party, as well as the public in general; and (3) to secure compliance with court orders."<sup>663</sup>

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<sup>662</sup> FED. R. CIV. P. 37

<sup>663</sup> Gutman, *supra* note 411, at Section 6.2.J. Citing "Everhome Mortgage Company v. Charter Oak Fire Insurance Company, NO. 07-CV-98, 2011 WL 4056043, at 2 (E.D.N.Y. April 18, 2011) (Magistrate Judge Report and Recommendation), report and recommendation adopted by Everhome Mortgage Company v. Charter Oak Fire Insurance Company, NO. 07-CV-98 (E.D.N.Y. Sept. 12, 2011)."

Other practitioners classify the sanctions that courts may impose on parties for violating discovery rules between three levels. They state that:<sup>664</sup>

[t]he mildest is an order to reimburse the opposing party for expenses caused by the failure to cooperate. More stringent are orders striking out portions of the pleadings, prohibiting the introduction of evidence on particular points and deeming disputed issues determined adversely to the position of the disobedient party. Harshesht of all are orders of dismissal and default judgment.

The discovery sanctions mentioned in Rule 37 are not exhaustive, since the court may impose any other sanctions it considers equitable. Discovery practice clearly needs "careful planning and execution and continuing vigilance."<sup>665</sup>

### **3.3.1 Failure to Disclose, to Admit, or to Supplement a Previous Response**

If a court decides that a party conducts discovery improperly and in a manner that harms another party, the court may apply tougher sanctions on these bad faith parties.<sup>666</sup> Rule 37(c) states:<sup>667</sup>

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<sup>664</sup> Gutman, *supra* note 411, at Section 6.2.J.; see also JSC Foreign Economic Association Technostroyexport v. International Development & Trade Services, Incorporated, No. 03 Civ. 5562 (S.D.N.Y. Aug. 16, 2005).

<sup>665</sup> Gutman, *supra* note 411, at Section 6.2.J.

<sup>666</sup> FED. R. CIV. P. 37(c); see also Larson, *supra* note 410, where Larson states "[i]f a court finds repeated or willful violations of discovery, the court may order more serious sanctions such as deeming certain facts to be admitted, limiting a party's ability to introduce certain evidence at trial, striking portions of the disobedient party's pleadings, granting full or partial summary judgment, or holding the disobedient party in contempt of court."

<sup>667</sup> FED. R. CIV. P. 37(c)

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof.

### **3.3.2 Failure to Comply with a Court Order**

Rule 37(b)(2) identifies a host of sanctions that a court may impose upon a party for failure to obey a court order to provide or permit discovery, including.<sup>668</sup>

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

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<sup>668</sup> FED. R. CIV. P. 37(b)(2)(A)

Beside these sanctions and regarding the expenses incurred because of a party's noncompliance, Rule 37(b)(2)(C) states that:<sup>669</sup>

instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

### **3.3.3 Party's Failure to Attend Its Deposition, to Answer Interrogatories, or to Respond to a Request for Inspection**

Under Rule 37(d)(1), the moving party, which seeks sanctions against a disobedient party, must file a motion with the court where the action is pending.<sup>670</sup> Rule 37(d)(1) states:<sup>671</sup>

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if: (i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

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<sup>669</sup> *Id.* 37(b)(2)(C)

<sup>670</sup> *Id.* 37(d)(1)

<sup>671</sup> *Id.*

The court, upon a motion, may order sanctions for noncompliance. Rule 37(d)(3) identifies the types of sanctions that the court may impose on a disobedient party in this circumstance.<sup>672</sup>

Rule 37(d)(3) states:<sup>673</sup>

*Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

### **3.3.4 Sanctions Related to the Discovery of ESI**

In addition to the general rules of sanctions for failure to comply with discovery requests, Rule 37(e) of the Federal Rules of Civil Procedure specifically addresses the sanctions for failure to preserve ESI. Rule 37(e) states:<sup>674</sup>

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

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<sup>672</sup> FED. R. CIV. P. 37(d)(3)

<sup>673</sup> *Id.*

<sup>674</sup> *Id.* 37(e)

From the context of Rule 37(e), if the party responsible for production took reasonable steps to preserve ESI, but the information nevertheless was lost, then no sanctions should be imposed on this party since this party was not negligent in preserving this information. If the producing party was negligent and did not take reasonable steps to protect and preserve the ESI, but this information may be recovered from another resource, no sanctions should be imposed on the negligent party.<sup>675</sup> The court must determine whether the party took reasonable steps to preserve the ESI in question, and therefore, whether it may impose sanctions on this party or not. This evaluation should consider two things: 1) the circumstances and sophistication of the case; and 2) the proportionality of the lost ESI to the need of the party's case.<sup>676</sup>

Attorneys should keep in mind, when submitting or responding to discovery requests, that they most likely will get reciprocal treatment from not only opposing parties but also from courts if the attorneys deal fairly and reasonably with discovery matters.<sup>677</sup> Considering the proportionality concept as the formal ground for discovery and adopting a measured approach to discovery would considerably help attorneys to resolve their clients' cases much sooner and at lower costs. This is especially true if the attorneys avoid conducting unreasonable e-discovery that would protract the resolution of cases and increase the expenses of litigation.<sup>678</sup> This is to properly

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<sup>675</sup> Battaglia, *supra* note 53, at 82.

<sup>676</sup> *Id.* at 83.

<sup>677</sup> Hodges, *supra* note 64, at 763.

<sup>678</sup> Hodges, *supra* note 64, at 763.

achieve the intended advantages of establishing the discovery regime in the United States and to eliminate any disadvantages of practicing discovery.

In short, this section discussed the legal consequences and sanctions that United States courts may apply on defiant litigants upon violating of the discovery rules under the FRCP. The discussion in this section included sanctions related to the discovery of ESI.

The following section of Chapter Two first discusses the role of discovery in the United States legal system. It then discusses the advantages of implementing the discovery regime in the United States legal system. The following section also discusses the disadvantages of the discovery practice, especially in terms of discovery expenses and the time consumed in conducting discovery. It also addresses the quantity of discovery in United States civil litigations and examines the consequences of the discovery practice in the United States civil litigation. It discusses the evolution of discovery and the discovery effects on litigants' behaviors in the United States. This discussion helps to identify which discovery rules are most effective in the United States and what obstacles other rules have caused that may make them less attractive for incorporation into the Saudi legal system. Section 3.4 also refers throughout to some existing empirical research regarding the impacts of discovery rules on the progress and speed of litigation and settlement in the United States. This is one way to help to identify which discovery rules could be most effectively adopted in Saudi Arabia. The next section also presents statistical evidence about the effects of discovery on a litigant's behavior. It also considers some arguments about the fact that the discovery practice is the main source of increased expenditure on litigation in the United States.

### **3.4 The Advantages and Disadvantages of the Discovery Regime in terms of Time and Cost; Consequences of the Discovery Practice in the United States, Supported by Statistical and Empirical Studies**

#### **3.4.1 Advantages of the Discovery Regime in the United States**

Several benefits of the discovery regime exist in the United States legal system. Discovery helps litigants uncover the adverse litigant's story about the dispute by making it difficult for the adverse litigant to alter its story after responding to a discovery request regarding a specific matter in question.<sup>679</sup> Disclosure of crucial facts also enables a comprehensive evaluation of these facts. Sometimes "it is not possible to fully assess the facts of a case, including theories of liability and possible defenses, before conducting discovery."<sup>680</sup> Discovery helps the parties to find facts to avoid any surprises and unpredicted facts at the time of trial.<sup>681</sup> Discovery increases the likelihood of litigants settling their disputes out of court.<sup>682</sup> Because discovery helps to reveal the strengths

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<sup>679</sup> Larson, *supra* note 410.

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

<sup>682</sup> Maurice Rosenberg. *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198 (1989). Rosenberg, in his commentary about the impacts of the Federal Rules of Civil Procedure on the United States legal system, writes that the discovery regime has positive impacts on the legal traditions in the United States. He states that "[f]ull access to the evidence would end trial by ambush and surprise. Open discovery would promote settlements; with both sides obliged to turn over all their important cards, secrets would disappear, and realistic negotiations would occur."

and weaknesses in litigants' allegations, it can lead them to settle their cases to avoid further legal expenses and get a better resolution.<sup>683</sup>

While some issues exist regarding the discovery of written documents remain, the discovery of documents is nevertheless still crucial since it facilitates litigants' search for facts that support their allegations. It also helps them to identify the issues at stake and formulate the types of questions that should be asked in depositions.<sup>684</sup> One benefit of this is to prevent parties from misusing depositions since "[t]he purpose of a deposition is not to harass or intimidate, but simply to make a clear and unambiguous record of what that witness's testimony would be at trial."<sup>685</sup>

Discovery also resolves the dispute without a full-blown trial. "Once discovery is complete, the information gained through discovery may ... be used as a basis for pretrial motions, seeking such potential relief as summary judgment (judgment without a full trial), the narrowing or limiting

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<sup>683</sup> Larson, *supra* note 410; see also Gutman, *supra* note 411, at Section 6.2.G. where the authors state that "discovery by or from you sometimes facilitates settlement. The opposing party may be induced to settle in order to avoid the effort, expense, and possible embarrassment of responding to your discovery requests. Disclosure of harmful facts may encourage settlement. When you respond to discovery and show the strength of your case, the opposing party may also be encouraged to settle." They also write that "discovery is essential in preparing for and conducting a trial. A deposition may be used to impeach a witness or may be offered into evidence as the testimony of a party, or of a witness who is unavailable for trial."

<sup>684</sup> Koppel, *supra* note 70, at 256.

<sup>685</sup>Schwarzer, *supra* note 415, at 3.

of issues that may be heard at trial, or rulings to exclude or limit the use of certain evidence at trial."<sup>686</sup>

Since the main role of discovery is to find facts and gather information and documents related to the parties' claims and defenses, information collected through discovery might support new claims, bring in new parties, and occasionally support new relief that could be sought in amended or supplemental pleadings.<sup>687</sup> Discovery practice helps to shape the parties' pleadings since discovery may reveal that "a claim is no longer viable or that a party should be voluntarily dismissed, and that an appropriate motion for dismissal should be filed."<sup>688</sup>

### **3.4.2 Disadvantages of the Discovery Regime in the United States**

Some researchers argue that the current discovery system in the United States causes a large number of legal problems, including the high costs of discovery practice. This is in addition to the waste of litigants' and courts' resources due to the overuse of discovery methods accompanied with high expenses.<sup>689</sup> This overuse of discovery has led to an increase in the cost of

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<sup>686</sup> Larson, *supra* note 410.

<sup>687</sup> Gutman, *supra* note 411, at Section 6.2.G.

<sup>688</sup> *Id.* Since one of the discovery goals is to generate usable evidence, the materials gathered and the facts found through discovery would most likely be very valuable for parties if they would like to seek summary judgment or, in some circumstances, preliminary injunction relief.

<sup>689</sup> Koppel, *supra* note 70, at 244.

litigation even in relatively small cases.<sup>690</sup> Some Scholars have addressed the elevated costs of the broad discovery in the United States and suggested reforms to limit the practice of discovery to decrease the costs of litigation and save courts' and litigants' resources.<sup>691</sup>

Arguably in response to the increased costs of discovery, the United States Supreme Court has developed a somewhat stricter pleading standard to prevent unfounded lawsuits from reaching the discovery phase in an effort to limit the costs of litigations.<sup>692</sup> Some scholars argue that this attempt to limit the costs of litigation also threatens to bar some worthwhile lawsuits by preventing some plaintiffs from using the power of courts to find facts and gather key information important for their cases.<sup>693</sup>

In response to criticisms regarding the overuse and misuse of discovery, the Advisory Committee on Civil Rules has amended the federal discovery rules numerous times since the 1970s to limit the discovery practice.<sup>694</sup> These reforms included imposing sanctions for discovery abuse

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<sup>690</sup> The next section, Section 3.5, provides some empirical support for this statement.

<sup>691</sup> Koppel, *supra* note 70, at 244.

<sup>692</sup> *Id.* at 245; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); See also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

<sup>693</sup> Koppel, *supra* note 70, at 245; See also Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 140-66 (2011).

<sup>694</sup> Koppel, *supra* note 70, at 250.

and limiting the amount of discovery, such as the number of depositions and interrogatories.<sup>695</sup> The Advisory Committee also amended the scope of discovery permitted – now discovery must be relevant to the parties' allegations and proportional to the needs of the case.<sup>696</sup>

Some critics of the discovery regime in the United States still argue that the current discovery practice allows the exposure of secret information for companies and personal information of litigants and makes this information available to the public, which may be unfair and may infringe the privacy of these litigants.<sup>697</sup> Such discovery may also expose the communications of governmental and corporate entities to public assessment, which may lead government agencies and companies to refrain from preserving written documents. Some litigants also may seek to settle their cases only to protect their sensitive materials from being exposed and released to others through discovery practice.<sup>698</sup>

Most of the critics' arguments about the current discovery regime in the United States rely on three main grounds: the comparatively incompetence of the discovery process; the injustice

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<sup>695</sup> Judicial Conf. Advisory Comm. On Civil Rules & Comm. On Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation*, 2010 CONFERENCE ON CIVIL LITIGATION 1, 9.

<sup>696</sup> FED. R. CIV. P. 26(b)(1); Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 MCGEORGE L. REV. 1051, 1060-62 (2001); see also Koppel, *supra* note 70, at 250.

<sup>697</sup> Geoffrey C. Hazard Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242 (1989); see also Koppel, *supra* note 70, at 254.

<sup>698</sup> Koppel, *supra* note 70, at 254.

caused by discovery; and the unreasonably high costs of discovery.<sup>699</sup> One of the major criticisms of the broad approach to discovery is its tremendous cost. The discovery of documents, both paper and electronic documents, is the most expensive stage of discovery practice, particularly in a progressively digital world.<sup>700</sup> Collecting and preserving a huge number of electronic documents (e-mails and other legal records) will most likely increase tremendously the expense of some litigations.<sup>701</sup>

Some practitioners claim that, even though discovery is not conducted in all cases, the expense of discovery in the cases in which it is used is extremely high. Even when discovery is conducted effectively, discovery expenses can constitute up to 90% of litigation costs.<sup>702</sup> Some urge that the best solution to the problems of broad discovery, especially its unreasonable costs, is to reform the entire discovery regime by minimizing the amount of discovery that may be taken in certain types of litigations. They state that discovery practices should be customized to each type of case pursuant to certain factors, including the size and value of the case.<sup>703</sup>

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<sup>699</sup> *Id.* at 257.

<sup>700</sup> *Id.* at 256; see also Colin L. Campbell, *We Are Not Finished Yet: Discovery Reform in Canada and the United States*, 84 J. AM C. TRIAL LAW. 91, 2 (2017).

<sup>701</sup> Koppel, *supra* note 70, at 256.

<sup>702</sup> *Id.* at 256-57.

<sup>703</sup> Koppel, *supra* note 70, at 245.

### 3.4.3 Quantity of Discovery in United States Civil Litigations

Two studies, one conducted by the Federal Judicial Center (FJC) in 1978, and the other conducted by the National Center for State Courts between 1990 and 1993, were done for the purpose of quantifying the amount of discovery taken in civil cases in the United States.<sup>704</sup>

The purpose of the FJC study was to quantify the discovery practice in United States civil suits by examining the amount of discovery in 3000 decided cases in (6) district courts in the United States.<sup>705</sup> This study concluded that no discovery was conducted at all in 52% of the cases. The study found that only around 5% of the total number of cases had (10) or more discovery requests.<sup>706</sup> In the cases examined, interrogatories and depositions accounted for about 78% of all the filed discovery requests.<sup>707</sup>

The National Center for State Courts' studied the amount of discovery conducted in some state cases. Peggy Bruggman<sup>708</sup> summarized the conclusions of the study by stating that "no discovery was initiated in 42% of 2,190 cases sampled, as compared with 52% in the FJC study"

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<sup>704</sup> Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1434-36 (1994); see also Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, 1995 PUB. L. RESEARCH INST. 1, 5.

<sup>705</sup> Mullenix, *supra* note 704, at 1434-36; see also Bruggman, *supra* note 704, at 5

<sup>706</sup> Mullenix, *supra* note 704, at 1434-35; see also Bruggman, *supra* note 704, at 5.

<sup>707</sup> Mullenix, *supra* note 704, at 1434-35; see also Bruggman, *supra* note 704, at 5

<sup>708</sup> Attorney Peggy E. Bruggman research while affiliated with Massachusetts Institute of Technology, Cambridge, Massachusetts, in the United States and other places.

in 1978.<sup>709</sup> Regarding the type of discovery methods taken in the sampled cases, Bruggman stated:<sup>710</sup>

[i]n the cases where discovery was filed: interrogatories, the most common form of discovery, were used in 88% (mean volume of 2.7), requests for production were used in 69% (mean volume of 3.5), depositions in 59% (mean volume of 2.3), and requests for admission in 12% (mean volume of 1.6). The nature of discovery changes when the volume of requests rises. In cases employing more than ten discovery requests, depositions become the most prevalent form of discovery.

In terms of the amount of discovery taken in civil litigation, a research conducted by the FJC concluded:<sup>711</sup>

[t]he most frequent form of discovery activity was document production: 84% of those who said there was some discovery or disclosure in their case said they engaged in document production. Interrogatories and depositions also occurred at relatively high rates: 81% and 67% respectively. Fifty-eight percent (58%) of the attorneys reported that initial disclosure occurred in their case, and 29% said expert disclosure did.

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<sup>709</sup> Bruggman, *supra* note 704, at 5-6.

<sup>710</sup> *Id.* at 6.

<sup>711</sup> Willging et al., *supra* note 509, at 3.

### **3.4.4 Consequences of the Discovery Practice in the United States, Supported by Statistical and Empirical Studies**

As states in the last subsection that some commentators argue that the high costs of discovery have led many litigants to settle their cases only to avoid such costs.<sup>712</sup> The commentators contend that many parties unfairly use discovery methods broadly as "a tactical weapon to impose excessive costs on the opposing party in the hope that he or she will eventually settle rather than incur further costs."<sup>713</sup>

The empirical data, however, may undercut the criticism that discovery is "too expensive" or "too intrusive." One of the statistical studies conducted by the Federal Judicial Center (FJC) collected some attorneys' opinions about the relationship between the amount of discovery conducted in the case to the actual need.<sup>714</sup> In summarizing the attorneys' opinions, this FJC study concluded:<sup>715</sup>

[m]ost attorneys --representing plaintiffs and defendants alike-- thought the discovery or disclosure generated by the parties was about the right amount needed for a fair resolution of their cases. Fewer than 10% thought the process generated too little information, and about 10% thought the process generated too much information.

On the other hand, in a study of attorneys' perspectives about discovery abuse in the United States, 77% of the interviewed attorneys admitted that they had taken discovery only to increase

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<sup>712</sup> Bruggman, *supra* note 704, at 1; see also Rosenberg, *supra* note 682, at 2204.

<sup>713</sup> Bruggman, *supra* note 704, at 1.

<sup>714</sup> Willging et al., *supra* note 509, at 4.

<sup>715</sup> *Id.*

costs and, therefore, drive the opposing parties to the settlement table against their will to avoid further legal costs.<sup>716</sup> Another form of discovery abuse that some commentators mention is the excessive use of discovery in the hope that it will buy them time.<sup>717</sup> Some of the methods that these litigants may use to achieve their purpose include "refusing to provide or hiding information, raising frivolous claims of privilege, destroying documents, disingenuously construing discovery requests narrowly, assisting in perjury, coaching witnesses to avoid disclosing information, and providing deliberately evasive answers to discovery requests."<sup>718</sup>

From a practical point of view, several factors contribute to the abusive use of discovery in the United States legal system. One of these factors is the financial advantage that attorneys obtain from conducting excessive discovery. This is because most attorneys get paid on an hourly basis, which encourages more discovery because it results in more money in the attorneys' pockets.<sup>719</sup> One of the reasons for the high costs of discovery in the United States is the shifting by attorneys from fixed-fee to hourly fee charges as the basis for their legal fees.<sup>720</sup> This has tremendously increased the costs of the discovery process and hence the costs of lawsuits in

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<sup>716</sup> Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 857 (1980).

<sup>717</sup> Bruggman, *supra* note 704, at 1.

<sup>718</sup> *Id.*; see also Charles W. Sorenson, Jr., Disclosure Under Federal Rule of Civil Procedure 26(a)-- "Much Ado About Nothing?," 46 Hastings L.J. 679, 699-700 (1995).

<sup>719</sup> Bruggman, *supra* note 704, at 1; see also Sorenson, *supra* note 718, at 699-700.

<sup>720</sup> Rosenberg, *supra* note 682, at 2200.

general, which have subsequently led many litigants to settle their disputes to avoid any unbearable legal expenses.<sup>721</sup>

Another factor that pushes attorneys to conduct broad discovery is their apprehension about being sued for malpractice if they fail to uncover something that could have been learned through discovery. This apprehension encourages them to seek more information via discovery. They use discovery to prompt the genuineness of this information, which in turn provides them with a large amount of money.<sup>722</sup> A third factor some commentators present as a reason for the abusive use of discovery is that "newcomers to the legal profession may simply not know any better."<sup>723</sup> Inadequate regulation of attorneys and lack of proper training early in their legal professional practice can lead to the abusive use of discovery too.<sup>724</sup>

One research study conducted by the FJC concluded that discovery practice constitutes about 50% of the litigation costs in the cases that involve discovery and represents about 3% of the amount at controversy in the case.<sup>725</sup> Based on the participating attorneys' reports about the relation between the discovery costs and the amount at stake in the cases, the FJC study concluded that "[d]iscovery expenses were quite low in relation to the amount at stake in the litigation. The median percentage was 3% of the stakes; however, a small percentage of the attorneys (5%)

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<sup>721</sup> *Id.* at 2204.

<sup>722</sup> Bruggman, *supra* note 704, at 1.

<sup>723</sup> *Id.* at 1-2.

<sup>724</sup> *Id.*

<sup>725</sup> Willging et al., *supra* note 509, at 2.

estimated discovery expenses at 32% or more of the amount at stake."<sup>726</sup> The FJC also summarized the opinions of participating attorneys about discovery costs by stating that "[a]bout half the attorneys thought the expenses of discovery and disclosure were about right in relation to their client's stakes in the case. Fifteen percent (15%) thought the expenses were high and 20% said they were low relative to the stakes."<sup>727</sup>

The late Rosenberg<sup>728</sup> wrote: "[o]ne reason discovery is so expensive is that when fees are paid on the basis of time charges, discovery practice marries the lawyer's professional instinct to leave no stone unturned to the financial advantage of doing so."<sup>729</sup> Rosenberg also states that the rule makers who formulated the discovery rules intended that "the discovery provisions would help the parties reach settlements or, at least, avoid trial by surprise and involve no great cost or burden to the system."<sup>730</sup>

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<sup>726</sup> *Id.* at 4.

<sup>727</sup> *Id.*

<sup>728</sup> Rosenberg conducted this study a long time ago before Electronic discovery was a big concern in terms of discovery costs. The discovery costs may have tremendously increased during the last couple of decades after the revolutionary use of technology to preserve information, which has led to an increase in the amount of ESI subject to discovery.

<sup>729</sup> Rosenberg, *supra* note 682, at 2204.

<sup>730</sup> Rosenberg, *supra* note 682, at 2205. Rosenberg also explains the intention of the discovery rules' drafters by stating that "[t]heir premises were: (1) 'More is better' and (2) discovery should be a lawyer's pursuit, with the judges taking as little part as possible."

This shifting of litigation duties from tribunals to parties' attorneys has increased the responsibility of such duties on parties<sup>731</sup>, and hence increased the litigation costs since attorneys will spare no effort to discover relevant information not only to accomplish the best resolution of the case but also to enrich themselves.<sup>732</sup> Some attorneys, and sometimes clients, do not use technology to preserve electronic copies of information and documents that might be subject for discovery.<sup>733</sup> Justice Colin Campbell<sup>734</sup> argue, in his report for the American College of Trial Lawyers, that this is because E-discovery would minimize the costs of finding and producing the requested legal materials and speed up the process of presenting these materials, which would reduce the financial benefits that the attorneys would earn as legal fees for conducting discovery.<sup>735</sup> In other words, this reduction in the costs and time consumed on discovery occurs because reviewing ESI would consume much less time, and hence less money for attorneys who are paid on hourly basis, than reviewing paper documents.<sup>736</sup>

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<sup>731</sup> For at least the past 30 or 40 years, judges have played an increasingly "managerial" role. *See* Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). In addition to limiting the number of depositions and interrogatories and reducing the scope of discovery, the amended FRCP have increased judicial involvement in the discovery process.

<sup>732</sup> Rosenberg, *supra* note 682, at 2205.

<sup>733</sup> Campbell, *supra* note 700, at 5.

<sup>734</sup> Justice Colin Campbell has established a mediation, arbitration, and case management practice following a distinguished career as litigation counsel and 15 years as a judge of the Ontario Superior Court of Justice.

<sup>735</sup> Campbell, *supra* note 700, at 5.

<sup>736</sup> *Id.*

In one of the recent studies performed by the FJC, some attorneys were asked if they think that the discovery practice in their recently concluded cases "increased the fairness of the outcome" in these cases. Around 39% of defendants' lawyers and 45% of plaintiffs' lawyers admitted or substantially admitted that the discovery practice in their cases had enhanced the fairness of the cases' outcome. Around 14% of defendants' lawyers and 12% of plaintiffs' lawyers disagree or substantially disagreed that the discovery practice had increased the fairness of the outcome of their cases' conclusions. The rest of the participants in this study either provided ambivalent answers or refused to provide answers.<sup>737</sup>

This official study shows that the discovery regime in the United States has positive impacts on the justice system by accomplishing a better and more efficient resolution of cases by fulfilling the fairness standards. Adopting such a regime in the Saudi legal system would have similar impacts if this regime were applied properly, seeking the achievement of justice with the lowest costs and the least waste of resources.

To sum up, Section 3.4 of Chapter Two discussed the discovery role in the United States legal system and addressed some advantages of the discovery regime in the United States legal system. This section also discussed some disadvantages of the discovery practice in the United States, especially in terms of discovery expenditure and the time consumed on discovery. It then considered the quantity of the discovery practice in the United States civil litigations. This section

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<sup>737</sup> Emery G. Lee Iii & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to The Judicial Conference Advisory Committee on Civil Rules*, 2009 FED. JUDICIAL CTR. 32, 29-30; See also Koppel, *supra* note 70, at 282-83.

also examined the consequences of discovery in civil litigation. Section 3.4 also referred throughout to some existing empirical research regarding the impacts of discovery rules on the progress and speed of litigation and settlement in the United States. It also presented statistical evidence about the discovery impacts.

The next and last section of Chapter Two, Section 3.5, addresses the role of judges in the pretrial discovery process in the United States as well as addresses the tribunals' reluctance to apply discovery sanctions on defiant litigants.

## 3.5 The Role of Judges in Pretrial Discovery in the United States; Arguments about their Reluctance to Impose Sanctions

### 3.5.1 Judges' Role in Pretrial Discovery Practice

Many commentators address concerns about the involvement of judges in the discovery practice in the United States., In *Why Don't Federal Judges Follow the (Discovery) Rules?* Charles S. Fax discusses the reasons why judges do not actively engage in the discovery process, not even supervising the recent amendments to the discovery rules, such as the proportionality concept.<sup>738</sup>

Fax cites United States District Judge Paul W. Grimm, an expert in the pretrial discovery practice, who gives in his article several reasons for this passive involvement of judges. Fax writes.<sup>739</sup>

First, there is nothing that compels the court to assume management of discovery; a judge may handle cases however he or she wants. Second, many judges are overwhelmed by their caseloads, and simply lack the time and resources to do more than wait for a dispute to arise. Third, Judge Grimm believes that some judges lack the training to manage discovery. He notes, for example, that nearly half of the district court judges he surveyed received no training at all, since becoming a judge, in how to manage the discovery process. Further, he found that nearly three-quarters of the surveyed federal magistrate judges, who handle most of the discovery disputes, have had no training in the proportionality requirement in Rule 26 or how to manage cases to achieve it. Fourth, a significant number of federal judges come from an academic, criminal, administrative, or other non-civil litigation background that affords no exposure to civil discovery.

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<sup>738</sup> Charles S. Fax, *Why Don't Federal Judges Follow the (Discovery) Rules*, 43 LITIG. NEWS 20 (2018).

<sup>739</sup> *Id.*; see also Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117 (2017).

Both Fox and Grimm articulate the necessity of producing some educational programs about discovery for judges to provide them the knowledge they need to oversee the discovery process appropriately.<sup>740</sup>

In one of the Federal Judicial Center studies, attorneys recommended that judges should be more involved in pretrial discovery through increased case management since their involvement would considerably help to reduce discovery problems and, therefore, decrease unreasonable discovery expenses.<sup>741</sup> When the participating attorneys were asked, in this study, about what kinds of discovery reforms would help the most to eliminate current discovery problems, the majority of them suggested increasing tribunals' involvement in the pretrial discovery.<sup>742</sup> The FJC summarized the attorneys' answers by stating: "[i]n response to a list of thirteen changes that might potentially reduce litigation costs, the most frequent choice by the attorneys was to increase the availability of judges to resolve discovery disputes (54%)."<sup>743</sup> The study also states that "[w]hen we combined these thirteen response options into a more limited set, judicial case management ranked first (63%), followed closely by changing attorney behavior through sanctions or civility codes (62%)."<sup>744</sup> When the participating attorneys were asked whether the discovery regime needs to be amended, and if so in what way, about 83% of the attorneys agreed that discovery requires certain

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<sup>740</sup> Fax, *supra* note 737, at 20; see also Grimm, *supra* note 738, at 117.

<sup>741</sup> Willging et al., *supra* note 509, at 2.

<sup>742</sup> *Id.* at 10.

<sup>743</sup> *Id.*

<sup>744</sup> *Id.*

amendments to improve the practice. But, instead of demanding the enhancement of judicial case management in discovery, they said that initial disclosure is the process that needs revision the most.<sup>745</sup> This study states:<sup>746</sup>

Regarding initial disclosure, a plurality of all respondents in the sample --41%-- favor a uniform national rule requiring initial disclosure in every district. Another 27% favor a national rule with no requirement of initial disclosure and with a prohibition on local requirements for initial disclosure. Close to a third --30%-- favor the status quo. Attorneys who participated in initial disclosure in the sample case were considerably more likely to favor requiring disclosure than attorneys who did not.

### **3.5.2 Tribunals' Reluctance to Impose Discovery Sanctions**

Some legal scholars affirm that tribunals contribute to the overuse and misuse of discovery due to their passive role in the discovery practice.<sup>747</sup> Scholars also confirm that not applying the discovery rules precisely and not imposing proper sanctions on parties acting in bad faith have let litigants use discovery excessively and unreasonably.<sup>748</sup> In the magistrate judge Wayne Brazil's study, in which Brazil interviewed a number of practicing attorneys in the United States, he announced that, based on the type of lawsuit, 50% to 90% of all the interviewed attorneys stated that they were not satisfied with the level of tribunals' help in resolving the discovery disputes they

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<sup>745</sup> *Id.*

<sup>746</sup> *Id.*

<sup>747</sup> Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 46-48 (1988); see also Bruggman, *supra* note 704, at 2.

<sup>748</sup> Wolfson, *supra* note 746, at 46-48; see also Bruggman, *supra* note 704, at 2.

faced and asked for better engagement from courts in the discovery practice. About 70% to 90% of the interviewed attorneys in this study suggested applying sanctions more frequently on parties who misuse discovery.<sup>749</sup>

Some commentators state some reasons for the courts' reluctance to apply discovery sanctions on parties who misuse discovery. Peggy Bruggman, for example, cites (7) reasons for this reluctance:<sup>750</sup>

[t]he reasons for the courts' reluctance include: (1) application of unclean hands--since it's likely that both sides have engaged in abuse the judge feels that neither side should be punished; (2) lack of awareness of the extent of abuse; (3) fear that sanctions will increase acrimony between the parties; (4) concern that attorneys will penalize clients for sanctions; (5) insufficient knowledge of the parties and the issues for the judge to feel confident in issuing sanctions; (6) empathy with, or indoctrination in the adversarial system; and (7) the absence of clear guidelines for issuing sanctions.

Bruggman also stated in this regard that "[t]his reluctance allows attorneys to engage in abusive discovery in the name of zealous advocacy with little fear of reprimand. Inherent in this behavior is the message that lawyers are unlikely to change their behavior unless they are forced to do so."<sup>751</sup>

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<sup>749</sup> Wolfson, *supra* note 746, at 46-48; see also Bruggman, *supra* note 704, at 2; see also Brazil, *supra* note 716, at 862.

<sup>750</sup> Bruggman, *supra* note 704, at 2; see also Sorenson, *supra* note 718, at 712.

<sup>751</sup> Bruggman, *supra* note 704, at 2.

### **3.6 Conclusion**

Chapter Two discussed the discovery rules under the Federal Rules of Civil Procedure and focused only on the federal practice of discovery in the United States. The first section in this chapter discussed the limits, scope and purposes of practicing document discovery and E-discovery of ESI. It also provided an overview of the discovery rules in FRCP and the proposes of establishing the discovery rules. It discussed the scope of discovery practice under the FRCP. Chapter Two also examined the discovery time limit under the FRCP, the principle of privilege regarding discovery, and the protective orders related to discovery matters. It also addressed some amendments to the FRCP to reform the scope of discovery practice.

Chapter Two also discussed the federal rules of discovery in the United States. It addressed the rules that govern the initial disclosures under the FRCP including initial disclosure time, format, and exclusions. Chapter Two then considered the discovery phase under the FRCP, including holding Rule 26(f) conference and preparing a joint discovery plan. It also examined each method to take discovery under the FRCP and shows how each method is taken to find facts. These methods included depositions, interrogatories, requests for production, requests for admission, physical and mental examinations, and subpoenas. Chapter Two also addressed the discovery of ESI, the approaches to supplement or amend initial disclosures and discovery responses, the process of pretrial disclosure, and the burden of litigation's costs in the United States, including discovery.

Chapter Two also discussed the legal consequences and sanctions that United States courts may impose on defiant litigants upon violating the rules of discovery. This discussion included sanctions related to the discovery of ESI.

Chapter Two also discussed the advantages of the discovery regime in the United States legal system. It then discussed the disadvantages of the discovery practice, especially in terms of the discovery costs and time consumed on it. This chapter also addressed the amount of discovery taken in United States civil litigations. It also considered the consequences of the discovery practice in the United States including the discovery impacts on litigants' behaviors, supported by some statistical evidence. Chapter Two also referred throughout to some existing empirical research regarding the discovery impacts on the progress and speed of litigation and on settlements in the United States. It also addressed some arguments that claim that discovery is the main source of increased expenditure on litigation in the United States.

The last subsection of Chapter Two considered the role of judges in the pretrial discovery process in the United States. It addressed some arguments about the tribunals' reluctance to impose discovery sanctions on defiant litigants as well.

The next chapter, Chapter Three, addresses some debates regarding the benefits of the discovery practice in the United States civil litigations. Chapter Three also considers some problems that exist in the Saudi legal system because of the discovery practice absence. It also discusses some advantages of having a regime to practice discovery in the Saudi civil proceedings. Chapter Three also considers possible discovery impacts of Saudi litigants as well as considering the Islamic Law point of view regarding settling cases out of court. Chapter Three also suggests some amendments to the Saudi rules to be appropriate with the discovery practice. It identifies the

legal methods to adopt discovery into the Saudi legal system as well. The last subsection of Chapter Three provides some suggestions to distribute the discovery costs between parties after the discovery adoption in Saudi Arabia.

## **4.0 Chapter Three: The Adoption of United States Discovery in the Saudi Arabia System**

### **4.1 Debates about the Discovery Practice in the United States**

#### **4.1.1 Criticism of the United States Discovery Regime**

This subsection provides some scholars' criticism and their suggestions on how to overhaul the discovery regime in the United States. These suggestions include demanding extensive judicial participation in the discovery practice and stricter discovery directions for litigants to follow. These suggestions also include the demand to formulate specifically designed discovery rules based on the size and value of the case, as well as the demand to formulate a nontranssubstantive discovery system.

##### **4.1.1.1 The Demand for More Tribunal Involvement in Discovery and Additional Specific Discovery Directions**

Many proposals have been laid out by legal scholars, attorneys and judges seeking to overhaul the discovery regime in the United States. Some proposals suggest that discovery rules must contain specific directions for litigants during their discovery practice to minimize the amount of discovery conducted and, therefore, reduce discovery costs.<sup>752</sup> One of these suggestions is to encourage more judicial engagement in the discovery practice. Some practitioners argue that

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<sup>752</sup> Koppel, *supra* note 70, at 270.

active judicial engagement in discovery would reduce the overuse and abuse of discovery because judges would be in charge of managing cases, and hence the discovery process, which would eliminate any discovery malpractice.<sup>753</sup> Judges, in this case, would be able to consider each discovery request between litigants to make certain that these requests were legitimate and taken to disclose helpful and relevant evidentiary materials. Judges also would be able to evaluate the rationality of the expenses of the sought information in discovery and the alleged importance of this information.<sup>754</sup>

Some judges also support the recommendation to establish judicial programs to correct the pretrial discovery practice. One of these programs is the "Pilot Projects." Former Colorado Supreme Court Justice Rebecca Kourlis and her team have initiated this program in the court system.<sup>755</sup> The major purpose of establishing the Pilot Projects in courts is to improve the discovery practice and eliminate disadvantages such as the high expenditures.<sup>756</sup> Some of the practical principles of the Pilot Projects include that "a single judge be assigned to manage each case from commencement through to trial; that a firm trial date be set early in the process; and that an early

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<sup>753</sup> *Id.* at 270-71; see also Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674-88 (2010).

<sup>754</sup> Koppel, *supra* note 70, at 271.

<sup>755</sup> Kourlis, *supra* note 487; see also Campbell, *supra* note 700, at 2.

<sup>756</sup> Kourlis, *supra* note 487; see also Campbell, *supra* note 700, at 2.

and mandatory identification and exchange take place of those documents counsel know will likely be used at trial."<sup>757</sup>

Some scholars criticize the fact that parties in United States civil proceedings are obliged to respond to all adverse parties' discovery requests.<sup>758</sup> The requesting parties do not have to show a good cause for this discovery as long as this information is proportionate to the subject matter of the case.<sup>759</sup> This is usually the case, and the responding party cannot refuse to disclose the requested information without obtaining a protective order or overcoming a motion to compel from the tribunal.<sup>760</sup> These scholars suggest that to fulfill the requirement of "just, speedy, and inexpensive" conclusions of cases as stated in Rule 1 of the FRCP, it would be more appropriate to require all discovery requests to be under the discretion of tribunals.<sup>761</sup> Under such a scheme, judges would determine whether the requested information should or should not be disclosed, upon showing valid reasons for or against this disclosure. This would reduce the amount of discovery, and hence, the costs and waste of resources caused by the abusive use of discovery methods.<sup>762</sup>

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<sup>757</sup> Campbell, *supra* note 700, at 2.

<sup>758</sup> James M. Campbell, *The Need for Discovery Reform*, 77 DEF. COUNSEL J. 3 n.1 (2010).

<sup>759</sup> *Id.*

<sup>760</sup> *Id.*

<sup>761</sup> *Id.*

<sup>762</sup> *Id.*

This approach to discovery would provide judges with wide discretion to formulate more individualized conclusions in discovery and, therefore, in the cases.<sup>763</sup> Some practitioners, on the other hand, believe that this approach to case management by tribunals may include much improvised discretion that would make a large number of litigants challenge this discretion on grounds of justice and objectivity.<sup>764</sup> Even though some practitioners demonstrate that this active judicial case management may reduce delays in litigation, this approach to case management brings considerable expense to courts in terms of time and resources expended to oversee this discovery practice.<sup>765</sup> In his article *Tailoring Discovery: Using Nontranssubstantive Rules to Reduce Waste and Abuse*, Joshua Koppel criticizes this judicial case management approach stating:<sup>766</sup>

Indeed, the American legal system demonstrates an historic distrust of giving this much power to a single entity, such as the judge. The right to a jury trial, the adversary system, and the principles of federalism and separation of powers are all meant to control the power of the judge. Although certain amounts of judicial discretion will always be necessary, and most often harmless, allowing judges broad, unreviewable authority to control the course of discovery is neither a workable nor a wise solution to the problems associated with modern discovery.

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<sup>763</sup> Gensler, *supra* note 752, at 674-88; see also Koppel, *supra* note 70, at 271.

<sup>764</sup> Resnick, *supra* note 730, at 424-31; see also Koppel, *supra* note 70, at 272.

<sup>765</sup> James S. Kakalik et al., *Just, Speedy, And Inexpensive?: An Evaluation of Judicial Case Management Under The Civil Justice Reform Act*, 1996 RAND INST. FOR CIVIL JUSTICE 14; see also Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 93 (1997); see also Koppel, *supra* note 70, at 271-72.

<sup>766</sup> Koppel, *supra* note 70, at 274.

#### 4.1.1.2 The Demand for Specifically Designed Discovery Rules Based on the Size and Value of the Case

Another suggestion that has emerged as a result of efforts to reform the discovery rules in the United States is the formulation of different specifically designed discovery rules that apply to different types of cases depending on the case's size and value.<sup>767</sup> This approach to reforming discovery represents a narrower variation of nontranssubstantivity and considers applying different discovery rules based on the size of the case. Joshua Koppel explains this approach to reforming discovery when he writes: "[i]n such a system, cases are assigned to a track, with its own set of procedures, based on the value of the claim, without regard to the subject matter of the suit. Variations on this model might also take the subject matter of the suit into account when assigning the case to a track."<sup>768</sup>

Some scholars have argued that the lawmakers who wrote the discovery rules as part of the FRCP formulated these rules with the assumption that they would be applied in all, and particularly the most complex, litigation.<sup>769</sup> This assumption may make it inappropriate to apply these rules to relatively small cases. Koppel and Weber have agreed that the best way to increase the efficiency

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<sup>767</sup> *Id.*

<sup>768</sup> *Id.*

<sup>769</sup> Koppel, *supra* note 70, at 274-75; see also Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113, 115-30 (1994).

of litigations in this respect is to formulate discovery rules specifically designed for smaller cases with few issues at stake.<sup>770</sup> Koppel, citing Weber in this matter, writes:<sup>771</sup>

... greater efficiency can be obtained through the creation of rules specifically for simple or low-stakes litigation. The incentives for attorneys to use discovery to produce cost and delay for the opposing party are particularly strong in smaller cases, because an economically rational litigant will focus on the proportion of threatened litigation costs to the amount in controversy in deciding its settlement posture. Therefore, rules aimed at limiting discovery in smaller cases may be particularly effective.

Weber also states that formulating "special rules for smaller cases would increase speed and reduce cost in federal civil justice without seriously detracting from the quality of adjudication."<sup>772</sup> Weber also suggests that "[t]he tactical advantages of complexity and delay are greatest in small and midsize cases because opponents who are economically rational will change their settlement posture when litigation costs threaten to exceed the amount to be gained or saved by the case."<sup>773</sup>

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<sup>770</sup> Koppel, *supra* note 70, at 274-75; see also Weber, *supra* note 768, at 115-30.

<sup>771</sup> Koppel, *supra* note 70, at 274-75.

<sup>772</sup> *Id.* at 275 footnote 150; see also Weber, *supra* note 768, at 130.

<sup>773</sup> Koppel, *supra* note 70, at 275, footnote 151; see also Weber, *supra* note 768, at 130.

#### 4.1.1.3 The Demand for Formulating a Nontranssubstantive Discovery System

Koppel proposes a new and innovative discovery system to overhaul the United States discovery regime. Mr. Koppel calls this system a "nontranssubstantive" discovery system and presents it as follows:<sup>774</sup>

A system of nontranssubstantive discovery rules that will provide for efficient case management and reduce the overuse and abuse of discovery will begin with case-type-specific discovery rules, but will also likely need to include elements of both an active judicial case management model and a value-of-claim tracking model. The base of the discovery system should be nontranssubstantive at the case-type level so that the discovery devices and their permitted scope will respond most closely to the issues that are most important to the claims. Because each type of claim will present different needs, case-type-specific nontranssubstantive rules will permit rule makers to craft discovery procedures more narrowly.

Koppel provides some advantages of the "nontranssubstantive" system. He nicely expresses these advantages when he states:<sup>775</sup>

A system of layered nontranssubstantivity like that proposed would help to ensure proportionality in a number of different ways. The base of casetype-specific rules will ensure that discovery is proportional to the complexity of the issues and the social importance of the litigation. Rule makers would allow for broader discovery in types of litigation where the issues are not as clear but narrow the scope of discovery in litigation where the issues are more likely to be straightforward, thus limiting the opportunity for abuse. Rules that apply differently based on the size of the claim will ensure that the resources spent in the conduct of litigation are proportionate to the value of the judgment at stake. Further, active judicial case management will allow judges

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<sup>774</sup> Koppel, *supra* note 70, at 279. (For further explanation of the proposed nontranssubstantive discovery to reform discovery system in the United States see at 279 et seq).

<sup>775</sup> *Id.* at 280.

to tailor the rules to the particulars of the case at bar and ensure that discovery remains proportional to the resources of the individual parties.

This dissertation suggests that this innovative proposal for reforming the discovery regime in the United States should be taken into consideration by the Saudi lawmakers during the process of drafting formal discovery rules to be adopted as a civil discovery regime in the Saudi legal system.

The next part of Section 4.1 of Chapter Three addresses critical practical recommendations that some legal practitioners propose to improve the United States civil discovery practice. These recommendations include tailoring the costs of the initial disclosure and the discovery practice, developing discovery methods patterned to litigants' needs, and establishing substance specific discovery rules to limit the broad discovery. Critics' recommendations also included proposing limitations on discovery to reduce its costs as well as recommendations to eliminate current discovery abuse. The next part also addresses some institutional efforts to eliminate the excessive delays and costs in United States civil litigations because of the discovery practice. It also considers some practitioners' proposals to simplify the discovery rules for self-represented litigants to make discovery practice easier and less expensive for pro se litigants. The last subsection of Section 4.1 of Chapter Three discusses critics' recommendations about how to reform the process of discovering electronically stored information (ESI).

#### 4.1.2 Reformative Proposals to Enhance the Efficiency of Discovery Practice in the United States

Some critics of the discovery practice in the United States express that the current version of discovery rules does not prompt the purpose of applying discovery nor does it reflect the primary concept of discovery rules stated in Rule 1 of the Federal Rules of Civil Procedure.<sup>776</sup> Rule 1 of the FRCP states that discovery "should be construed and administrated to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>777</sup>

In his article about *The Need for Discovery Reform*, James Campbell, cites a report of the American College of Trial Lawyers issued in 2009 regarding the need to revise the discovery regime in the United States by amending the current discovery rules in the Federal Rules of Civil Procedure.<sup>778</sup> The report mentions that the discovery process needs to be reviewed due to the "increasing concerns" that the current discovery application causes unreasonable delays and "prohibitive expense," which obstruct the justice sought by bringing the matters to courts of law.<sup>779</sup> This report suggests that there is a need for "a cultural change in the legal profession and its clients." The report states that this recommendation is made because "[t]he system simply cannot

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<sup>776</sup> Campbell, *supra* note 757, at 4.

<sup>777</sup> FED. R. CIV. P. 1.

<sup>778</sup> The report of the American College of Trial Lawyers issued on March 11, 2009 [hereinafter ACTL report]; see also Campbell, *supra* note 757, at 4.

<sup>779</sup> ACTL report, *supra* note 777; see also Campbell, *supra* note 757, at 4.

continue on the basis that every piece of information is relevant in every case. ... At present, the system is captive to cost, delay and, in many instances, gamesmanship."<sup>780</sup>

#### **4.1.2.1 Tailoring the Cost of Disclosure and Discovery Practice**

Some scholars criticize the method of bearing discovery costs in the United States. They state that both the cost of discovery and the cost of preserving legal documents and information in anticipation of litigation should not fall only on parties from whom discovery is sought (producing parties).<sup>781</sup> The scholars suggest renovating the current discovery practice by obliging discovery-requesting parties to pay for the expenses and efforts consumed to retrieve the legal materials that these parties obtained through discovery.<sup>782</sup>

Some practitioners have provided recommendations for lawmakers in the United States regarding amendments that should take place to improve the United States discovery regime and minimize the costs accompanied with discovery.<sup>783</sup> One proposed amendment states that "where the type or size of a case makes initial required disclosures unnecessary or inefficient, the disclosure rules should not apply."<sup>784</sup> Another suggestion to reform the current discovery regime

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<sup>780</sup> ACTL report, *supra* note 777; see also Campbell, *supra* note 757, at 4.

<sup>781</sup> Campbell, *supra* note 757, at 4.

<sup>782</sup> Campbell, *supra* note 757, at 4.

<sup>783</sup> Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 411 et seq (2011); See also Koppel, *supra* note 70, at 287-90.

<sup>784</sup> Koppel, *supra* note 70, at 287.

is related to cases in which specific information is essential to help the process of the litigation. The practitioners suggest that the initial disclosure rules in these cases require disclosing this specific information "with as much specificity as possible."<sup>785</sup>

#### **4.1.2.2 Developing Patterned Discovery Methods**

Some commenters recommend that "pattern interrogatories" and "pattern requests for production" be promoted as part of the requisite discovery practice to enhance the efficiency of discovery and considerably reduce its costs. In the process of formulating pattern discovery rules, lawmakers should specify the types of discovery requests that should be completed by litigants as quickly as possible and without raising disputes about their legality.<sup>786</sup>

#### **4.1.2.3 Establishing Substance Specific Discovery Rules**

Other legal practitioners argue that the establishment of "substance-specific" or "nontranssubstantive" rules, particularly in the discovery practice, would help to decrease expenses by substituting broad discovery rules with more specific rules designed for certain types of lawsuits. These specifically designed rules would help to reduce the waste and abuse caused by discovery.<sup>787</sup> Nontranssubstantive discovery rules would also allow discovery rule makers "to make deliberate choices about how discovery can be used as a tool to promote goals of substantive

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<sup>785</sup> *Id.*: see also Burbank & Subrin, *supra* note 782, at 411 et seq.

<sup>786</sup> Koppel, *supra* note 70, at 287; see also Burbank & Subrin, *supra* note 782, at 411 et seq.

<sup>787</sup> Koppel, *supra* note 70, at 245.

and procedural fairness thereby allowing rule makers to decide when costly discovery would or would not be appropriate."<sup>788</sup> The formulation of nontranssubstantive rules would cause some challenges for the discovery rule makers, and the amount of discovery allowed in litigation can have a tremendous impact on the case and its consequences. Some legal scholars illustrate that discovery rule makers must make value-based determinations about the amount and forms of discovery that must be allowed in any given substantive area.<sup>789</sup>

Rule makers, in general, identify two forms of "transsubstantivity."<sup>790</sup> The first form is the "case-type" transsubstantivity.<sup>791</sup> In this form, the same rules apply to all cases whatever the subject matter of the litigation.<sup>792</sup> The other form of transsubstantivity is the "case-size." In this form, the same rules should apply notwithstanding the amount of the dispute or the complexity of the case.<sup>793</sup> Some legal researchers claim that the discovery process in the Federal Rules of Civil

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<sup>788</sup> *Id.*

<sup>789</sup> *Id.* at 245-46.

<sup>790</sup> *Id.*; see also Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010).

<sup>791</sup> *Koppel* defines the term "transsubstantivity" in a footnote in page 246. He states that this term is utilized "to mean case-type transsubstantivity, unless otherwise specified Correspondingly." *Koppel* also states that the nontranssubstantive term refers to the rules that "apply differently depending on the subject matter of the litigation."

<sup>792</sup> *Koppel*, *supra* note 70, at 246.

<sup>793</sup> *Id.*

procedure will be improved by both forms of transsubstantivity. They demand that the discovery regime be reformed to apply different discovery rules for different types of lawsuits.<sup>794</sup>

Some scholars state that applying "substance-specific" discovery rules that are specifically designed to be applied on certain types of cases would be more appropriate to discover information and documents in such types of cases since the specifically designed discovery rules would better fulfill the practical needs of the different types of litigations. They also state that the specifically designed rules would reduce tribunals' engagement in deciding discovery-related disputes because there would be a very limited number of disputes about the compatibility of the discovery rules. There would also be a limited need for tribunals' involvement in determining the requirements of the discovery rules because these rules would be specifically designed for that litigation.<sup>795</sup> Formulating specifically designed discovery rules would both save tribunals' resources by minimizing their involvement in discovery disputes, and therefore providing them with more room to examine other cases, and also save litigants' time and expenses that are inappropriately drained by the current broad discovery practice.<sup>796</sup>

#### **4.1.2.4 Proposing Limitations on Discovery to Reduce Its Costs**

As a part of the practical efforts to provide recommendations to overhaul the legal practice in the United States, the American College of Trial Lawyers Task Force on Discovery and the

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<sup>794</sup> Koppel, *supra* note 70, at 246; see also Subrin, *supra* note 789, at 378.

<sup>795</sup> Koppel, *supra* note 70, at 265-66.

<sup>796</sup> *Id.* at 266

Institute for Advancement of the American Legal System proclaim in one of their reports (9) proposed reforms to the United States discovery regime to reduce the legal expenses of discovery.<sup>797</sup> This report provides recommendations to place certain limitations on discovery practice including:<sup>798</sup>

(1) limitations on scope of discovery (i.e., changes in the definition of relevance); (2) limitations on persons from whom discovery can be sought; (3) limitations on the types of discovery (e.g., only document discovery, not interrogatories); (4) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time); (5) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report; (6) limitations on the time available for discovery; (7) cost shifting/co-pay rules; (8) financial limitations (i.e., limits on the amount of money that can be spent or that one party can require its opponent to spend—on discovery); and (9) discovery budgets that are approved by the clients and the court.

These limitations are "presumptive rules," which makes them subject to tribunals' discretion to modify them upon showing legitimate justification by interested parties.<sup>799</sup>

#### **4.1.2.5 Proposing Recommendations to Eliminate Discovery Abuse**

Some practitioners recommended that the current discovery regime in the United States should be amended to eliminate discovery abuse and its resulting costs and delays.<sup>800</sup> Charles

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<sup>797</sup> FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS (ACTL) TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS (IAALS & ACTL, 2009).

<sup>798</sup> *Id.*; see also Koppel, *supra* note 70, at 288.

<sup>799</sup> Koppel, *supra* note 70, at 289.

<sup>800</sup> Charles F. Preuss, *Toward a Better Discovery Process*, 65 DEF. COUNSEL J. 173 (1998).

Preuss claims that few restrictions exist on broad discovery to limit its scope to relevant evidentiary materials.<sup>801</sup> This is in addition to the meager engagement of judges in the pretrial discovery practice. This issue has dared some litigants to overuse discovery to concern adverse litigants and drive them to seek settlements to avoid unbearable legal fees.<sup>802</sup>

To reform the status quo of discovery practice in the United States, Preuss cites some recommendations from significant proposals that suggest amending the United States discovery regime. Preuss writes:<sup>803</sup>

[t]his statement sets forth six recommendations: 1. The scope of Rule 26(b)(1) should be confined to the claims or defenses of the party seeking discovery. 2. Because courts historically have seldom used the discovery limitations set forth in Rule 26(b)(2)(i) through (iii), the Advisory Committee Notes to Rule 26(b)(2) should be amended to require courts to undertake the analysis under subsections (i) through (iii) if requested, or to do so on their own initiative if it appears that discovery is being overused or abused. If the court determines that the discovery is abusive, it should restrain the offending discovery. 3. The mandatory disclosure provision of Rule 26(a) has proved to be ineffective and costly, and it should be eliminated in favor of sequential initial disclosures, a meet-and-confer conference to discuss further documents to be produced, the subsequent joint submission of a proposed scheduling order, followed by a Rule 16 pretrial conference to discuss the proposed scheduling order, and, if necessary, a further discovery conference in complex cases. 4. Rule 34 requests should be expressly subject to the limitations of Rule 26(b)(2) and confined to the claims and defenses asserted by the parties. Further, the requesting party should participate in the process of defining and narrowing the scope of the desired documents, and the court should use its discretionary authority to limit document production to the essential claims and defenses of the parties, giving consideration to electronic or computerized documents. 5. Rule 37 should be converted to a rebuttable

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<sup>801</sup> *Id.* at 173.

<sup>802</sup> Preuss, *supra* note 799, at 173.

<sup>803</sup> *Id.*

presumption against sanctions. 6. Rule 26(b)(5), relating to the assertion of privilege, should be clarified to avoid the disproportionate burden of requiring a company to prepare a log of privileged documents in favor of a meet-and-confer process for resolving challenges to a privilege claim, utilizing court adjudication as necessary.

Some scholars also proposed practical methods to overhaul the current application of discovery in the United States.<sup>804</sup> Michael J. Raphael and his coauthors recommended that parties' attorneys, upon serving discovery requests, must limit their requests to only the needed information to protect clients' money and attorneys' efforts and time.<sup>805</sup> To explain their proposal more, they write:<sup>806</sup>

... counsel should tailor the requests to the information that they genuinely need to prove or defend their client's case. Overly broad requests, or requests that seek irrelevant information, serve only the purpose of drawing legitimate objections. Tailoring requests to more narrowly cover the critical subject matter will actually put more pressure on the responding party, which will have fewer grounds for objection and may risk looking unreasonable if the party resists a limited request. Moreover, clear and narrow requests better frame the issues for the court in the event of motion practice.

Michael J. Raphael et al also propose that "[t]he responding party can enhance its credibility significantly if the court sees that it has carefully considered its responses and objections, tailored them to the particular requests, and made an effort to be forthcoming rather

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<sup>804</sup> Michael J. Raphael et al., *Just Discovery*, 38 L.A. LAW 14, 16 (2015).

<sup>805</sup> *Id.*

<sup>806</sup> *Id.*

than evasive."<sup>807</sup> This would also preserve courts and parties' time and resources consumed on discovery. It would also positively improve parties' reciprocal dealings regarding discovery requests.

#### **4.1.2.6 Institutional Efforts to Eliminate Excessive Delays and Costs Due to Discovery**

As part of the efforts to reform discovery by legal organizations in the United States, the International Association of Defense Counsel (IADC) with cooperation with other legal organizations has endeavored to amend the current discovery rules to increase the efficiency of the civil legal system in the United States.<sup>808</sup> Some of the practical efforts constructed by the IADC concern:<sup>809</sup>

(1) Elimination of notice pleading and implementation of a requirement to plead facts sufficient to support the legal claims and theories asserted in the complaint and in affirmative defenses; (2) Early identification of the substantive issues involved in the dispute; (3) Limitations of discovery to those substantive issues involved in the dispute; (4) Procedures for the early dismissal of lawsuits unsupported by the available evidence; (5) Improved rules regarding e-discovery; (6) Rules that require discovery to be proportional to the amount in dispute; (7) Rules that require the inquiring party to pay for the costs involved in producing information during discovery.

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<sup>807</sup> *Id.*

<sup>808</sup> Campbell, *supra* note 757, at 4; see also INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL website, available at: <https://www.iadclaw.org/white-paper-published-on-federal-rules-of-civil-procedure/>.

<sup>809</sup> Campbell, *supra* note 757, at 4; see also INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL website, available at: <https://www.iadclaw.org/white-paper-published-on-federal-rules-of-civil-procedure/>.

The main purpose of these steps is obviously to improve the discovery regime in the United States by eliminating any unreasonable delays or tremendous costs that exist in the civil litigations because of discovery practice.

#### **4.1.2.7 Simplifying the Discovery Practice for Self-Represented Litigants**

One other reform that some legal practitioners in the United States suggest for the improvement of the discovery regime relates to facilitating the procedures of discovery for litigants not represented by attorneys (*pro se* litigants).<sup>810</sup> They proclaim that this may be done by simplifying the discovery process in the cases where self-representation is prevalent among litigants.<sup>811</sup> This simplifying of discovery procedures would assist *pro se* litigants in getting accustomed to discovery process and court procedures.

One recent piece of legislation in the United States that deals with streamlining the discovery process in the cases in which self-representation exists very often is the Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions.<sup>812</sup> The reason for formulating the Initial Discovery Protocols for Fair Labor Standards Act is to simplify practicing discovery in labor cases in the federal courts, and establish more adequate discovery practice in

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<sup>810</sup> *Cf.* S.C. R. FAM. CT. 25; see also Koppel, *supra* note 70, at 289.

<sup>811</sup> U.S. COURTS, *U.S. District Courts—Civil Pro Se and Non-Pro Se Filings*, 2009 JUDICIAL BUSINESS 1. (This report provides some data on self-represented (*pro se*) filings of cases in the United States.)

<sup>812</sup> INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS (FEDERAL JUDICIAL CENTER, 2018).

these cases by decreasing the discovery expenses and disputes for all litigants.<sup>813</sup> Carolyn Tyler, in her article *Streamlining Discovery at Heart of New Fair Labor Standards Act Protocols*, provides further explanation of the protocols of this Act writing:<sup>814</sup>

[t]he protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to FLSA cases. They identify which documents and information must be produced simultaneously by both parties early in the case, help the parties frame the issues to be resolved, and plan for more efficient and targeted discovery. Individual federal judges throughout the country are encouraged to use the protocols in their courtrooms and the Federal Judicial Center will monitor their impact.

To demonstrate the advantages of these protocols, Brittany Kauffman<sup>815</sup>, one proponent of reforming the United States civil justice system, explains that "[b]y streamlining the discovery process, both parties are able to get to resolution in a more cost-effective way. That means a more accessible process for everyone—for the restaurant workers who are not properly compensated for their overtime, or for the company whose employee records provide proof of accurate payment."<sup>816</sup>

Lawmakers in Saudi Arabia must consider the Initial Discovery Protocols for Fair Labor Standards Act before formulating discovery rules, especially when simplifying the rules of discovery practice for self-represented (pro se) litigants in all labor disputes and other civil cases.

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<sup>813</sup> Carolyn Tyler, *Streamlining Discovery at Heart of New Fair Labor Standards Act Protocols*, IAALS (Jan. 10, 2018), <https://iaals.du.edu/blog/streamlining-discovery-heart-new-fair-labor-standards-act-protocols>.

<sup>814</sup> *Id.*

<sup>815</sup> To read more for/about Brittany Kauffman see <https://iaals.du.edu/profile/brittany-kauffman>.

<sup>816</sup> Tyler, *supra* note 812.

The self-representation (pro se) issue is an important matter that the legislature in Saudi Arabia should take into account during the process of formulating discovery rules to be applied in the legal system. Many more litigants in Saudi Arabia than the United States represent themselves in court without seeking any legal advice from attorneys.<sup>817</sup> One reason for this is the common lack of awareness of the importance of hiring attorneys.<sup>818</sup> Accordingly, the proposed rules of discovery in Saudi Arabia should be simplified for these unrepresented litigants especially in the cases in which self-representation are most common, such as family and employment cases. The reason is to allow pro se litigants to get the proper benefit from the discovery regime adopted in the legal system.

#### **4.1.2.8 Suggestion to Reform the Process of Discovering Electronically Stored Information (ESI)**

In terms of the e-discovery process, some commentators argue that conducting discovery of ESI minimizes the costs of allocating and producing the requested documents and speeds up the process of retrieving these documents, which means it reduces the legal expenses incurred due to conducting discovery on paper documents.<sup>819</sup> A recent study indicates that progress towards a more digitalized world has led to a "societal shift" that has increased the use of electronic devices

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<sup>817</sup> Maryam Al-Jaber, *La Tatahadath Amam Almuhaqiq Wa Alqadi Bidun Mhami..! [Do not Speak Before the Investigator and the Judge Without a Lawyer..!]*, Al Riyadh (Jun. 4, 2013), <http://www.alriyadh.com/840801>.

<sup>818</sup> *Id.*

<sup>819</sup> Campbell, *supra* note 700, at 5.

to store information more than using paper documentation. This shift to ESI has caused a tremendous increase in the costs of discovery and it currently exceeds the costs of all other litigation procedures.<sup>820</sup> This study examined the costs associated with the e-discovery process of (8) large companies, and provided information about the expenses these companies incurred.<sup>821</sup> The scholars who conducted this study stated that "the major cost component in our cases was the *review* of documents for relevance, responsiveness, and privilege (typically about 73 percent). *Collection*, an area on which policymakers have focused intensely in the past, consumed about 8 percent of expenditures for the cases in our study, while *processing* costs consumed about 19 percent in typical cases."<sup>822</sup> In terms of the sources of the costs of reviewing, collecting and producing the ESI, this study concluded that "expenditures for the services of outside counsel consumed about 70 percent of total e-discovery production costs. Internal expenditures, even with adjustments made for underreporting, were generally around 4 percent of the total, while vendor expenditures were around 26 percent."<sup>823</sup> This study suggests that the current process of reviewing electrically stored information should be amended. This case study examined some proposals to reform the process of e-discovery and, in particular, the process of reviewing ESI.<sup>824</sup>

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<sup>820</sup> Pace & Zakaras, *supra* note 419, at xiii.

<sup>821</sup> *Id.*

<sup>822</sup> *Id.* at xiv.

<sup>823</sup> *Id.* at xiv, xv&36.

<sup>824</sup> Pace & Zakaras, *supra* note 419, at xiv, 25&41.

The reason for the suggested overhaul is to minimize e-discovery costs since the review process uses around (73) cents of any dollar used to produce ESI for discovery.<sup>825</sup> Based on the result of their interviews, the scholars who conducted this case study provided three recommendations to reform the current practice of the E-discovery in the United States.<sup>826</sup> One of their recommendations is to "adopt computer categorization to reduce the costs of review in large-scale E-discovery efforts."<sup>827</sup> They commented on this recommendation by writing that "[t]he increasing volume of digital records makes predictive coding and other computer-categorized review techniques not only a cost-effective option to help conduct review but the only reasonable way to handle large-scale production."<sup>828</sup>

These scholars also recommend improving practical methods to track the costs of production and preservation. They address some reasons for the need to track these costs. One of these reasons is that without formal methods to track discovery costs, "companies cannot develop strategies for dealing with massive data volumes, such as investing in automated legal hold-compliance systems or advanced analytic software for early case assessment."<sup>829</sup>

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<sup>825</sup> *Id.* at xvi.

<sup>826</sup> *Id.* at xx&99.

<sup>827</sup> *Id.* at xx, 59&99.

<sup>828</sup> *Id.* at xx&97.

<sup>829</sup> *Id.* at xx, 85&100.

The last recommendation of this study is to "bring certainty to legal authority concerning preservation." The authors write:<sup>830</sup>

[s]teps must be taken soon to address litigant concerns about complying with preservation duties. The absence of clear, unambiguous, and trans jurisdictional legal authority is thwarting thoughtful preservation efforts, potentially leading to over preservation at considerable cost; and creating uncertainty about proper scope, defensible processes, and sanctionable behavior.

Section 4.1 of Chapter Three discussed some critical practical suggestions and recommendations that some legal scholars and practitioners propose to improve the United States civil discovery practice including tailoring the discovery costs of, engaging patterned discovery, establishing substance specific discovery rules, proposing limitations on discovery to reduce its costs and eliminate abusive discovery, simplifying discovery for self-represented litigants, and reforming the process of discovering ESI.

The following section, Section 4.2, considers some advantages of adopting a discovery regime in the Saudi legal system. The potential advantages of discovery considered in Section 4.2 include: developing the judicial process by moving some judges' responsibilities to judicial lieutenants to grant judges more room to concentrate on crucial matters, fulfilling some of the main purposes of the Shariah rules (Shariah Maqasid), reducing the increased number of hearings held only to examine evidentiary materials, enhancing the due process in the Saudi legal system, and decreasing the number of malicious lawsuits. Section 4.2 also addresses some of the disadvantages

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<sup>830</sup> *Id.* at xxi, 92, 94&101.

that exist in the current Saudi legal system due to the absence of a discovery regime. It also discusses some existing legal issues in Saudi Arabia that adopting discovery would resolve.

## **4.2 Legal Issues Posed by the Lack of Discovery and the Advantages of Discovery Practice in the Saudi Legal System**

### **4.2.1 Disadvantages Caused by a Lack of Discovery in the Saudi Legal System and Issues Discovery Would Resolve**

#### **4.2.1.1 Defendants Late Responses**

Defendants are required to submit their answers to courts prior to the assigned hearings, the time limit of submission depends on the type of court. However, there is no formal penalty for defendants who do not comply with the time limits set forth in Article 45 of the Civil Procedure Law, and no legal consequences exist for non-compliance.<sup>831</sup> Defendants do not lose their right to submit their answers even if the time limit for submission has passed. Some defendants do not provide answers and raise defenses against the plaintiffs' claims until the first judicial hearing and without any previous submission to the court as required by law.<sup>832</sup> Adopting a formal discovery regime would resolve this issue because litigants would be obliged to cooperate with each other and exchange their claims, defenses and evidentiary materials early in the proceedings, in the initial disclosure and during the discovery stage. Defendants would be required to provide their answers to plaintiffs during a specific time limit; otherwise, they would bear the legal consequences of non-compliance. New sanctions must also be added to the Saudi Civil Procedure Law to penalize

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<sup>831</sup> Civil Procedure Law, *supra* note 6, Art. 45; see also Dewidar, *supra* note 18, at 472.

<sup>832</sup> Civil Procedure Law, *supra* note 6, Art. 45; see also Dewidar, *supra* note 18, at 472.

defiant defendants for failure to submit their answers to the complaints within the period specified by law.

#### **4.2.1.2 Plaintiffs Fail Because They Have No Evidence in their Possession**

One of the disadvantages of the absence of a discovery practice in the Saudi legal system is the rule stated in Article 66 of the Civil Procedure Law. This rule requires judges to examine plaintiffs' allegations in the first hearings and question them to make certain that the plaintiffs have enough evidence supporting their allegations.<sup>833</sup> If the plaintiffs cannot prove their cause of action against defendants at that time, judges most likely will dismiss their cases as a matter of law even before questioning the defendants. Doing so denies some of the plaintiffs' legal rights only because they do not possess solid pieces of evidence supporting their legal action against defendants in courts of law.<sup>834</sup>

Note here as comparison that Rule 8(a) of the FRCP states regarding the plaintiff's claim for relief that:

A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

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<sup>833</sup> Civil Procedure Law, *supra* note 6, Art. 66; see also Dewidar, *supra* note 18, at 492.

<sup>834</sup> Civil Procedure Law, *supra* note 6, Art. 66; see also Dewidar, *supra* note 18, at 492.

After adopting a discovery regime in the Saudi legal system, courts should acknowledge plaintiffs' cases even if they do not have sufficient evidentiary materials to support their claims at the time of filing the cases. This is because, during the discovery phase, each litigant has the opportunity to find facts and obtain relevant supportive materials in the adverse party's possession or control. If plaintiffs are not able to prove their allegations after the initial disclosure and discovery practice, then they are exposing themselves to legal penalties for wasting tribunals' and defendants' time and resources by bringing malicious lawsuits.

#### **4.2.1.3 Considering Plaintiffs as Present by Default in Hearings**

Islamic Law and the Saudi Civil Procedure Law do not consider the physical appearance of plaintiffs, or their counsels, at hearings necessary to consider them present during proceedings. These laws set by default that plaintiffs in civil cases are present even if they did not show up at the judicial hearings in court.<sup>835</sup> The ground for this setting is that plaintiffs must submit all their claims and evidentiary materials at the time of the filing cases. If the plaintiff does not appear in the hearings, the tribunal will assume that the plaintiff does not have any further claims or responses to the defendant's defenses. This is because the plaintiff had the opportunity to submit its defense earlier as well as there is no question about the plaintiffs' awareness of the time, date, and place of the proceedings. In fact, it is not quite logical to think that courts can understand

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<sup>835</sup> Awad, *supra* note 29, at 390.

plaintiffs' wishes when the plaintiffs may not have been able to be present and, therefore, did not make it to the courtroom on the assigned times.<sup>836</sup>

The adopted discovery regime would prevent this incident from occurring, because during the discovery stage, the court allows litigants to investigate their cases and provide each other, either voluntarily or involuntarily, relevant evidentiary materials that support their claims or defenses. The discovery phase may lead to settling cases out of court, which would reduce the importance of appearing in a court of law to conduct any legal action.

Note here that the discovery methods are a device that only attorneys use to resolve cases in the United States. It would be very difficult to train and encourage self-represented (pro se) litigants to engage in discovery at the early stage of adopting a discovery regime in the Saudi legal system. Accordingly, even though a small percentage of civil cases in the Saudi courts are currently litigated by lawyers, after adopting discovery in Saudi Arabia, the discovery practice must be limited, during a transition period, to large cases in which parties are represented only by licensed attorneys. This is to prevent the inappropriate use of discovery methods by inexperienced pro se litigants.

#### **4.2.1.4 Motions Submitted to Tribunals to Obtain Information from Adverse Parties**

In the Saudi civil procedural system, motions are one of the tools to practice judicial rights before courts of law. During proceedings, if a party needs to request something from another party or has a defense against it, the interested party can only file a motion for its request or defense to

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<sup>836</sup> Civil Procedure Law, *supra* note 6, Art. 49; see also Awad, *supra* note 29, at 390.

the judge overseeing the case, and the judge must decide on this motion. These motions include any information a party needs from another party meaning that judges must be present all the time to consider litigants' motions.<sup>837</sup>

By adopting a discovery regime in the Saudi procedural system, parties can direct formal requests to each other regarding their cases without the interference of the courts, except in very limited incidents. The adoption of the discovery practice would significantly reduce the number of motions submitted to tribunals because litigants would have the opportunity to exchange and discuss information and materials related to their cases out of court. This would secure tribunals' time and resources to decide only a limited number of motions when litigants disagree about a specific matter. Discovery would also minimize the number of motions that defendants may raise, with valid reasons, to dismiss cases or remit them to competent courts. This is because all parties would have to exchange relevant information in this matter during discovery stage earlier in their proceedings.

#### **4.2.1.5 Plaintiffs Abandon Lawsuits Due to Lack of Supportive Evidence**

One of the disadvantages of the absence of a discovery regime in the Saudi legal system is that plaintiffs may abandon their lawsuits during all different stages of the litigation to avoid the risk of losing their rights because they realize that they do not have sufficient admissible pieces of evidence to support their cause of action against their defendants. The abandonment of lawsuits, because of the lack of admissible evidence, would most likely be eliminated in the Saudi legal

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<sup>837</sup> Awad, *supra* note 29, at 283.

system after the adoption of a discovery regime. This is because plaintiffs would be able to file cases by providing only some documents supporting their cause of action, and then through the required initial disclosure and permitted discovery, they would have the opportunity to obtain any supportive materials in the possession of adverse parties. In other words, one of the reasons why plaintiffs abandon their lawsuits is their realization that they have a lack of sufficient material to prove their allegations in court. Discovery would allow them to find facts and obtain materials in the possession or control of defendants, which would reduce the number of abandoned lawsuits.

#### **4.2.1.6 Increased Reconsideration Petitions to Examine New Evidence**

Another disadvantage of the lack of a discovery practice in the Saudi legal system is the growing number of reconsideration petitions. Many litigants who seek reconsideration of their cases have obtained new evidentiary materials, which were not available to them before the courts issued the final rulings in their cases.<sup>838</sup> Adopting a formal discovery practice would strengthen litigants' power and authorize them to discover evidentiary materials they need to support their allegations. This would decrease the likelihood of their requesting reconsideration because of obtaining relevant materials late. The large number of reconsidered cases wastes courts' time and resources by making them reexamine decided cases to consider new materials. These materials could have been obtained earlier in the proceedings if initial disclosures and discovery rules had been part of the judicial system.

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<sup>838</sup> Civil Procedure Law, *supra* note 6, Art. 200; see also Dewidar, *supra* note 18, at 671.

Article 201 of the Saudi Civil Procedure Law sets limitations on the time for moving for reconsideration in certain circumstances, but no limitations exist in certain others, which makes them open-ended cases. It could cause serious problems if litigants have the unlimited right to reopen their cases. Even though reconsideration is usually a waste of the court's time, it is a crucial legal method to fulfill equity. The discovery regime would help tremendously in reducing the number of the reconsideration requests filed to Saudi courts. Discovery would also maintain the litigants' right to submit such motions, but only if needed and with valid reasons.

One other problem is that Article 201 of the Civil Procedure Law obliges litigants who seek reconsideration to submit their requests within (30) days from the date when they find out that they are entitled to reconsideration. The law, however, exempts these litigants from proving when this date was. This has a negative impact on the steadiness of litigants' legal status due to some bad faith litigants who exploit illegitimately this leniency for their favor.<sup>839</sup> In other words, because of their exemption from the burden to prove detection times, some bad faith losing parties may come across some materials, but they, for some reason, delay filing their motion for reconsideration. Enforcing a formal process to discover evidentiary materials early on during proceedings will considerably eliminate such behaviors.

Adopting a formal regime to practice discovery in the Saudi legal system will most likely decrease the number of submitted petitions to review final judgments because litigants will be obliged by law, through initial disclosure and discovery, to provide each other with any relevant

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<sup>839</sup> Civil Procedure Law, *supra* note 6, Art. 201; see also Dewidar, *supra* note 18, at 674.

materials to the case and any requested information or documents. This will maintain the resources of tribunals and litigants. With the discovery regime, bad faith litigants, who attempt to hide crucial materials will be sanctioned for their improper behavior. The discovery practice also helps to reduce forgery and fraud conducted by some bad faith litigants, because during the discovery stage, each party will have access to relevant original documents in the possession of the other parties, which will make forgery or fraud extremely difficult.

## **4.2.2 The Advantages of Adopting Discovery Practices in the Saudi Legal System**

### **4.2.2.1 Adopting Discovery Would Improve the Judicial Process**

Saudi Judges perform many major duties while overseeing cases. These include examining parties' arguments, personally attending witnesses' testimonies, and authenticating litigants' oath taking. The Saudi Civil Procedure Law states that no one other than a judge is qualified to examine evidentiary materials; otherwise, the legal action will be invalid and will have to be performed again in the presence of a judge.<sup>840</sup>

Upon adopting a discovery regime in the Saudi legal system, some of these judges' responsibilities would be shifted to discovery magistrates. The duties of these magistrates would be inserted into the duties of the judicial lieutenants in the Saudi legal system.<sup>841</sup> This would allow

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<sup>840</sup> Civil Procedure Law, *supra* note 6, Art. 71, Clause 1 of its executive regulation.

<sup>841</sup> Judicial lieutenants are considered in the Saudi legal system as judges' assistants who are responsible to attend judicial hearings and consider with judges the litigants' claims and defenses. Such training is an early stage of the

judges to concentrate on the more complex and critical issues and to decide cases rather than authenticate litigants' admissions or parties' reconciliation. Requiring the attendance of a judge where disputes no longer exist consumes tribunals' resources. Other judicial personnel, judicial lieutenants for example, can oversee undisputed matters, such as authenticating witnesses' testimonies, with the judges being involved only to certify the legal actions, when needed.

Upon adopting discovery in the Saudi legal system, judges need not be personally present during the authentication of undisputed procedures. This is because the discovery magistrates would be responsible to authenticate such procedures, since the possibility of reaching settlements during the discovery stage is higher than any other time. Articles 70 and 71 of the Saudi Civil

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independence of the judicial lieutenant in the judiciary field because the judicial lieutenant will be promoted to a judge position after a specified period of time. Some of the duties of the judicial lieutenants during their qualification period include: accompanying judges in courtrooms, understanding the types of courts and their specialties, identifying the judges' aides in court and their duties, learning the ethics of judges in courtrooms, distinguishing judges rights and duties, getting involved in the stages of the case from filing the case in court and until the issuance of the final judgment, understanding the modern laws and circulars and how to deal with them in case these laws contradict with Islamic Law or other more superior regulations, and finally learning how to deal with official correspondence. According to the Regulation of the Work of the Judicial Lieutenants, the duration of judicial lieutenancy in court is (3) years from the date of appointment of the judicial lieutenant by the Supreme Judicial Council. Accordingly, judicial lieutenants are not legally qualified to consider and decide all cases before the end of these (3) years. In practice, however, judicial lieutenants begin to decide some minor cases after (3) months of the commencement of their work, but their decisions are not considered valid and effective until these decisions are affirmed by the judges who oversee the judicial lieutenants' work. *See* Judicial Lieutenants Regulation, *supra* note 353.

Procedure Law and the relevant parts of their executive regulation must accordingly be modified to stimulate this role for discovery magistrates.<sup>842</sup>

#### **4.2.2.2 Adopting Discovery Would Fulfill Some of the Main Purposes of the Shariah Rules (Shariah's Maqasid)**

One of the main purposes of the rules of Shariah (in Arabic: *Shariah's Maqasid*) related to the judiciary is the importance of expediting the adjudication of cases to finalize disputes as early as possible when all the facts of the case are clear, and the case is ready for final judgments.<sup>843</sup> Another main purpose of the rules of Shariah (*Shariah's Maqasid*) is related to mastering litigation procedures to ensure the granting of final judgments in favor of parties who are truly entitled to them.<sup>844</sup> Courts of law must, by all available means, examine all materials and consider them thoroughly in each case in order to achieve justice by granting the right relief to the right party.<sup>845</sup>

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<sup>842</sup> Civil Procedure Law, *supra* note 6, Art. 70&71; see also Dewidar, *supra* note 18, at 488.

<sup>843</sup> Al Khnein, *supra* note 93, at 99. The author cites this rule from some major sources in Islamic Law, see AL-EZZ IBN ABDUSALAM, QAWAID AL-AHKAAM FI MASALEH ALANA'AM [THE RULES OF PROVISIONS IN THE INTERESTS OF PEOPLE] VOL. 2 (1262), at 43; see also ABU BAKR IBN AL ARABI, AHKAM AL QURAN [THE PROVISIONS OF THE QUR'AN] VOL. 4 (1148), at 43; see also SHAHABUDDIN AL KHARAFI, AL-EHKAM [THE PRECISION ON DISTINGUISHING FATWAS FROM RULINGS AND ACTIONS OF THE JUDGE AND IMAM] (1285), at 75; see also MOHAMMED AL-TAHIR IBN ASHUR, MAQASID AL SHARIAH AL-ISLAMIAH [PURPOSES OF ISLAMIC LAW] (1946), at 200.

<sup>844</sup> Al Khnein, *supra* note 93, at 96; see also Ibn Ashur, *supra* note 842, at 201-03.

<sup>845</sup> Al Khnein, *supra* note 93, at 97-98.

If the judge finds a conflict between these two main Shariah purposes (*Shariah's Maqasid*), the principle of mastering litigation procedures has priority over the principle of expediting adjudication due to the importance of the first principle of permanently finalizing disputes in court.<sup>846</sup>

Another main purpose of Shariah rules (*Shariah's Maqasid*) is to prevent by all means procrastination and unreasonable postponing caused by litigants or legal procedures, which leads to delaying ending disputes.<sup>847</sup> Islam forbids conducting any legal action only to delay the achievement of justice against the will of litigants who deserve relief.<sup>848</sup>

In the absence of any sort of discovery practice to finalize disputes early in the proceedings, the current system of litigating in Saudi courts of law is not functioning in accordance with fulfilling this main purpose of the rules of Shariah (*Shariah's Maqasid*). The reason for this is that, currently, many people's religious beliefs are not strong enough to restrain them from conducting legal action to obtain things to which they have no legal right. Many litigants may commence their lawsuits in courts of law even if they are fully aware that the relief that they seek is not legitimate

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<sup>846</sup> Al Khnein, *supra* note 93, at 100; see also IBRAHIM IBN FARHUN, TABSERAT AL HUKAAM [RULERS' INSIGHT INTO JURISPRUDENCE AND RULINGS' CURRICULA] VOL. 1, (1397), at 74; see also OTHMAN IBN ALSALAH, ADAB AL-MUFTI WA AL MUSTAFTI [THE MANNER OF THE MUFTI AND RESPONDENT] (1245), at 111; see also Ibn Ashur, *supra* note 842, at 202.

<sup>847</sup> Al Khnein, *supra* note 93, at 105.

<sup>848</sup> *Id.* at 106.

relief. No formal methods exist in the legal system to expose these unlawful actions early in the proceedings.

The practice of discovery in the Saudi legal system, therefore, would be compatible with all Shariah's main purposes (*Shariah's Maqasid*) and will help to eliminate such bad faith behavior. This is especially true in fulfilling the above-mentioned main purposes of Shariah (*Shariah's Maqasid*) since one of the major advantages of the discovery practice is to find facts and clarify the truth about litigants' claims, defenses, and any alleged legal rights at an earlier stage during proceedings. Adopting a discovery regime in the Saudi legal system will facilitate the fulfillment of some of the crucial main purposes of Shariah rules (*Shariah's Maqasid*).

To eliminate such unlawful actions by some bad faith litigants early in the proceedings, the Saudi legal system also needs to adopt both discovery rules as well as a rule similar to Rule 11 of the Federal Rules of Civil Procedure in the United States. Rule 11 of the FRCP provides:<sup>849</sup>

**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the

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<sup>849</sup> FED. R. CIV. P. 11.

claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

**(c) Sanctions.** (1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee. (2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion. (3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b). (4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation. (5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction: (A) against a represented party for violating Rule 11(b)(2); or (B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. (6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

#### 4.2.2.3 Discovery Would Eliminate Postponing Adjudications to Examine Evidence

One circumstance in which judges are required to delay the issuance of their judgments under Islamic Law is when litigants need more time to bring to court absent materials that support their allegations.<sup>850</sup> With valid reasons, judges must grant these litigants time extensions to present this proof to court. This is because Islamic Law requires judges not to rule on cases as long as significant proof exists that has not yet been examined.<sup>851</sup> Judges must not reject litigants' requests for reasonable time extensions to present additional materials without legitimate justification; otherwise, these judgments would be invalid and would most likely be reversed by the appellate court.

Granting such time extensions, even with valid reasons leads to postponing hearings.<sup>852</sup> Granting these time extensions and assigning other judicial hearings to consider only absent materials exhausts tribunals' time and resources and causes delays in the resolution of lawsuits. Many hearings take place only for judges to examine a single piece of material, and this is occurring at a time when the Saudi judicial system is suffering from a severe shortage of judges.

A formal process to practice discovery in the Saudi legal system would help considerably in resolving this problem because there would be an official legal regime by which litigants would be able to examine each other's materials with no need for substantial tribunal involvement. Adopting a discovery practice in the Saudi legal system preserves courts' and litigants' resources

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<sup>850</sup> Al-Sheikh, *supra* note 35, at 52.

<sup>851</sup> *Id.* at 53.

<sup>852</sup> Al-Sheikh, *supra* note 35, at 53.

by minimizing the number of hearings, because litigants would have had the chance to communicate with each other and exchange any relevant evidentiary materials. This will allow litigants to identify the facts of the case, and lead to settling their dispute out of court without wasting resources. During the discovery stage, judges will be aware of all the results of the discovery practice, including interrogatories, depositions, requests and subpoenas, because they would have had considerable authority to oversee the discovery practice between litigants and to supervise the discovery magistrates' job. Judges also should interfere in discovery whenever they believe it is necessary, or when parties are seeking the tribunals' interference for relief.

#### **4.2.2.4 Adopting a Discovery Regime Would Enhance Due Process**

Under Shariah, one of the most important aspects of due process in lawsuits is to enable litigants to present their arguments and prove them. Each litigant must have the opportunity to examine the other litigant's claims, and tribunals must help litigants do so. Shariah motivates litigants to assert all their legal arguments before courts of law to achieve reliable judicial conclusions and fair verdicts. One of the main duties of Shariah judges is to listen to all parties' claims and answers and permit them to present arguments or defenses as valid materials that may be admitted in court. Discovery will assure that judges make decisions on solid grounds.<sup>853</sup> This

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<sup>853</sup> This essential due process in Shariah, as well as in the Saudi judicial system, will be promoted upon putting a formal discovery process into effect in the Saudi legal system since one of the major goals of discovery is to provide each litigant with the opportunity to present its defenses and to investigate the other litigants' claims and refute them.

revised due process will satisfy litigants concerned about their disputes. It will also simplify the tribunal's job of examining the evidentiary materials if matters proceed to trial.<sup>854</sup>

#### **4.2.2.5 Adopting Discovery Would Reduce Malicious Lawsuits**

Article 3 of the Saudi Civil Procedure Law states that courts may apply penalties on litigants who file frivolous or malicious lawsuits upon dismissing their cases.<sup>855</sup> Upon adopting a discovery regime in the Saudi legal system, courts should also impose sanctions on litigants who submit malicious discovery requests when the courts dismiss their requests. The discovery practice would reduce the number of malicious lawsuits, because the intentions of bad faith litigants would more likely be exposed early in the proceedings, during the discovery stage, which would expose them to legal sanctions. Adopting a rule in the Saudi legal system similar to Rule 26(g) of the Federal Rules of Civil Procedure will also help to eliminate malicious lawsuits as well as malicious discovery requests. Rule 26(g) obligates litigants and their legal representatives to sign the initial disclosures and discovery requests, responses, and objections upon preparing and before serving them to adverse litigants. This signature is an authentication of the served documents to ensure that these documents do not include malicious matters to the best knowledge of the signer.<sup>856</sup>

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<sup>854</sup> Al Khnein, *supra* note 93, at 258.

<sup>855</sup> Civil Procedure Law, *supra* note 6, Art. 3; see also Dewidar, *supra* note 18, at 251.

<sup>856</sup> FED. R. CIV. P. 26(g), Signing Disclosures and Discovery Requests, Responses, and Objections, states:

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by

The previous few subsections discussed some advantages of adopting discovery practice in the Saudi legal system. They also addressed some of the disadvantages that exist because of the lack of discovery, and the current legal problems that discovery adoption would resolve.

This section examined some disadvantages that exist due to the absence of discovery as well as discussing some issues that the discovery process will most likely resolve. It also examined

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the party personally, if unrepresented—and must state the signer’s address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is complete and correct as of the time it is made; and (B) with respect to a discovery request, response, or objection, it is:

- (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
- (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
- (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney’s or party’s attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.

some advantages of adopting discovery in the Saudi legal system, including evolving the judicial process, fulfilling some of the Shariah Maqasid, reducing hearings held to examine materials, enhancing due process, and eliminating malicious lawsuits.

The next section, Section 4.3, considers some of the legal impact that applying discovery to the legal system will have on Saudi litigants. These impacts include the evolvement of the legal benefits that parties, especially plaintiffs, grant to demonstrate their allegations against their encounter parties, and the revolutionary alteration of parties' responsibilities conducted prior to filing cases in court. Section 4.3 also incorporates some of discovery's impact on the nature of judicial hearings and Saudi religious values. These include the impact of discovery on the procedures of defense in civil proceedings, the parties' burden of proof, the role of judicial hearings, the right to question or cross-examine parties, the resolution of problems caused by the solitary reliance on religious oath taking, and witness appearance in court.

Section 4.3 also discusses some examples of Islamic Law rules that encourage parties to settle their cases out of court. These examples include Islamic Law emphasis on tribunals to delay adjudications where the court finds that reconciliation is possible to end the dispute, and Shariah directions to tribunals to induce settlement where the dispute is equivocal. The last subsection of Section 4.3 is a brief discussion about how discovery fulfills the Shariah desire to end disputes by reconciliation.

### **4.3 The Impact of Discovery on Saudi Litigants with a Discussion about the Attitude of Islamic Law Regarding Settlements**

#### **4.3.1 Plaintiffs Are Not Left Alone to Prove Their Claims**

A lawsuit in the Saudi judicial system begins with the filing of a complaint in a court of law and serving the defendant a copy of the complaint with the summons including information about the assigned date for the first judicial hearing. Upon the parties' appearance in court, cases precede through several hearings during which parties challenge allegations and provide evidentiary materials to the court. Judges must conclude hearings and issue their verdicts when they believe that cases are ready for adjudication.<sup>857</sup>

Filing a civil lawsuit in the Saudi courts of law implies that the plaintiff must, on its own, collect the needed materials to prove that it is entitled to relief. The plaintiff must prove that a certain infringement has been committed; and as a result, the plaintiff has suffered a loss and therefore is entitled for relief. Placing the entire burden of proof solely on plaintiffs would be costly. It can also be difficult for them to defend themselves properly without having the advantages of the discovery regime.<sup>858</sup>

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<sup>857</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 3.

<sup>858</sup> Litigation Procedures and Strategies, *supra* note 126, at 2.

#### 4.3.2 Discovery Would Alter Current Litigants' Responsibilities

Litigants in civil proceedings are not required to perform any legal action prior to filing complaints in Saudi courts and, therefore, commencing the lawsuits. Plaintiffs are not obliged to serve defendants formal demand notices before commencing lawsuits in court. However, if the defendant is a governmental entity, the plaintiff is required to first submit a formal letter to this entity.<sup>859</sup> In this letter, the plaintiff must address its claims and demand the entity to grant the plaintiff the desired relief. Governmental entities must answer to such letters within (60) days, starting from the day of receiving them, by either granting the desired relief or refuting the plaintiffs' claims.<sup>860</sup> Upon their denial, or after the 60-day period has passed, the plaintiffs may seek relief by filing lawsuits regarding these matters in court.<sup>861</sup> In family cases and in some labor disputes, cases may not proceed to trial before the parties attempt to resolve the disputes amicably out of court.<sup>862</sup>

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<sup>859</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 3.

<sup>860</sup> *Id.*

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

<sup>862</sup> *Id.*

### 4.3.3 Impact of Discovery on the Nature of Judicial Hearings and Saudi Religious Values

#### 4.3.3.1 The Procedures of Defense in Civil Proceedings

The general rules for defense in the Saudi Civil Procedure Law require defendants to answer immediately in the same hearing as soon as plaintiffs raise their claims unless courts believe that it is necessary to grant them time limits to prepare their answers.<sup>863</sup> In this case, the courts must schedule other hearings to consider the defendants' answers.<sup>864</sup> If a court of law, upon a legitimate justification, does not grant a time limit to a defendant, then the defendant must answer immediately to the plaintiff's allegations.<sup>865</sup>

Defendants most likely precede in one of the following ways: First, they admit the plaintiff's claims, which means that judges must issue final judgments in favor of plaintiffs granting them the relief they seek.<sup>866</sup> Second, the defendants refute the plaintiff's claims, which means that

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<sup>863</sup> Civil Procedure Law, *supra* note 6, Art. 68.

<sup>864</sup> *Id.*

<sup>865</sup> Civil Procedure Law, *supra* note 6, Art. 68.

<sup>866</sup> "All the admissions occurring in this interchange are, of course, voluntary. Although a defendant is compelled to give an answer to a claim duly raised against him, his answer can be a blank denial. But parties show themselves reluctant simply to deny categorically their opponents' assertions before the qadi, or to attack the technical admissibility or authenticity of their offerings of proof, when these recommend themselves to the qadi's common sense and seem to demand an explanation." *See Vogel, supra* note 112, at 153.

the courts must apply an Islamic Law rule taken from a prophetic *Hadith*<sup>867</sup> (a notable saying of Prophet Mohammad), which states that "the burden of proof falls on who asserts, and oath taking falls on who denies."<sup>868</sup>

If a plaintiff provides admissible materials to court supporting its claims, then the court will most likely issue its verdict granting the plaintiff what it seeks for relief.<sup>869</sup> If plaintiffs cannot provide any proof for their claims, then the only legal formal option they have is the defendant's oath. If the defendant takes the oath denying the plaintiff's allegations, the court will issue its final judgment in favor of the defendant.<sup>870</sup> If the defendant refuses to perform the oath refuting

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<sup>867</sup> *Hadiths* are the record of the traditions and sayings of the Prophet Muhammad that are revered and received as a major source of Islamic law and moral guidance. *Hadiths* are considered as the second source of legislation in Islamic Law after the authority of the Quran, the Holy Book of Islam. See Cragg, *supra* note 28.

<sup>868</sup> Vogel, *supra* note 112, at 147; see also Awad, *supra* note 29, at 407.

<sup>869</sup> To prove an assertion, one must produce evidence (bayyina), ideally two male Muslim witnesses of good character, and to disprove an assertion (except in criminal cases), one must swear an exculpatory oath refuting the adverse party's assertion. See Vogel, *supra* note 112, at 147.

<sup>870</sup> However, "if, after a defendant has taken the oath, the plaintiff later comes forward with testimonial evidence, the trial is reopened, and the plaintiff's evidence is heard. If the testimony is valid and accepted, the plaintiff wins. Umar reportedly said, 'The Adl (virtuous or righteous) testimony is more just than the corrupt oath.' The defendant's oath being disproved in the zahir (apparent), the qadi (the judge) may choose to punish him for his apparently sinful act." See Vogel, *supra* note 112, at 149.

plaintiff's claims, the court will consider the defendant's refusal to take the oath as an indication that the plaintiff is entitled to relief and would most likely rule for the plaintiff.<sup>871</sup>

#### **4.3.3.2 Argument about Which Party Must Prove Allegations**

Some commenters argue that litigants who are obliged to provide evidence to support their allegations and bear the burden of proof are not always the plaintiffs. In some cases, based on tribunals' discretion, the burden of proof falls on the litigant whose allegations are weaker and conflict with the basic rules of rights, whether they are plaintiffs or defendants. This is due to some scholars' explanation of the above-mentioned prophetic Hadith to mean that the burden of proof falls on the litigants whose arguments are weaker, and the oath taking falls on the litigants whose arguments are stronger but do not have other admissible pieces of evidence in courts of law. This explanation of the prophetic Hadith alters the rules of burden of proof.<sup>872</sup>

In other words, if the plaintiff has some materials that support its cause of action against the defendant, but these materials are not adequate for the court to grant the plaintiff the relief it needs, the court then may order, upon an adverse party's motion, the plaintiff, or the defendant to perform the oath to affirm or refute the plaintiff's allegations. If the plaintiff performs the oath, this oath would be considered as a supportive oath for the plaintiff's pieces of evidence, and therefore, the court must rule in the plaintiff's favor. If the defendant performed the oath, this oath would be

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<sup>871</sup> Vogel, *supra* note 112, at 147; see also Al Khnein, *supra* note 93, at 265-66.

<sup>872</sup> Vogel, *supra* note 112, at 147; see also Al Khnein, *supra* note 93, at 265-66.

considered as a decisive oath, and the court would have to rule for the defendant. The court has wide discretion to decide who should perform the oath to finalize the parties' dispute.

#### **4.3.3.3 The Impact of Discovery on the Role of Judicial Hearings**

Adopting a formal regime to practice discovery in Saudi Arabia, including a detailed initial disclosure, would certainly enhance the role of judicial hearings and, therefore, the legal system since the discovery process would be a perfect device for guarding litigants against the use of false oaths.<sup>873</sup> This will happen by helping to resolve the judicial problems that exist in Saudi Arabia due to some rules that legitimize the sole reliance on people's morality or religious beliefs to decide cases. Plaintiffs, through defendants' initial disclosures and discovery methods, would have the opportunity to find facts and obtain any needed evidentiary materials in the possession, control, or custody of their defendants, and established to be related to their cases. Defendants would also have a reciprocal opportunity to discover materials in the plaintiffs' possession, control, or custody, and help to empower the defendant's defenses. It is more important to require the defendant to

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<sup>873</sup> Imposing discovery obligations, opportunities, and duties on litigants in civil proceedings will greatly alter the way hearings are conducted in the Saudi legal system. This dissertation should have the potential to suggest tremendous reforms in the way hearings are conducted in Saudi civil proceedings, based on a concomitant reform of the rules of civil procedure and practice. This issue is discussed where this dissertation addresses the impacts of discovery on the United States civil proceedings. After researching in the field of discovery in the United States, the conclusion of this dissertation is that the broad discovery process as it is in the United States is difficult to be adopted in Saudi Arabia. Certain aspects of discovery, especially initial disclosure, would be most beneficial for the Saudi legal system.

make initial disclosures than to require the plaintiff to make initial disclosures, although a reciprocal process would be fair.

Discovery and initial disclosure would work substantially well as a formal replacement for defendants' oaths in case no admissible materials is in the plaintiffs' possession. This is because defendants would disclose related materials in their possession, control, or custody either through initial disclosure and voluntary discovery, or through discovery with the threat of being susceptible to judicial sanctions for noncompliance. Discovery of evidentiary materials would help to decrease the necessity of oath taking and restrict using oaths as evidence to a very limited number of incidents in which there is virtually no admissible evidence in the possession of any party to support or refute their claims, which makes taking oaths realistically the sole approach to end disputes.<sup>874</sup>

#### **4.3.3.4 Discovery Impact on the Right to Question**

Article 74 of the Saudi Civil Procedure Law restricts the right of asking questions in courtrooms to judges. Judges can permit any party to provide the court with its questions.<sup>875</sup> The

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<sup>874</sup> As discussed earlier, there is technically a difference in the Federal Rules of Civil Procedure in the United States between initial disclosure requirements that are imposed on both parties, and discovery that is voluntarily engaged in by the parties and encouraged but not required by the judges. This distinction is discussed thoroughly in Chapter Two of this dissertation.

<sup>875</sup> Civil Procedure Law, *supra* note 6, Art. 74.

judge then decides whether these questions are relevant and must be directed to the other party. Judges can also allow parties to cross-examine each other but only before tribunals.<sup>876</sup>

With a new process to practice discovery in the judicial system, the right to ask questions and to cross-examine adverse parties would shift to litigants themselves through depositions, interrogatories, and other discovery methods. The duties of discovery magistrates would then be added to the current responsibilities of the judicial lieutenants.<sup>877</sup> Saudi judicial lieutenants are the ones who then would-be supervising litigants' discovery practice, while judges would have the authority to observe the whole discovery process without wasting considerable efforts by being engaged in directing questions and cross-examinations among litigants. The judges' responsibility to question litigants and their witnesses will have to be amended, accordingly.

It may be difficult for litigants themselves to learn to cross-examine witnesses. This is because throughout the history of Islamic civilization, the responsibility of all types of cross-examination is part of the tribunals' tasks, which makes shifting this duty to the litigants not a smooth transition. The cross-examination process would most likely be easier if attorneys represent litigants. Upon adopting a discovery regime in Saudi Arabia, the duty of cross-examining parties or witnesses should be limited to licensed attorneys only. Attorneys will be permitted to cross-examine if they are certified to be competent to do so.

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<sup>876</sup> *Id.*; see also Dewidar, *supra* note 18, at 492.

<sup>877</sup> The judicial lieutenants' position already exists in the Saudi legal system. They are assigned certain duties to perform. This proposal suggests expanding the authority of these lieutenants to be responsible for discovery magistrates' duties.

#### 4.3.3.5 The Impact of Discovery on Some Taking-oath Issues

Taking individuals' religious beliefs into account when considering pieces of evidence in court is crucial because justice requires it in certain incidents where there is no other legal solid ground to examine the legitimacy of evidence.<sup>878</sup> Many incidents exist where Islamic Law adopts the doctrine of relying on people's religious beliefs in deciding cases. This approach clearly exists in examining evidentiary materials by Shariah courts, especially in regard to authenticating witnesses' testimonies, litigants' oaths taking, and confessions.<sup>879</sup> The main reason for the reliance on people's religious beliefs in Islamic Law rules is Islam's prevailing belief in God's fair judgments, rewards and punishments in the afterlife. Muslim people must be aware of this, believe in it, and have confidence in it.<sup>880</sup> This belief should induce people to do good deeds, be righteous and to refrain from committing wrongdoings.<sup>881</sup> This reliance on morality, especially in a largely religious society like the Saudi community, has positive impacts on the integrity of the judiciary and its judgments.<sup>882</sup>

In recent days, however, such rules are causing people, in many incidents, to lose their legal and legitimate rights. The main reason for this is that people's religious beliefs have changed over time, and some are not sincere and religious as Islamic Law trusts them to be, especially when

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<sup>878</sup> Al-Sheikh, *supra* note 35, at 8.

<sup>879</sup> *Id.* at 6.

<sup>880</sup> *Id.* at 5.

<sup>881</sup> Al-Sheikh, *supra* note 35, at 5.

<sup>882</sup> *Id.* at 8.

they are taking oaths as the definitive sole evidentiary approach to finalize judicial disputes.<sup>883</sup> This is one of the crucial reasons this dissertation was written. As a previous practicing attorney in the Saudi courts, the researcher can confirm the existence of this problem. During extensive discussions, current judges and practicing attorneys in the Saudi legal system informed the researcher that this issue has become a major problem in the last few years. To finalize disputes faster, many Saudi judges have begun to permit the oath taking upon litigants' requests very early during the proceeding, sometimes even in the first hearing. One reason for this is the tremendous caseload for which these judges are responsible.

Legal rights of many litigants in Saudi Arabia have been infringed upon only because they do not have any admissible materials to support their claims in court other than their defendants' deceptive oaths. The strength of people's religious beliefs in Islamic communities is not as it was at the beginning of Islam, more than fourteen hundred years ago, when most of the judicial rules of Islamic Law came into effect.<sup>884</sup> Even in the early Muslim communities, judges scrutinized the authenticity of actual materials that litigants possessed before relying on their religious honesty alone.<sup>885</sup>

Practicing discovery does not contradict any of the major evidentiary rules in Islamic Law. It is important to rely not only on people's religious beliefs, but also on an established formal regime for the discovery of evidentiary materials that parties have. This process should deal with

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<sup>883</sup> Awad, *supra* note 29, at 407.

<sup>884</sup> Al-Sheikh, *supra* note 35, at 50.

<sup>885</sup> Al-Sheikh, *supra* note 35, at 9.

both the authenticity of materials provided before the court, and legal procedures that authorize parties to find facts and obtain legal materials from each other at an early stage in proceedings. This process, accordingly, will help to come to better conclusions about parties' claims and defenses than relying on their religious credibility alone.

#### **4.3.3.6 Impact of Discovery on Witness Appearance in Court**

Article 126 of the Saudi Civil Procedure Law grants two chances for litigants to bring their witnesses to the judicial hearings to perform their testimony in the presence of the judges overseeing their cases. If any litigant fails to bring its witnesses to the first and second assigned hearings, then the judges will consider this litigant unable to establish the proof for its claim or defense. The judge, then, can proceed with the case without listening to these witnesses.<sup>886</sup> Judges have a wide discretion to evaluate litigants' excuses for not bringing witnesses to assigned hearings.<sup>887</sup> This rule should also apply to granting chances for litigants to bring any written documents that prove their claims or defenses. Witness testimony, nevertheless, may stand as proof even if there are documents inconsistent with these testimonies. In practice, some judges grant priority for testimonies over any other method of proof, including written documents, based on opinions of some Islamic law scholars.<sup>888</sup>

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<sup>886</sup> Civil Procedure Law, *supra* note 6, Art. 126.

<sup>887</sup> Awad, *supra* note 29, at 409.

<sup>888</sup> Vogel, *supra* note 112, at 146.

One of the advantages of the discovery practice is that defendants may be pushed to provide materials in their possession even if the information provided is not in their favor. This would include any witnesses who may have information relevant to the case. This will facilitate both plaintiffs' and defendants' missions to locate witnesses to authenticate their testimony in courtrooms before judges.

The initial disclosure and discovery practice would have a positive effect on bringing witnesses to courtrooms in a timely manner. Litigants, in the initial disclosure, must reveal any information about witnesses who may testify in their cases. During the discovery phase, the litigants can cross-examine the adverse parties' witnesses. Conducting such cross examinations out of courtrooms would not only help to avoid the legal consequences of not appearing in court to testify at the assigned judicial hearings, but also maintain the tribunal's time and resources.<sup>889</sup>

After examining some of the impact of discovery on the nature of judicial hearings and on the Saudi religious values in this subsection, the next subsection addresses how the rules of Islamic Law encourage litigants to settle their cases out of court without having the court interfere to issue adjudications to end their dispute.

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<sup>889</sup> *Being a Witness,* CITIZENS INFORMATION, [https://www.citizensinformation.ie/en/justice/witnesses/how\\_you\\_are\\_called\\_as\\_a\\_witness.html](https://www.citizensinformation.ie/en/justice/witnesses/how_you_are_called_as_a_witness.html) (last updated Mar. 15, 2019).

#### **4.3.4 Islamic Law Rules Encourage Reconciliations**

Islamic Law requires disputes to be determined at the earliest possible time.<sup>890</sup> Islamic Law encourages judges to issue their verdicts on considered disputes as soon as they have a comprehensive vision of the cases and fully determine parties' disputes. Judges must not delay their judgments without legitimate justifications because this might be considered as bias in favor of some litigants and against the best interest of other litigants.<sup>891</sup> Therefore, it is crucial for judges to decide cases as soon as possible after closing arguments and after being convinced the cases are ready for adjudication.

##### **4.3.4.1 Shariah Demand to Delay Adjudications Where the Likelihood of Settlement is**

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In terms of encouraging the settlements of cases, the rules of Shariah guide judges to delay issuing their judgments in some circumstances.<sup>892</sup> One of the incidents in which judges may postpone their decisions occurs when a high likelihood of settling disputes out of court exists, and at the same time, judges are not completely certain which litigants are entitled to relief. If they

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<sup>890</sup> Al-Sheikh, *supra* note 35, at 47.

<sup>891</sup> *Id.* at 49; see also ABDULLAH IBN QUDAMAH, AL-MUGHNI VOL. 14, (1223), at 29.

<sup>892</sup> Surah An-Nisa of the Holy Quran, verse number 128; see also Al-Sheikh, *supra* note 35, at 50.

were, they would have to rule in favor of entitled parties.<sup>893</sup> The main purpose for such a delay is to motivate litigants to conduct reconciliation without the court's interference since one of Shariah's major judicial principles is to resolve people's disputes voluntarily.<sup>894</sup>

#### **4.3.4.2 Shariah Demands Tribunals to Induce Settlement Where the Dispute is Equivocal**

Islamic Law also encourages judges to persuade litigants to settle their disputes among themselves when litigants' disputes are too ambiguous for judges to resolve them.<sup>895</sup> In this case, it would be unjust for judges to decide on the merits of the case and grant relief for certain litigants and not others. In this case, Islamic Law does not permit judges to issue their judgments due to

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<sup>893</sup> Al-Sheikh, *supra* note 35, at 50; see also MOHAMMED IBN AL-QAYYIM AL JAWZIYYAH, ELLA'AM ALMUWAQEEN EN RAB AL-ALAMEEN [THE INFORM OF THE SIGNATORIES ON BEHALF OF THE LORD OF THE WORLDS] VOL. 1, (1350), at 109; see also Ibn Qudamah, *supra* note 890, at 29; see also Vogel, *supra* note 112, at 156.

<sup>894</sup> Ibn Al-Qayyim, *supra* note 892, at 109; see also Al-Sheikh, *supra* note 35, at 51.

<sup>895</sup> It may be useful to note here that Mr. Frank Vogel states: "Saudi qadis [judges] show great skill as mediators and conciliators. Shaykh al-Muhanna, qadi of the Great Sharia Court of Riyadh, was especially effective. His civil jurisdiction included all claims of more than SR 8,000 (about \$2,000) that do not involve merchants. Of all the disputes (excluding cases for diya, blood-money for injuries) he heard over four months, only two ended in a ruling by the qadi. Although the disputes he faced were ones that had already resisted all the many social pressures toward reconciliation, Shaykh al-Muhanna could very often settle them by amicable agreement within a half hour, even when they involved large sums of money. In two other courts I observed, both tribunals for commercial disputes between merchants, reconciliation was again the most common termination, though to a lesser extent." *See* Vogel, *supra* note 112, at 155.

this potential injustice.<sup>896</sup> They must persuade litigants to settle their disputes; otherwise, they must postpone their judgments until they have determined which litigants are entitled to relief.<sup>897</sup> This would take quite an extended amount of time and exhaust the resources of tribunals because the court would need to expend resources to determine meritorious allegations.<sup>898</sup>

#### **4.3.4.3 Discovery Fulfills Shariah Desire to End Disputes by Reconciliation**

Adopting a discovery regime in the Saudi legal system would considerably help to fulfill the purposes of one of the main Shariah principles: to resolve disputes without court decisions. Establishing a formal process that provides litigants with the opportunity to discover and exchange evidentiary materials in their possession or in the control of adverse parties or nonparties without wasting the court's resources would substantially satisfy this Shariah principle. By conducting discovery, litigants would have a better awareness of the strength of their arguments in courts of law. Courts as well would be overseeing the litigants' discovery practice and would be well-informed about the materials scrutinized during the discovery stage. This would make it much easier for courts to decide on cases if litigants do not voluntarily settle their disputes. Adopting a

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<sup>896</sup> Al-Sheikh, *supra* note 35, at 51-52.

<sup>897</sup> "In bringing about sulh [reconciliation] the qadis [judges] do not depend wholly on religious arguments. Their practice demonstrates the truth of a maxim often quoted, 'Sulh is near to judgment' (al-sulh qaribun min al-hukm). This means that the qadi may actively, even forcefully, exhort the parties to sulh if he thinks that is where justice lies... Saudi qadis [judges], however, seem never to force the parties to agree, although they can use strenuous persuasion." *See* Vogel, *supra* note 112, at 156.

<sup>898</sup> Al-Sheikh, *supra* note 35, at 52.

formal regime for a discovery practice in Saudi Arabia would not only prompt litigants to settle their disputes without court judgments, which would fulfill one of the Islamic Law goals, but also would help to reduce tribunals' duties when trying to reach a fair judgment. It is noteworthy to quote Mr. Frank Vogel's statement about reconciliations in the Saudi civil proceedings. He writes in his book.<sup>899</sup>

In Saudi sharia courts, I was often told, "the great majority" or "99 percent" of all civil cases end in reconciliation. I was often quoted the legal maxim, "sulh is best." It comes from a verse of the Qur'an that suggests amicable divorce when a wife fears ill-treatment: [I]t shall not be wrong for the two to set things peacefully to rights between them: for sulh is best (al-sulh khayr) [reconciliation is best] [4:128] ... When asked why he sought reconciliation, when judgments were after all "by God's law," Shaykh al-Muhanna gave two reasons. The first is that sulh [reconciliation] confers religious blamelessness (bara'a diniyya) on the qadi, parties, and witnesses, or relief from their onerous moral obligation in the batin [inside oneself], since the parties' agreement replaces the trial and the qadi's ijihad [judge's diligence] as the basis for the outcome. The second is that formal judgment can cause animosity between the parties, while sulh [reconciliation] brings people together. This explanation comes directly from authoritative texts and Fiqh writings on the qadi art.

In sum, Section 4.3 addressed some of the impacts that discovery would have on Saudi litigants after applying discovery in the legal system, including the improvement of the legal benefits that parties enjoy proving their allegations, and the prospective alteration of current parties' responsibilities. This section also discussed some of discovery's impacts on the nature of the judicial hearings and the Saudi religious values. These included discovery's impact on the procedures of defense, the burden of proof, the role of judicial hearings, the right to question and

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<sup>899</sup> Vogel, *supra* note 112, at 154.

cross-examine, resolving problems caused by relying on religious oath taking, and witnesses' appearance in court. Section 4.3 also addressed examples of Islamic Law rules that encourage settlements, including the Shariah demand on tribunals to delay adjudications where reconciliation is possible, and the demand to induce settlement where the dispute is equivocal. The final subsection of Section 4.3 included a discussion about how discovery fulfills the Shariah desire of ending disputes by reconciliation.

The next section of Chapter Three, Section 4.4, proposes some amendments that should be incorporated into the Saudi legal system to prepare for the discovery practice. These amendments include establishing a new formal phase for initial disclosure and discovery as part of the judicial procedures of civil proceedings. Section 4.4 also includes suggestions to revise the Saudi Civil Procedure Law to make the discovery practice operational. The proposed revisions to the law include revising the current rules that deal with submitting supportive materials to court, revising the materials disclosure process to meet the discovery requirements, and revising the rules of incidental petitions to be complaint with the discovery regime.

Section 4.4 also suggests amendments to the concept of time limits to make way for adopting discovery, including establishing proper discovery time limits and restructuring the current lenient time limits in the Civil Procedure Law. Section 4.4 then considers the formal legal approaches to revising the rules of the Saudi Civil Procedure Law and its executive regulations. It also examines the rules of the Saudi Enforcement Law that are related to discovery adoption in the Saudi legal system. The last subsection of Section 4.4 addresses the importance of asserting explicit discovery permissions in the power of attorney to permit attorneys to practice discovery properly.

## **4.4 Recommended Reforms to the Saudi Legal System to Enable Discovery**

### **4.4.1 Establishing a Discovery Stage within Civil Litigations Procedure: A New Stage for Initial Disclosure and Discovery**

The proper legal method to adopt a formal regime to practice discovery in the Saudi legal system is to implant this regime as a new and innovative process that will function as a newly established phase within the judicial dispute procedures. The judicial dispute procedures are the sequential judicial procedures required by the Saudi Civil Procedure Law, which both litigants and courts must follow in any proceeding. These procedures start with filing cases and continue until judicial verdicts have been granted on the subject matter of the cases, or until disputes are terminated as a matter of law.<sup>900</sup>

The proposed discovery process should be a new required stage within these judicial procedures. After the defendant submits its initial answer to the plaintiff claims, parties may discuss the next steps of their proceeding. These include exchanging their initial disclosures and holding a formal conference, which should be required by law, to discuss the parties' discovery plan, when applicable. After the parties hold this conference, the discovery phase should officially start and last for the period specified by law (e.g., 60 days), unless the parties agree to a different time limit to complete their discovery practice. Upon concluding the discovery practice in the case, the parties may negotiate to settle their case out of court, which most likely would happen, or they

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<sup>900</sup> Awad, *supra* note 29, at 307.

may proceed to the trial phase to terminate their dispute before a court of law through a judicial verdict.<sup>901</sup>

#### **4.4.2 Recommended Amendments to the Civil Procedure Law to Shape an Effective Discovery Regime**

##### **4.4.2.1 Revising the Current Rules of Submitting Supportive Materials**

To adopt a discovery regime in the Saudi legal system, Clause F of Article 41 of the Civil Procedure Law needs to be amended to require plaintiffs to provide at the time of filing cases all evidentiary materials that prove they are entitled to relief.<sup>902</sup> After adopting a discovery regime, plaintiffs should not be obligated to submit to court, at the time of filing cases, all materials supporting their claims, but they should be asked to provide proof to support their cause of action against their defendants. Later, in the initial disclosure, plaintiffs must exchange relevant information and evidentiary materials they have with the encounter parties.<sup>903</sup> These proposed

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<sup>901</sup> Mr. Frank Vogel in his book *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* writes about the current system of proceedings in Saudi Arabia that "[i]n most cases the final stage of formal proof becomes unnecessary. Cases that proceed to final judgment are rare; most are settled by agreement of the parties, usually with the qadi's [judge's] assistance. Settlement is an extremely important aspect of practical adjudication in Saudi Arabia and, apparently, in other Islamic legal systems as well. It appears not merely as a convenient procedure, but as a basic norm of the system of adjudication." *See Vogel, supra* note 112, at 153.

<sup>902</sup> Civil Procedure Law, *supra* note 6, Art. 41.

<sup>903</sup> *Id.*; see also Dewidar, *supra* note 18, at 314-16.

required disclosures should be similar to the required disclosures stated under Rule 26(a) of the United States Federal Rules of Civil Procedure.<sup>904</sup>

Plaintiffs may also obtain from the adverse parties, during the discovery phase, the relevant materials supporting their claims. This would increase the chance of settling cases out of court without proceeding to the trial phase. The concept of presenting evidentiary materials in the Saudi legal system will fundamentally change upon adopting discovery since plaintiffs would not be required to present their materials directly to court at the time of filing cases, but rather send them directly to their defendants in initial disclosures or as responses to discovery requests. This would lower tribunals' responsibility of examining materials prior to the trial phase and would also reduce the court's time and effort to consider evidentiary materials during trials.

#### **4.4.2.2 Revising the Evidence Disclosure Process in the Civil Procedure Law to Meet**

##### **Discovery Requirements**

As part of courts' examination of written materials and litigants exchange of documents, the Saudi Civil Procedure Law states that any litigant who claims forgery regarding a specific document must submit this document or a copy of it to the court of law so the court can check the authenticity of the document. If the document in question is in the possession of another party, then the court may ask this party to make the document available to the court to examine it.<sup>905</sup> If the party, who possesses the document, refuses to exchange it or to submit it to the court for

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<sup>904</sup> FED. R. CIV. P. 26(a)

<sup>905</sup> Civil Procedure Law, *supra* note 6, Art. 151.

examination, or denies possessing it at all, then the court is not obliged by the law to conduct any further actions against this party and may consider the document as not existing and will proceed with the case. This is also true even if the document could not be obtained by any means from somewhere else.<sup>906</sup> This passive attitude by courts impacts the best interests of many good faith litigants, and therefore, the reliability of the entire judicial system.

Note that courts of law are involved here in practicing disclosure of materials. This would be a part of litigants' duties upon adopting discovery in the Saudi legal system. The rules related to this matter in the Saudi Civil Procedure Law, Articles 141 to 155, must accordingly be modified to be compliant with the adoption of discovery.<sup>907</sup> This would relieve judges of their duty to discover any evidence and shift to litigants the burden to prove any forgery and to examine and validate any conflicting documents. This also would provide more room for litigants to prove their legal rights, based on the conflicting documents in question, while courts of law oversee the process of examining the conflicting materials and interfere when they find it necessary. This

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<sup>906</sup> Civil Procedure Law, *supra* note 6, Art. 151 and Clauses 2-3 of its executive regulation.

<sup>907</sup> Some arguments exist about the structure and text of these rules of the law. They state that these rules should be amended on a more general level. One example is the situation involving whether the statement of claim is attached to the notice of the lawsuit. The rules are confusing and need to be clarified on this because the disclosure rules would be an element of the rules almost from the outset of litigation. Many administrative circulars currently exist in the Saudi judicial system to provide judges and other legal personnel with further instructions or explanations to the provisions of the Civil Procedure Law. These circulars need to be part of the law or its executive regulation upon any future amendments to eliminate any disparity or inconsistency between these circulars and the texts of the law or its executive regulation.

would maintain the tribunals' resources as well, by shifting some of their duties to litigants, while courts would still have the authority to guide the litigants during this process. Note that detecting forgery in the United States legal system may be the result of discovery practice. However, this is not a central purpose of the discovery rules because the main purpose of discovery is to help parties to find out the facts of their case, even if those facts are true regarding committing forgery.

#### **4.4.2.3 Revising Incidental Petition Rules in the Civil Procedure Law to Comply with Discovery Practice**

The current incidental petitions rules in Article 82 of the Saudi Civil Procedure Law should organize litigants' discovery motions after adopting a discovery regime in Saudi Arabia. This is in addition to the future discovery clauses in Article 83 and Article 84 of the law. Upon drafting discovery rules, the legislature in Saudi Arabia must modify Article 82 to restrict submitting motions to compel only during the discovery phase to be admitted. This is because the current statement of this article allows parties to submit their incidental petitions anytime during proceedings until the closing arguments.<sup>908</sup> As stated in these articles concerning incidental

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<sup>908</sup> Civil Procedure Law, *supra* note 6, Art. 82 states that "[i]ncidental petitions shall be filed by the plaintiff or defendant by means of a memorandum served to the litigants before the day of the hearing in accordance with applicable case-filing procedures, or pursuant to an oral petition made during the hearing in the presence of the litigant. Said petition shall be recorded in the hearing transcript. No incidental petitions may be permitted after the closing of proceedings."

petitions, courts should also have the discretion to admit upon valid reasons any motions to compel after the end of the discovery phase.

The Saudi Civil Procedure Law discusses in Articles 83 and 84 certain incidents in which plaintiffs and defendants can submit to court incidental petitions related to their original claims or defenses.<sup>909</sup> Upon adopting discovery in the Saudi legal system, the legislature must modify Articles 83 and 84 to include, as new clauses, the litigants' motions to compel. The legislature must also modify the relevant parts of the executive regulations of these two articles and some other related articles of the Saudi Civil Procedure Law to discuss thoroughly a party's discovery motions to compel another party to submit a specific material if the other party does not cooperate with a moving party's discovery request.

Article 85 of the Saudi Civil Procedure Law sets generally that tribunals should decide on any incidental petitions with the original claims when granting verdicts. As an exception, this article grants the judge the discretion to decide these petitions during the proceeding, prior to issuing his final adjudication in the case.<sup>910</sup> After adopting a discovery regime in the Saudi legal system, the current version of Article 85 should be revised since the court must consider the motions to compel immediately upon the party's submission to determine whether the party is entitled to compel the adverse party to disclose the material requested. Article 85 of the law and

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<sup>909</sup> *Id.* Art. 83-84; see also Dewidar, *supra* note 18, at 518&526.

<sup>910</sup> Civil Procedure Law, *supra* note 6, Art. 85 states that "[t]he court shall, if possible, rule on an incidental petition along with the original case; otherwise, it shall retain the incidental petition for ruling upon ascertaining its validity."

relevant parts in its executive regulation<sup>911</sup> must be modified to be compatible with the adoption of a discovery regime by stating clearly that motions to compel as exceptions to the general rule must be considered by the court immediately upon submission.

Article 178 of the Civil Procedure Law states that if a court has ruled on any litigant's incidental petitions before granting a final judgment in the case, then appealing the court's decision regarding these incidental petitions must be after the court issues its final ruling and in the same request to appeal the court's judgment to the appellate court.<sup>912</sup> After adopting a discovery regime in the Saudi legal system, courts must also apply Article 178 to the rejected motions to compel<sup>913</sup> in case the motions to compel were determined by legislature in Saudi Arabia to be considered as incidental petitions submitted to court during proceedings.

According to this rule of Article 178, the litigant cannot appeal the court's decision dismissing its motion to compel until the court issues its final verdict in the case. The reason for this is that even if the court dismisses a party's motion to compel, it may grant the final judgment

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<sup>911</sup> The executive regulation of a Law is the document of regulations issued by the competent executive authority in the State to interpret the rules of the law and to set forth plans to put these rules into effect practically. The executive regulations of the Saudi Civil Procedure Law are the document of regulations issued by the Ministry of Justice and the Supreme Judicial Council that contains further explanation for each article of the Civil Procedure Law.

<sup>912</sup> Civil Procedure Law, *supra* note 6, Art. 178; see also Dewidar, *supra* note 18, at 591.

<sup>913</sup> The motion to compel is the motion that a party submits to court seeking to push another party, who refuses to comply voluntarily with the moving party's discovery requests, to make certain materials available for examination by the moving party. The court may apply sanctions on the defiant party if it did not comply with the court's discovery orders issued upon the submitted motion to compel.

in favor of this party, which makes this party whole with no need to appeal the court's discovery decisions. In other words, the party whose motions to compel were dismissed and has a legitimate interest in appealing the first-degree court's decision will have the right to appeal the court's final judgment if the verdict was not in its favor, and therefore, this party will be able to appeal the court's dismissal of its motions to compel.<sup>914</sup>

#### **4.4.2.4 A Current Rule to Join Nonparty to Submit Materials**

One example of the rules that might be considered as disclosure rules to detect evidentiary materials in the current Saudi legal system exists in Article 80 of the Saudi Civil Procedure Law. Article 80 states that a court, on its own or by a motion, may order the joinder of any person to a proceeding if this joinder is in favor of achieving justice and clarifying the truth. As a result of this article in the new law, the court may order a non-party to join in a proceeding and become a party in order to provide any materials in its possession or control so long as the requested legal material is crucial to finalize the dispute before the court. Article 80 also includes the situation in which a court orders the joinder of a nonparty to a proceeding only to provide a crucial document for the proceeding in its possession without being a party in the lawsuit.<sup>915</sup>

After addressing in this subsection some proposed amendments to the Civil Procedure Law to shape a more affective discovery regime to take place as part of the Saudi legal system, the

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<sup>914</sup> Civil Procedure Law, *supra* note 6, Art. 178; see also Dewidar, *supra* note 18, at 623.

<sup>915</sup> Civil Procedure Law, *supra* note 6, Art. 80; see also Awad, *supra* note 29, at 278.

following subsection discusses how to revise the current concepts of time limits in the Saudi judicial system to facilitate applying the discovery rules.

#### **4.4.3 Revising the Concept of Time Limits to Facilitate Discovery Adoption**

##### **4.4.3.1 Two Current Standards of Time Limits**

Two major criteria regarding time limits exist in the Saudi judicial system. Courts must fulfill these two criteria to establish a balance between litigants' positions. The first criterion is that the law obliges courts to provide each litigant with a reasonable time limit to conduct any required process and to prepare its defense on counter claims. The second criterion infers that providing any time limit to a litigant to practice its legal rights must not, by any means, prevent a case from being adjudicated in a reasonably timely manner. These two legal criteria demonstrate that the legal practice of litigants must not be left without strict time limits to exercise their legal rights. Instead, while fulfilling their legal rights, litigants must respect the time limits set by law or court orders. This is to assure achieving the best interest of all litigants as justice desires and to safeguard tribunals' time and resources to achieve a more effective resolution of cases.<sup>916</sup> These two judicial criteria must also be applied to the discovery practice upon adopting a discovery regime in Saudi Arabia.

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<sup>916</sup> Awad, *supra* note 29, at 328.

#### 4.4.3.2 Setting Proper Time Limits for Discovery

One legal consequence of not following the sequence of judicial dispute procedures or not conducting any of these procedures in a timely manner is the termination of the defiant litigant's right to undertake any further action regarding this procedure before courts of law.<sup>917</sup> Similar to the case in the United States where some time limits for discovery practice exist under the discovery rules in the FRCP, the proposed rules to practice discovery in the Saudi judicial system must have strict time limits during which discovery must be conducted. Beyond these time limits, litigants would lose their right to discover any materials in the possession or control of another party, unless courts permitted discovery in special circumstances. Saudi legislature must set appropriate discovery time limits accordingly to be part of the proposed rules of discovery practice in the Saudi legal system. Tribunals should also have the discretion to set different time limits if justice requires some modifications to the time limits set by law.

The time limits of the proposed discovery regime in Saudi Arabia should be considered as part of the procedural time limits to conduct judicial actions set by the Civil Procedure Law. The procedural time limits in the Saudi Civil Procedure Law refer to the time limits required to satisfy any procedural requirement, such as preparing answers and collecting materials to support litigants' defenses.<sup>918</sup> The purpose of distinguishing this time limit is that different kinds of time limits exist in the academic literature of the Saudi procedural laws. Accordingly, the mentioned

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<sup>917</sup> *Id.* at 310.

<sup>918</sup> Awad, *supra* note 29, at 328.

procedural time limit is the major time limit that litigants must comply with during the discovery practice in Saudi Arabia.

#### **4.4.3.3 Restructuring Current Lenient Time Limits in Civil Procedure Law**

The Saudi Civil Procedure Law seems to be lenient in some incidents in terms of enforcing strict time limits. Defiant litigants who do not follow some time limit rules do not bear serious legal consequences.<sup>919</sup> One example for this leniency borrowed from a previous discussion in Chapter One is that the Saudi Civil Procedure Law obligates the defendant to submit its answers to court (1) or (3) days prior to the first hearing, depending on the type of court of law.<sup>920</sup> The law considers this time limit as organizational and not as an inevitable time limit.<sup>921</sup> Infringing these time limits does not result in invalidating defendants' right to submit their answers later. The defendant can come to the hearings and submit its answer at that time, orally or in writing.<sup>922</sup> The tribunal must accept the defendant's answer, by including it in the case record, and proceed in the lawsuit.<sup>923</sup> To prove that this time limit is only organizational, Article 47 of the Civil Procedure Law states that if any group of litigants go to a court of law together seeking to adjudicate their dispute without an assigned hearing, the court must examine their dispute immediately, if

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<sup>919</sup> *Id.* at 332.

<sup>920</sup> Civil Procedure Law, *supra* note 6, Art. 45.

<sup>921</sup> Awad, *supra* note 29, at 332.

<sup>922</sup> Civil Procedure Law, *supra* note 6, Art. 47.

<sup>923</sup> *Id.*

possible.<sup>924</sup> This indicates that the law considers any time limits for litigants, before the court examines their allegations, regulatory time limits with no consequences for violating them.<sup>925</sup>

The legislature must revise Article 47 and similar rules in the Saudi Civil Procedure Law in regards of discovery practice. The reason for this revision is to implement serious legal consequences on defiant litigants who violate discovery time limits. These legal consequences would include revoking the defiant litigant's right to obtain any materials from another party after the assigned discovery deadline has passed and revoking the defiant litigant's right to use specific materials to support its allegations in courts of law.<sup>926</sup>

Note that even though the Saudi civil procedure rules appear to be lenient in some cases, there are other cases in which the rules are very strict about time limits. The law determines some procedural time limits during which litigants can enjoy their procedural rights. Litigants must comply with these time limits in order to preserve their rights; likewise, if they do not comply with these time limits, their procedural rights will be revoked.<sup>927</sup>

An example of strict time limits in the Saudi Civil Procedure Law is the time limit for the right to appeal. In order to maintain its right to appeal, the party who would like to appeal its case must submit its request to the appellate court within (30) days starting from the day on which the moving party become officially aware of the first-degree court's verdict. If a party was defiant in

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<sup>924</sup> Civil Procedure Law, *supra* note 6, Art. 47.

<sup>925</sup> Awad, *supra* note 29, at 332.

<sup>926</sup> Civil Procedure Law, *supra* note 6, Art. 45-47; see also Awad, *supra* note 29, at 332.

<sup>927</sup> Awad, *supra* note 29, at 353.

submitting its request to the appellate court within the assigned timeframe, this party eliminates its right to appeal the case, and the first-degree court's decision becomes final for this party.<sup>928</sup>

After discussing, in this subsection, the method to amend the current concepts of time limits in the Saudi judicial system to ease the discovery application, the next subsection addresses the available legal methods to revise the Saudi Civil Procedure Law rules to include discovery rules and to be compliant with the discovery regime.

#### **4.4.4 The Legal Method to Amend the Saudi Civil Procedure Law and Its Executive**

##### **Regulations**

Article 240 of the Saudi Civil Procedure Law states that any required modification of any rules of this law must be conducted through the same legal method by which these rules were issued. Article 240 also states that the executive regulations of this law were prepared by the Ministry of Justice and the Supreme Judicial Council. According to the same article, the Ministry of Interior should also collaborate with these two entities to prepare regulations for Ministry of Interior related affairs.<sup>929</sup>

A Royal Decree must, accordingly, be issued for the modification of any current articles of the Saudi Civil Procedure Law to be appropriate for the adoption of a formal regime to practice discovery in the legal system. The reason for this is that these articles of the Civil Procedure Law were issued through a Royal Decree, which was the Royal Decree No. (M / 1) 22 Moharram 1435

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<sup>928</sup> Civil Procedure Law, *supra* note 6, Art. 82&187.

<sup>929</sup> *Id.* Art. 240.

H. [26 November 2013]. To modify the executive regulations of any article of this law, the Ministry of Justice, the Supreme Judicial Council, and the Ministry of Interior, in its related affairs, are the official entities that oversee the accomplishment of such modifications.<sup>930</sup>

After mentioning, in this subsection, the legal method to revise the Saudi Civil Procedure Law rules to include discovery in its provisions, the following subsection considers some of the Saudi Enforcement Law provisions and examine their relation to the process of adopting a discovery regime in Saudi Arabia.

#### **4.4.5 The Saudi Enforcement Law in Relation to Discovery Adoption**

##### **4.4.5.1 Overview to General Rules of the Enforcement Law**

The main rules to be applied while executing judicial judgments are the rules of the Saudi Enforcement Law and the relevant rules of the Saudi Civil Procedure Law. This is because the Enforcement Law focuses on executing judgments of cases considered in civil courts. Article 2 of the Enforcement Law excludes from its provisions all judgments issued by the criminal or administrative courts.<sup>931</sup>

Article 2 of the Saudi Enforcement Law also states that there must be special judges in the judicial system whose job is to implement judicial judgments. These enforcement judges have the legal authority to enforce implementable judicial judgments. These judges also oversee the process

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<sup>930</sup> Civil Procedure Law, *supra* note 6, Art. 240.

<sup>931</sup> Enforcement Law, *supra* note 88, Art. 2.

of enforcing judgments by other official officers who are working in the enforcement courts. Article 2 also states that enforcement judges should instruct the enforcement officers to help them in performing their jobs.<sup>932</sup>

Article 3 of the Enforcement Law grants enforcement judges the authority to examine all civil enforcement disputes, whatever their values. The enforcement judge under this law is authorized to issue any decision needed to implement judicial judgments properly. The same article grants the enforcement judge the power to seek help from other authorities such as police departments if needed to facilitate performing the judge's duties.<sup>933</sup> While implementing judgments, the enforcement judge can issue decisions banning any individual from traveling out of the country or imprisoning individuals whenever the judge believe it is necessary to implement the judgment.<sup>934</sup>

#### **4.4.5.2 The Enforcement Law and Adopted Discovery Regime**

Upon adopting a discovery regime in Saudi Arabia, enforcement judges should be responsible, in certain cases, for implementing court discovery orders to compel litigants to submit crucial materials if the litigants refuse to comply with the courts' discovery orders. This should occur only if it is necessary for the proceeding to present the materials in dispute.

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<sup>932</sup> Enforcement Law, *supra* note 88, Art. 2.

<sup>933</sup> *Id.* Art. 3.

<sup>934</sup> *Id.*

Article 46 of the Saudi Enforcement Law states that litigants must comply within (5) days from the date of notice with the enforcement the judge's order to perform a legal action, to provide legal materials, or to help others to conduct legal actions related to the implementation of judgments. Courts may penalize defiant individuals for not obeying the enforcement court's orders through imposing the sanctions mentioned in Article 46 of the Enforcement Law. Some of these sanctions include restrictions on the defiant individuals' civil rights such as banning it from traveling out of the country and reserving its financial dues.<sup>935</sup> Upon adopting a formal regime for discovery, the court should also apply these sanctions, in addition to any other justified sanctions, on litigants who refuse to comply with the court's discovery orders. This is to push defiant litigants to cooperate and make requested materials in their possession or control available for examination by the requesting parties, if necessary.

When the Enforcement Law discusses the case in which the enforcement judge duty is set as an order to act or to refrain from action, the law requires individuals to comply with the court's orders within (5) days. The enforcement courts may use their own authority and seek help from other official authorities to prevent litigants from conducting certain legal actions.<sup>936</sup> If it is impossible for the enforcement court to implement a judgment for some reason, or if the duty of enforcement relies on a litigant who must personally conduct a legal action, then the enforcement court may impose fines on the defiant litigant for each day of delay because of the litigant's

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<sup>935</sup> Enforcement Law, *supra* note 88, Art. 46.

<sup>936</sup> *Id.* Art. 68.

noncompliance.<sup>937</sup> If the litigant in these cases does not comply with the court's order to perform or to refrain from performing an action within an assigned time limit, even with applying fines on this litigant, the court then may issue an order to imprison the defiant litigant to force it to comply with the court order.<sup>938</sup>

If the legislature in Saudi Arabia agrees to adopt a formal process to practice discovery in the Saudi judicial system, the above-mentioned rules may also be applied as sanctions on litigants who do not comply with courts' discovery orders. Even though courts impose these sanctions on litigants who show defiance to comply with court orders to implement final judgments, it is most likely that similar sanctions for noncompliance with courts' discovery orders would induce litigants to perform their discovery obligations properly to avoid such legal consequences.

After examining the related rules of the Saudi Enforcement Law to the adoption of discovery in Saudi legal system in this subsection, the following one addresses the importance of stating explicit discovery permissions in the power of attorney documents to allow attorneys to practice discovery appropriately.

#### **4.4.6 Explicit Discovery Permission in the Power of Attorney**

Similar to laws in other countries, the Saudi Civil Procedure Law requires litigants to provide special and explicit authorization for their attorneys in the power of attorney document to authenticate certain legal actions to be admissible in courts of law. Article 51 of the Civil Procedure

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<sup>937</sup> *Id.* Art. 69.

<sup>938</sup> *Id.* Art. 70&83.

Law states that all attorneys' actions on behalf of their clients are considered valid except certain legal actions where attorneys are required to obtain specific permission from their clients to act on their behalf if their clients are not present personally with them in court.<sup>939</sup> Some of the legal actions stated in Article 51 that require special permission are the admission of another party's alleged rights, the waiver of clients' alleged rights, conducting reconciliation, taking oaths, and alleging forgery.<sup>940</sup> These actions, therefore, must be considered to be part of the discovery practice due to the fact that practicing discovery in the United States usually leads to the settlement of cases, and hence, similar results would most likely occur upon adopting a formal discovery regime in the Saudi legal system. If the client would like its attorney to be able to conduct any of these legal actions on its behalf, then the client needs to state explicitly, in the power of attorney document, its permission for the attorney to conduct discovery involving any of these incidents. This permission is also to allow the attorney to discuss these matters with the adverse parties, and therefore, negotiate to reach settlements before trial.

In summary, Section 4.4 of Chapter Three addressed some amendments to the Saudi legal system to be appropriate with the discovery practice. These amendments included establishing a new formal phase for initial disclosure and discovery, revising the Saudi Civil Procedure Law to include the discovery practice by fixing the rules of evidentiary materials submission, revising the process of materials disclosure to meet the discovery standards, and revising the rules of incidental

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<sup>939</sup> Civil Procedure Law, *supra* note 6, Art. 51.

<sup>940</sup> Civil Procedure Law, *supra* note 6, Art. 51; see also Dewidar, *supra* note 18, at 442-43.

petitions to be compliant with discovery. Section 4.4 also suggested amending the concept of time limits, including establishing proper discovery time limits and fixing the current time limits in the Civil Procedure Law. It also considered the approaches to revise the Civil Procedure Law and its executive regulations as well as considering the rules of the Saudi Enforcement Law related to the discovery adoption. The last subsection of Section 4.4 addressed the need for discovery permissions in the power of attorney document to allow attorneys to practice discovery properly.

The following section, Section 4.5, discusses the legal methods to operate the discovery practice after adopting a discovery regime in the Saudi legal system. One of the suggested methods in this regard is to consider legitimate interest as the valid legal ground to submit discovery requests between parties and to submit motions to compel to tribunals. Another method discussed in Section 4.5 is the adjustment of the training methods of judges to make adopting a discovery regime in the Saudi legal system more effective.

Section 4.5 also discusses possible approaches to appoint discovery magistrates upon adopting a discovery regime in the Saudi legal system. These approaches include revising the Civil Procedure Law to designate judicial lieutenants as discovery magistrates, granting the Supreme Judicial Council the authority to oversee assigning discovery magistrates, and allowing each court to name its own discovery magistrates. The next section also includes a brief overview of the current role of judicial lieutenants in the Saudi judicial system to demonstrate the reason why judicial lieutenants should be appointed as discovery magistrates. The last two subsections of Section 4.5 of this chapter are a discussion about the legal status of discovery orders upon discovery adoption in the Saudi legal system, and the discovery sanctions that courts should apply on defiant litigants when violating discovery rules.

## 4.5 Steps to Activate the Discovery Regime in the Saudi Legal System

### 4.5.1 Legitimate Interest as a Legal Ground for Discovery Requests

Article 3 of the Saudi Civil Procedure Law states that all the procedures to present and request materials before courts are considered as legitimate actions for litigants according to the judicial dispute procedures in Islamic Law. Saudi civil procedure rules follow Islamic Law rules in this matter. It is crucial to discuss the capability of making the practice of discovery a legitimate action for litigants in both Islamic and Saudi laws so that the adoption of a discovery process in Saudi Arabia will be based both on legal and religious grounds.<sup>941</sup>

Article 3 of the Saudi Civil Procedure Law and its executive regulation considers the litigant's valid interest in a lawsuit as a primary condition to accept its lawsuit in the court of law.<sup>942</sup> The executive regulation of this article defines a valid interest as everything bringing benefit or alleviating harm, and this is also the Islamic Law definition of legitimate interest.<sup>943</sup> This definition of interest seems to be very broad and may comprise all litigants' requests. Article 3 of the law determines valid interest by stating that courts must not admit any request or defense unless the moving litigant has a legitimate and urgent interest. However, a potential interest is sufficient if the purpose of the request or defense is either to seek protection from immediate damages or to authenticate a right if the litigant fears that the materials supporting this right will disappear and

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<sup>941</sup> Civil Procedure Law, *supra* note 6, Art. 3.

<sup>942</sup> *Id.*

<sup>943</sup> *Id.* Clause 1 of its executive regulation

the litigant will need these materials in the future if a dispute were to arise.<sup>944</sup> Courts of law oversee examining the legitimacy of litigants' interests. Courts must make certain that litigants' interests do not conflict with Shariah laws, the ethics of Saudi society, and the current public policy of the country.<sup>945</sup> The contexts of Article 48 and Article 55 of the Saudi *Basic Law of Governance* confirm this statement clearly.<sup>946</sup>

Upon adopting discovery in the Saudi legal system, the court must also examine the condition of having a legitimate and urgent interest on all litigants' discovery requests. Litigants must have legitimate interests for seeking discovery of any materials if the law does not require these materials to be disclosed in the initial disclosure. The same applies to motions to compel submitted to courts seeking to push a party to provide materials in its possession, control, or custody. The proportionality principle, like the one specified in Rule 26(b) of the United States Federal Rules of Civil Procedure, should also be adopted and preserved in this regard. This is in addition to applying another standard similar to the one stated under Rule 34(a)(1) of the FRCP regarding the contents of discovery requests that fall within the scope of discovery stated in Rule 26(b). Applying these standards must only occur to the extent that does not contradict Shariah or any other Saudi superior law if a contradiction exists.

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<sup>944</sup> *Id.* Art. 3; see also Dewidar, *supra* note 18, at 242.

<sup>945</sup> Dewidar, *supra* note 18, at 249.

<sup>946</sup> A big debate remains about the exact significance of the "Public Policy" term in the Saudi laws. This term can be defined as the set of political, social, economic, and moral foundations on which the Saudi community is based. These foundations, however, must comply with Shariah laws to be considered valid foundations in Saudi Arabia.

Adopting a new rule in the Saudi Civil Procedure Law similar to Rule 34(a) of the Federal Rules of Civil Procedure will help to distinguish the legitimate interest of discovery requests, and therefore, establish the scope of the evidentiary materials that may be subject for discovery. Rule 34(a) states:

**In General.** A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

This subsection examines the legal ground for discovery requests as part of the methods to operate the discovery practice upon adopting it in Saudi legal system. The subsequent part discusses how to prompt the application of discovery in the Saudi judicial system by modifying the methods of training judges.

#### **4.5.2 Adjusting the Training Methods of Judges to Make the Discovery Adoption More Effective**

Due to the problems in the legal education in Saudi Arabia discussed in Chapter One, those responsible for developing the education of Shariah judges in Saudi Arabia must reform the current

educational approach by adopting a hybrid approach of legal education. The hybrid approach would provide future judges with knowledge of both Shariah laws and modern enacted statutes to function appropriately in the modernized Saudi legal environment. This type of education must be the sole approach to educating and training future judges. This will provide future judges with knowledge about enacted modern laws and to accustom them to dealing with these types of statutes and regulations. With this experience, there will be a greater likelihood that judges will engage more modern enacted laws when they examine legal matters in court.<sup>947</sup> This hybrid approach to educate judges would include educating and training judges about the discovery practice if the legislature agrees to adopt a discovery regime as part of the provisions of the Saudi Civil Procedure Law.

The Saudi Judiciary Law currently requires judges to enroll in some of the legal programs formulated by the Higher Judicial Institute and the Institute of Public Administration to absorb crucial information regarding new regulations or statutes recently enacted in the Saudi legal system.<sup>948</sup> Upon adopting a discovery regime, the Council of Ministers or the Ministry of Education should instruct the Higher Judicial Institute and the Institute of Public Administration to prepare the required legal programs to educate current judges about the discovery practice and prepare programs to train judicial lieutenants. These lieutenants should be working as discovery magistrates during the discovery stage to observe the practice among litigants who would be using the discovery methods adopted as a formal process to practice discovery. Currently, there are

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<sup>947</sup> Al-Jarbou, *supra* note 219, at 53.

<sup>948</sup> Judiciary Law, *supra* note 86, Art. 6, Clause (a); see also Al-Jarbou, *supra* note 219, at 53.

judicial lieutenants working in Saudi courts. Upon adopting discovery, these lieutenants should perform the discovery magistrates' duties in addition to their current duties, and accordingly the judiciary branch may hire more lieutenants if needed to perform these responsibilities.<sup>949</sup>

After considering the adjustment of judges training methods to prompt the discovery practice in Saudi Arabia in this subsection, the following part specifies the available legitimate approaches to assign magistrates to oversee the discovery practice in Saudi Arabia. It also provides a brief overview of the judicial lieutenants' current role in the Saudi judicial system to show why

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<sup>949</sup> Judicial lieutenants are considered in the Saudi legal system as judges' assistants who oversee attending judicial hearings and considering with judges the litigants' claims and defenses. Such training is the beginning of the independence of the judicial lieutenant in the judiciary field since he will be promoted to a judge position after a specified period of time. Some of the duties of the judicial lieutenants during their qualification period include: accompanying judges in courtrooms, understanding the types of courts and their specialties, identifying the judges' aides in court and their duties, knowing the ethics of the judge in courtrooms, knowing the judges rights and duties, knowing the stages of the case from filing the case in court until the issuance of the final judgment, understanding the modern laws and circulars and how to deal with them in case they contradict with Islamic Law or other more superior regulations, and finally knowing how to deal with official correspondence. According to the Regulation of the Work of the Judicial Lieutenants, the duration of judicial lieutenancy in court is (3) years from the date of appointment of the judicial lieutenant by the Supreme Judicial Council. Accordingly, judicial lieutenants are not legally qualified to consider and decide all cases before the end of these (3) years. In practice, however, judicial lieutenants begin to decide some minor cases after (3) months of the commencement of their work, but their decisions are not considered valid and effective until these decisions are affirmed by the judges who oversee the judicial lieutenants' work. *See* Judicial Lieutenants Regulation, *supra* note 353.

these lieutenants are the most qualified personnel to oversee the discovery practice upon adopting discovery.

### **4.5.3 Legal Approaches to Appoint Discovery Magistrates**

#### **4.5.3.1 Amend the Civil Procedure Law to Designate Judicial Lieutenants as Discovery**

##### **Magistrates**

Upon adopting discovery, the legislature in Saudi Arabia should revise the relevant rules of the Civil Procedure Law to grant judicial lieutenants the power to supervise discovery practice. The initial burden of supervising the discovery practice falls on attorneys. However, judicial lieutenants are the personnel who should work as discovery magistrates during the discovery phase to monitor litigants' discovery practice, and to consider any motions to compel submitted to court. Upon adopting a formal discovery regime, the legislature should amend Article 114 of the Saudi Civil Procedure Law to grant judicial lieutenants the authority to authenticate oath taking out of courtrooms. This amendment to the article will provide judges with the opportunity to concentrate their efforts on matters occurring within courtrooms.

To assign the discovery magistrates' roles to qualified individuals, the Saudi legislature must make recommendations to modify relevant laws to be able legally to assign the role of discovery magistrates to judicial lieutenants, who are the most qualified persons to work in this

position, after judges.<sup>950</sup> Based on the legislature recommendations, the King would most likely issue one or more royal decrees for the required modifications of the laws in question.<sup>951</sup>

#### **4.5.3.2 The Supreme Judicial Council Assigns Discovery Magistrates**

If the modified laws regarding the adoption of discovery practice rules do not assign the role of magistrate to certain officers or do not specify the magistrates' duties, another judicial method should appoint magistrates to oversee the discovery practice. The Supreme Judicial Council could issue judicial regulations to appoint certain officers to work as discovery magistrates and to determine these magistrates' responsibilities.<sup>952</sup> One of the new administrative responsibilities of the Supreme Judicial Council stated in the Saudi Judiciary Law is the consideration of judges' functional affairs. This includes the appointment, promotion, discipline, training and dismissal of judges.<sup>953</sup> The Supreme Judicial Council is also responsible for planning and organizing the jobs of the judicial lieutenants, which makes this council competent to assign the judicial lieutenants as discovery magistrates.<sup>954</sup>

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<sup>950</sup> Basic Law of Governance, *supra* note 85, Art. 67.

<sup>951</sup> *Id.* Art. 70.

<sup>952</sup> Judiciary Law, *supra* note 86, Art. 6; see also Ansary, *supra* note 98, at 34.

<sup>953</sup> Judiciary Law, *supra* note 86, Art. 6.

<sup>954</sup> Judiciary Law, *supra* note 86, Art. 6 Clause (i); see also Awad, *supra* note 29, at 56-58.

#### **4.5.3.3 Each Court Allocates Its Own Discovery Magistrates**

If neither of the previous two legal methods to appoint magistrates occurs, then administrative circulars should be coordinated within each court to regulate the steps of supervising discovery practice. However, this alternative legal method to assigning magistrates' responsibilities might create ambiguity about the magistrates' authority during the discovery practice because this unsystematic assignment could make magistrates' roles differ from one jurisdiction to another. This would make it quite complicated for litigants, especially attorneys, who practice discovery in different jurisdictions.

#### **4.5.3.4 The Current Role of Judicial Lieutenants**

Judicial lieutenants in the Saudi legal system are considered as judges' assistants who are accountable of attending judicial hearings and considering with judges the litigants' claims and defenses. Such training is the beginning of the independence of the judicial lieutenant in the judiciary field. After a specified period of training, the King, upon the Supreme Judicial Council recommendation, will issue a royal order to promote the judicial lieutenant to a judicial position. Some of the judicial lieutenants' duties during their qualification period include: accompanying judges in courtrooms, understanding the types of courts and their specialties, identifying the judges' aides and their duties in court, learning the ethics of the judgeship in courtrooms, learning judges' rights and duties, distinguishing the stages of the case from filing the case in court and until the issuance of a final judgment, understanding the modern laws and circulars and how to deal with them in case they contradict with Islamic Law or other more superior regulations, and finally

learning how to deal with official correspondence.<sup>955</sup> According to the Regulation of the Work of the Judicial Lieutenants, the duration of judicial lieutenancy in court is (3) years from the date of the judicial lieutenant's appointment by the Supreme Judicial Council. Judicial lieutenants are not legally qualified to consider and decide all cases before the end of these (3) years.<sup>956</sup> In practice, however, judicial lieutenants begin to decide some minor cases (3) months after the commencement of their work, but the law does not consider their decisions valid and effective until these decisions are affirmed by the judges who oversee the judicial lieutenants' work.

Upon adopting a discovery regime in the Saudi judicial system, the Supreme Judicial Council would have the authority to appoint some judicial lieutenants to work as discovery magistrates to oversee the practice of discovery among litigants. Upon assigning judicial lieutenants as discovery magistrates, judges must grant the lieutenants the authority to order their other assistants, including clerks and enforcement officers working in court, to help the lieutenants to perform their job as discovery magistrates.<sup>957</sup> Doing so would help to reduce judges' workloads by shifting part of their responsibilities to judicial lieutenants who are working as magistrates. These magistrates would monitor the discovery practice between parties, as is the case in the United States, and interfere to resolve discovery disputes, if needed, while judges would still have the power to observe the magistrates' job.

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<sup>955</sup> Judicial Lieutenants Regulation, *supra* note 353.

<sup>956</sup> *Id.*

<sup>957</sup> Awad, *supra* note 29, at 58.

Now after addressing in this subsection the available approaches to appoint magistrates to oversee the discovery practice and providing an overview of the current role of judicial lieutenants in Saudi Arabia, the subsequent part examines the prospective nature of courts' discovery orders and their legal status after adopting discovery in the legal system.

#### **4.5.4 The Legal Status of Discovery Orders in the Saudi Legal System**

Saudi laws use different titles for court decisions depending on (3) factors. This subsection discusses the basis for these factors to identify the essence of courts' decisions regarding discovery, and hence the practical titles that should be used for these decisions.

First, the name of the decision depends on the time when the court issues its decisions. Saudi laws call all court decisions made during proceedings and before granting final judgments as court orders or court decisions. Examples of these decisions are court orders to re-register a case, to bring witnesses, and to hire experts. The court's final adjudication, upon which the court concludes the dispute, is called a court verdict or judgment.<sup>958</sup> If a discovery regime is adopted in Saudi Arabia, court decisions regarding discovery requests, such as the decisions on motions to compel, should be considered as court discovery orders on litigants' requests or motions. This is similar to the United States judicial system, and this leads us to consider another factor when differentiating between judicial terms.

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<sup>958</sup> Awad, *supra* note 29, at 445-46.

Second, the Saudi law should consider discovery orders as procedural decisions. This is because court discovery decisions determine procedural matters, regarding discovery requests, while courts are still considering the subject matter of cases. This leads to the conclusion that the law could also treat discovery orders as procedural judgments since they are final procedural decisions issued before deciding the cases' subject matter.<sup>959</sup>

Third, the last factor to distinguish between judicial decision terms is the coercive power of courts' decisions. This factor implies that the court coerces the parties to perform enforceable legal actions. Examples of these decisions are court decisions to submit specific things to court or to pay a specific amount of money.<sup>960</sup> Saudi law, therefore, may consider discovery orders as coercive courts decisions since the court may enforce these decisions on litigants by imposing sanctions on defiant ones who do not comply with court discovery orders to push them to conduct specific legal actions or to submit specific materials.

This subsection distinguished the nature of court discovery orders and the legal status of these orders after adopting discovery in Saudi Arabia. The following part discusses the sanctions that the court should enforce on litigants and their attorneys if they infringe the adopted rules of discovery.

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<sup>959</sup> Awad, *supra* note 29, at 453.

<sup>960</sup> *Id.* at 459.

#### 4.5.5 Discovery Sanctions Upon Adopting Discovery

The Saudi Advocacy Law imposes sanctions on attorneys who violate the formal rules of legal practice, or who intentionally commit any violations of Islamic or Saudi laws. The Advocacy Law specified Article 29 through Article 37 to discuss sanctions that the court may impose on attorneys upon being convicted of committing legal violations.<sup>961</sup> These sanctions are mainly civil sanctions. However, Article 37 of the law contains criminal sanctions that the court should impose on attorneys upon conviction of certain incidents.

The main criteria for accusing attorneys of committing violations of the enacted laws or the legal professional obligations, and accordingly commencing civil, criminal, or disciplinary actions against them, is the concept of committing guilt. The concept of guilt in this regard refers to attorneys' intentional misconduct by committing actions that the law considers as substantial infringements of the enacted laws or the legal professional obligations. The disciplinary liability of attorneys in the Saudi legal system includes all attorneys' behavior while practicing law as well as all behavior in their personal life activities. Accordingly, all the attorneys' conduct is monitored to be compliant with the enacted laws and legal professional obligations.<sup>962</sup>

During the preparation to adopt a discovery regime in the Saudi legal system, the civil sanctions of disciplinary liability stated in Articles 29 and 30 of the Saudi Advocacy Law should be applied, if needed, as part of the sanctions that are imposed on attorneys who violate discovery rules while practicing discovery. This is in addition to the discovery sanctions that should be

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<sup>961</sup> Advocacy Law, *supra* note 314, Art. 29–37.

<sup>962</sup> Alasmi, *supra* note 316, at 136-37.

adopted in the Saudi legal system from the Federal Rules of Civil Procedure in the United States. The purpose for imposing this combination of sanctions is to widen the scope of sanctions applied on litigants and attorneys due to committing violations of discovery rules. The legal ground to impose the sanctions stated in the Saudi Advocacy Law on attorneys as discovery sanctions is the fact that all attorney conduct, including their personal life activities, are widely monitored in the Saudi legal system to be compliant with Islamic Law, the enacted laws, and legal professional obligations.<sup>963</sup> Misconduct during discovery practice should accordingly be considered as noncompliance with an enacted law, discovery rules. This will help to safeguard litigants' best interests in addition to securing the integrity of practicing law in the Saudi legal system.<sup>964</sup>

The legislature in Saudi Arabia should substantially revise many provisions of the Saudi Advocacy Law due to many existing problems caused by current provisions. There is some academic literature on this issue, but this subsection only suggests incorporating the sanctions specified in the Advocacy Law to be part of the discovery sanctions upon adopting a discovery regime.

In conclusion, Section 4.5 of Chapter Three has addressed the legal methods to operate discovery after adopting it in the Saudi legal system. These operational methods included considering legitimate interest as the legal ground for discovery requests and motions to compel and adjusting judges' training methods to make discovery practice more effective in the legal

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<sup>963</sup> Alasmi, *supra* note 316, at 196.

<sup>964</sup> *Id.*

system. This section also examined the possible approaches to appoint discovery magistrates upon adopting discovery including revising the Civil Procedure Law to designate judicial lieutenants as discovery magistrates, allowing the Supreme Judicial Council to assign discovery magistrates, and letting each court name its own discovery magistrates. Section 4.5 also contained an overview of the current role of judicial lieutenants in the Saudi judicial system. It also included a discussion about the legal status of discovery orders, and the sanctions that should be applied on defiant litigants upon violating discovery rules.

The final section of Chapter Three, Section 4.6 discusses some suggestions to allocate the burden of discovery costs upon adopting discovery practice in the Saudi legal system. Section 4.6 also considers whether the State would be willing to cover litigants' discovery expenses in whole or in part. It also proposes the parties who would be responsible for discovery costs if the State is not willing to pay for discovery expenses, which most likely would be the case. The last subsection of Section 4.6 provides some recommendations to allocate the parties who must pay the costs of discovery practice upon adopting discovery in the Saudi legal system.

## 4.6 Allocation of Discovery Cost After Adopting Discovery in the Saudi Legal System

### 4.6.1 State Willingness to Pay Discovery Expenses

Going to court in Saudi Arabia and proceeding with lawsuits is a service that is free of charge.<sup>965</sup> The state bears the cost of lawsuits for all people in the country regardless of their

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<sup>965</sup> There is a new proposed law to impose court fees on litigants. "At present, there are no fees for filing a claim with any court in Saudi Arabia. In July 2017, however, the Ministry of Justice issued a draft law for the introduction of judicial costs and fees. It is currently under review by the Saudi Board of Experts. The draft law is expected to be enacted after being approved by a royal decree. The proposed law will apply to most cases before the Saudi courts, except for a small number of cases such as criminal, family and enforcement cases. The law includes fees to be paid in relation to any requests made to the Court for certified copies of a judgment or copies of documents. Furthermore, the losing party will be liable to pay all Court fees in the proceedings to the claimant. In the event that the Court has not awarded the full amount of the claim, the losing party will pay only part of the court fees, in proportion to the degree of success of the winning party. The fees paid by the parties will be deposited in a special account dedicated to improving judicial bodies in Saudi Arabia. Under the provisions of the draft law, the maximum judicial costs and fees for any case will not exceed SAR 1,000,000. Further clarification on particular issues, such as the amount of fees payable for certain services, will be provided in the implementing regulations which will be published after the law receives royal approval. Judicial experts and prominent lawyers have stated that they expect this law will reduce the number of the spurious cases being brought before the courts, encourage settlement of cases outside court and the use alternative dispute resolution such as mediation." See Basrawi, *supra* note 126.

financial situations.<sup>966</sup> However, since having counsel is not mandatory in the Saudi judiciary system, the state does not pay attorneys' fees, except in very limited incidents. Litigants themselves must bear their attorneys' expenses if they decide to have attorneys representing them in court. If a litigant cannot afford the cost of another needed service in court, such as the expenses of assigning experts or translators to help resolving the case, the state or the adverse party will pay for these expenses with no cost on the litigant unless this litigant loses in the case.<sup>967</sup>

Upon adopting discovery in Saudi Arabia, the court, in certain circumstances, may order the State or adverse parties to be responsible to pay for the discovery expenses where the requesting party cannot afford the discovery expenses. This may also include the attorneys' fees resulting from practicing discovery.<sup>968</sup> The state's willingness to adopt such a new regime in the legal system should accordingly be considered.

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<sup>966</sup> Basic Law of Governance, *supra* note 85, Art. 47; see also Basic Law of Governance, *supra* note 85, executive regulation of Art. 47; see also <https://makkahnewspaper.com/article/74394>; see also <https://www.maaal.com/archives/20170205/86737>;

<sup>967</sup> Awad, *supra* note 29, at 48.

<sup>968</sup> The self-representation (pro se) issue is an important matter that the legislation in Saudi Arabia should consider during the process of formulating discovery rules to be applied in the legal system. This is because many more litigants in Saudi Arabia than the United States represent themselves in court without seeking any attorney's legal aid. One reason for this is the common lack of awareness of the importance of hiring attorneys. Therefore, the proposed rules of discovery in Saudi Arabia should be simplified for these unrepresented litigants, especially in the cases in which self-representation are most common, such as family and employment cases. The reason is to allow pro se litigants to get the proper benefit from the discovery regime adopted in the legal system.

#### 4.6.2 If Not the State, Who Pays Discovery Costs?

If the state is not willing to pay for discovery expenses, then the adopted discovery rules must initially impose the burden of the discovery costs on the litigant who seeks discovery, and then tribunals, upon granting their verdicts, may oblige the unsuccessful party to pay all or part of the discovery practice costs as part of the successful parties' compensation. Currently, courts of law in Saudi Arabia do not oblige the losing party to bear the successful party's legal expenses. Each litigant bears its own legal expenses, including attorneys' fees, whether the verdict is in its favor or not.<sup>969</sup>

With the adoption of a discovery regime, the Saudi legal system should also adopt new regulations concerning the burden of lawsuits' costs. This is to grant courts of law the power to oblige unsuccessful parties to pay certain legal expenses for prevailing ones, in some incidents. After adopting discovery in the Saudi judicial system, the new power that allows courts to award legal expenses would also be part of the legal sanctions that courts would be able impose on defiant litigants who misconduct during the discovery practice, or who did not comply properly with discovery orders.

In the United States, parties bear their own litigation costs, including attorneys' fees, discovery costs, etc. whether they win or lose. Important exceptions include fee-shifting statutes that allow the prevailing party to recover its legal expenses in certain substantive areas of law. There is also a rule in the Federal Rules of Civil Procedure (FRCP) as well as a statute that permit

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<sup>969</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 8.

the court to order the loser to pay certain expenses at the end of the case, but ordinarily not attorneys' fees.<sup>970</sup>

In jurisdictions that adopt the civil law system "lawyer fees are much lower and more predictable, and thus a party can generally predict the amount that will be imposed on the loser with some accuracy."<sup>971</sup> On the other hand, the majority of the countries that adopt common law systems, including the United States, "leave attorney fee pricing to the market and determine the amount of fees shifted through judicial discretion, leaving costs much less predictable and the chance for extremely high costs much greater."<sup>972</sup>

#### **4.6.3 Recommendations for Allocating Discovery Costs**

After considering the pros and cons of the allocation of discovery costs in the United States,<sup>973</sup> this dissertation recommends that the costs of discovery, upon adopting a discovery regime in Saudi Arabia, should be placed initially on the party who requests information or documents through discovery. This process may take place practically by requiring the requesting party to pay an estimated amount of money to the responding party as a deposit to cover the expenses of the discovery request. The responding party should specify this deposit, and in case

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<sup>970</sup> The statute is 28 U.S.C. §§ 1920-24, and the rule is FED. R. CIV. P. 54(d).

<sup>971</sup> Kauffman, *supra* note 653, at 25.

<sup>972</sup> *Id.*

<sup>973</sup> *Id.* at 38-39.

of any disagreement, the court should interfere, upon a party's request, to decide the reasonable amount to be paid.

In terms of the costs incurred for conducting the initial disclosure, each party should bear the expenses of its own initial disclosure since the law would require this disclosure to be conducted by each party to disclose the materials this party aims to use to support its allegations. The prevailing party may try to recover the initial disclosure expenses after the court's issues its verdict in the case.

After the court adjudicates the case, the prevailing party may file a request to the court to recover the expenses it incurred by requesting discovery along with its request to recover any other legal expenses. This is due to the fact that courts have the authority to award prevailing parties, upon their request, the legal expenses resulting from bringing the case to court of law.<sup>974</sup> This request to the court may also include the expenses that the prevailing party incurred by conducting the initial disclosure. The compensation for discovery costs may include attorney's fees resulting from gathering facts through discovery. The amount of money recovered for discovery costs would be subject to the court's discretion with it deciding whether to compensate the prevailing party for all of the discovery expenses or only part of them.

The reason for placing the discovery costs initially on the requesting party is to limit the amount of discovery requests to the very crucial documents and information that support the party's allegation. By obligating each party to pay for the expenses of its own discovery requests, the legal

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<sup>974</sup> Civil Procedure Law, *supra* note 6, Art. 84, Clause (b).

expenses generated by discovery practice would most likely be limited while prevailing parties can recover the expenses of their discovery requests.

## 4.7 Conclusion

This chapter provided some criticism and suggestions to revamp the discovery regime in the United States. These suggestions included demanding: extensive judicial participation in discovery, stricter discovery directions, establishing specifically designed discovery rules based on the case's size and value, and formulating a nontranssubstantive discovery system. This chapter also addressed some critics' recommendations to improve the United States discovery practice, including tailoring the initial disclosure and discovery expenses, developing patterned discovery methods to litigants' needs, establishing substance specific discovery to limit the broad discovery, limiting discovery to reduce high expenditures, and recommendations eliminate current discovery abuse. Chapter Three also addressed some efforts to eliminate the excessive delays and expenditures due to discovery in the United States civil litigation. It also considered some proposals to simplify discovery for self-represented litigants to make discovery easier and at lower costs. Chapter Three also addressed recommendations to overhaul the discovery of ESI.

Chapter Three also considered advantages of adopting discovery in Saudi Arabia, including: developing the judicial process by shifting some tribunals' responsibilities to judicial lieutenants, fulfilling some of the Shariah Maqasid, reducing the hearings held to examine evidentiary materials, enhancing the due process in the Saudi legal system, and eliminating malicious lawsuits. This chapter also addressed disadvantages that exist due to the absence of discovery as well as legal issues in the Saudi legal system that adopting discovery would resolve.

Chapter Three also considered the impacts of discovery on Saudi litigants, including: evolving the legal benefits that parties grant to demonstrate their allegations, and altering the

parties' responsibilities conducted prior to filing cases. This chapter also incorporated some of discovery's impact on the nature of hearings and Saudi religious values, including discovery impacts on the defense procedures, the parties' burden of proof, the role of judicial hearings, and the right to question or cross-examine parties. This also included resolving the problems caused by the solitary reliance on oath taking, and witness testimony. Chapter Three also discussed examples of Islamic Law rules that encourage parties to settle their cases, including Islamic Law emphasis on tribunals to delay adjudications where reconciliation is possible, and Shariah directions to tribunals to induce settlement where the dispute is equivocal. In addition, it discussed how discovery practice fulfills the Shariah desire to end disputes by reconciliation.

Chapter Three proposed some reforms to the Saudi legal system for the discovery adoption, including establishing a new formal phase for initial disclosures and discovery as part of the judicial procedures, and revising the Saudi Civil Procedure Law to make the discovery practice operational. The proposed revisions to the law included revising the rules of submitting supportive materials to court, revising the process of materials disclosure, and revising the rules of incidental petitions. This chapter also suggested reforming the concept of time limits upon adopting discovery, including establishing proper discovery time limits and restructuring the current lenient time limits in the Civil Procedure Law. It also considered the approaches to revising the Civil Procedure Law and its executive regulations. It also examined the Saudi Enforcement Law regarding discovery adoption as well as addressed stating explicit discovery permissions in the power of attorney.

Chapter Three discussed the methods to operate discovery after adopting a discovery regime in Saudi Arabia. These methods included considering legitimate interest as the legal ground to

submit discovery requests and motions to compel and adjusting judges' training methods upon adopting a discovery regime in Saudi Arabia. This chapter discussed the methods to appoint discovery magistrates upon adopting a discovery, including revising the Civil Procedure Law to designate judicial lieutenants as discovery magistrates, authorizing the Supreme Judicial Council to assign magistrates, and allowing each court to name its own discovery magistrates. Chapter Three included a brief overview of the current role of judicial lieutenants in the Saudi judicial system. It also included a discussion about the legal status of discovery orders in the Saudi legal system, and the discovery sanctions that courts should apply on defiant litigants.

The final section of Chapter Three provided suggestions to allocate the discovery costs upon adopting discovery in Saudi Arabia. It also considered whether the State would be willing to cover litigants' discovery expenses and proposes the parties who would be responsible for discovery expenditures if the State is not willing to pay. This chapter also provided recommendations to identify the parties who must pay for discovery in the case.

Chapter Four will address some reforms that occur under the current Saudi laws and are considered as incremental steps to discovery adoption in Saudi Arabia. These reforms include some improvements to the recent Civil Procedure Law and the commercial judicial system, including enacting new commercial law in Saudi Arabia that contains some discovery rules. Chapter Four also addresses some potential challenges of adopting discovery in Saudi Arabia. This includes addressing some arguments about the incompatibility of United States discovery system with the civil law system. Chapter Four then examines the compatibility of the discovery practice with the Islamic and Saudi laws. It also discusses some possible challenges of adopting regime to practice discovery in the Saudi legal system, and the approaches to cope with these challenges.

## 5.0 Chapter Four: Amendments Made Under Recent Laws and Potential Challenges of Adopting Discovery in Saudi Arabia

### 5.1 Recent Civil Procedure Law Reforms in Saudi Arabia<sup>975</sup>

Section 5.1 of this chapter discusses some changes made under the new Saudi Civil Procedure Law. This dissertation considers these changes to be improvements to the civil procedure system in Saudi Arabia. These reforms include improvements in the process of serving

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<sup>975</sup> The enactment of a new Saudi Civil Procedure Law in 2013 is part of the recent wave to reform the legal system and judiciary in Saudi Arabia initiated by King Abdullah Program for Judicial Reform, which was established in 2007 accompanied with a new judicial structure and courts system. Professor Abdullah Ansary states regarding the issuance on the new Saudi procedural laws: "[i]n a further step in the development of the judiciary, Royal Decree No. M/1 was issued on November 25, 2013, enacting a new Law of Procedure before Shariah Courts, supplemented by Royal Decree No. M/2 of the same date enacting a new Law of Criminal Procedure. The two Laws focus on the objective rather than the personal aspect from the stage of preliminary litigation to appeal, specify the channels of appeal against court rulings, define the pleading procedures before higher courts and higher administrative courts, guarantee the right of defense for the accused, including the right of access to legal counsel even for persons unable to afford it, secure the right of women to expeditious litigation and appeal procedures, curb procrastination as far as litigation procedures before religious courts are concerned, ensure free-of-charge flexible procedures and shorten the duration of litigation. In compliance with the two Laws, the Council of Ministers adopted resolution No. 142 of January 1, 2015 enacting the Implementing Regulations of the Law of Criminal Procedure, followed by the Minister of Justice's order No. 39933 of March 20, 2014 enacting the Implementation Mechanism of the Law of Procedure before Shariah Courts." *See Ansary, supra* note 98, at 33

summons upon defendants, the appearance of defendants in court, the rules of materials disclosure, the rules to compel non-parties to submit evidentiary materials, and the rules of representation in court.

The reason for addressing these improvements is to demonstrate how the Saudi legal system and the Civil Procedure Law have been recently undergoing continuous reforms to eliminate any obstructions that slow down the development of the country. Showing these reforms to the Civil Procedure Law facilities understanding how the law is being developed to gradually shift several judicial responsibilities from courts to parties, which is one standard of the discovery practice. This dissertation considers each one of the following reforms to the Saudi Civil Procedure Law addressed in this section as incremental steps to revamp the legal system by shifting some of tribunals responsibilities to parties, and therefore, to adopt rules for discovery practice in the foreseen future to engage parties in finding the facts of their case.

### **5.1.1 In the Service of Summons**

Regarding serving summons upon defendants in the new Saudi Civil Procedure Law, Clause 5 of the executive regulation of Article 17 states that courts may order any governmental and local entity to suspend assisting any defendant who does not have a known address or who refuses to appear in a court of law without a valid reason.<sup>976</sup> The governmental and local entities will not assist these defendants in any manner and will not offer them any services. One example

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<sup>976</sup> Civil Procedure Law, *supra* note 6, Art. 17, Clause 5 of its executive regulation.

of this suspension of service is preventing defiant defendants from conducting any banking transactions until they appear in court.<sup>977</sup> The purpose of such orders is to force defendants to go to court and appear at the assigned hearings. Many people consider this regulation as an improvement in the new Saudi Civil Procedure Law since such court orders regarding suspending defendant service or alternative consequences did not exist under the old Civil Procedure Law. Such court orders have helped to increase the efficiency of litigants' appearance in court in a timely manner, which facilitates cases being decided sooner.<sup>978</sup>

It is notable that, as an improvement in the new Civil Procedure Law, Article 43 of the old Saudi Civil Procedure Law and the same article, Article 43, of the new law provide plaintiffs with the option to serve, by themselves, defendants with summons including copies of their complaints and notices to appear in court directly without the interference of courts.<sup>979</sup> However, Article 43 of the old law did not mention any time limits for plaintiffs to conduct the service process upon receiving official paperwork from courts, which might have affected defendants' interests and caused delays in deciding cases and finalizing disputes.<sup>980</sup>

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<sup>977</sup> *Matha Yashmal Eqaf Alkhadamat [What Does Suspending Services Include?]*, ALMRSAL, <https://www.almrsal.com/post/865956> (last updated Aug. 31, 2019).

<sup>978</sup> Civil Procedure Law, *supra* note 6, Art. 17, Clause 5 of its executive regulation.

<sup>979</sup> Civil Procedure Law, *supra* note 6, Art. 43; see also Abdullah Albarqawy, *Wazir Aladl Yatamid Zawabit Eqaf Alkhadamat Alhukumia [The Minister of Justice Approves the Criteria of Suspending Governmental Services]*, SABQ (Apr. 11, 2018), <https://sabq.org/TQ3svH>.

<sup>980</sup> Old Civil Procedure Law, *supra* note 349, Art. 43.

Article 43 of the new Civil Procedure Law, however, clearly specifies a time limit for service by obligating plaintiffs, in addition to officers of the court, to serve defendants with summons within (15) days of receiving the paperwork from the court. As an exception, if the first hearings are assigned to take place within this 15-day period, then the paperwork must be served to defendants as soon as possible prior to the first hearings to allow the defendant of reasonable time limit to prepare it answers.<sup>981</sup>

### **5.1.2 Defendants' Appearance in Court**

The new Saudi Civil Procedure Law has improved on the old law in terms of compelling defendants' attendance in judicial hearings. The rules have become much stricter to force defendants to appear in court in a timely manner. The rules stated in Article 55 of the old Civil Procedure Law, regarding defendants' attendance in court, were eliminated in the new law. Article 57 of the new Civil Procedure Law includes an entirely new set of rules, regarding uncooperative and defiant defendants. These rules allow courts, under certain conditions, to order the arrest of defendants who evade appearing in court and refuse without valid reasons to attend hearings.<sup>982</sup> This is true particularly in family law cases even though the rules seem to mandate an appearance in all civil cases, including commercial disputes. Courts of law can order bringing the defendants in these cases to court. Coerced appearance is permitted in these cases if justice requires the

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<sup>981</sup> Civil Procedure Law, *supra* note 6, Art. 43.

<sup>982</sup> Civil Procedure Law, *supra* note 6, Art. 57; see also Dewidar, *supra* note 18, at 460-61.

defendants' attendance.<sup>983</sup> Article 57 of the new Saudi Civil Procedure Law should be considered an improvement from the old law, regarding defendants' appearance in court, since this article sets sanctions against defendants who refuse to appear in court in a timely manner to motivate them to attend assigned hearings. However, adopting a discovery regime in the Saudi legal system will help to eliminate coerced appearance in court since most of litigants' disagreements would most likely be resolved through settlements with no major need to appear in numerous judicial hearings.

Clause 4 of the executive regulation of Article 57 permits courts, if needed, to order suspending defendants' services in all governmental entities and banks, which means suspending defendants' legal privileges to take advantage of these entities, including conducting bank transactions and making purchases using their bank accounts. This consequence is intended/designed to put pressure on defendants to comply with court orders or to appear in a court of law.<sup>984</sup> This sanction has only recently been adopted in the legal system.

Some practitioners and human rights activists, however, argue that this sanction should be eliminated or limited to very few incidents since it is causing serious problems for some defendants and their families and violating their civil rights.<sup>985</sup> The Ministry of Justice has recently limited

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<sup>983</sup> Civil Procedure Law, *supra* note 6, Art. 57; see also Dewidar, *supra* note 18, at 460-61.

<sup>984</sup> Civil Procedure Law, *supra* note 6, Art. 57; see also Dewidar, *supra* note 18, at 460-61; see also Albarqawy, *supra* note 978.

<sup>985</sup> Saeed Alzahrani, *Eqaf Alkhadamat..Men Waseelat Dagt le Sadad Alhoqooq ela Eqab Jamaee Ala Fe'l Fardy ["Suspending services" From a Mean of Pressure to Repay Rights to Collective Punishment for an Individual Action]*, ALMADINA (Apr. 21, 2018), <https://www.al-madina.com/article/570542>; see also Jamal Banoon, *Eqaf*

the application of this sanction to certain type of defendants.<sup>986</sup> In doing so, the ministry amended the executive regulations of Articles 17 and 57 of the Civil Procedure Law. Clause 5 of the executive regulation of Article 17 and Clause 4 of the executive regulation of Article 57, regarding suspending the services of certain types of defendants, were repealed to reduce the negative impacts of this sanction on litigants' civil rights.<sup>987</sup>

Clause 5 of Article 57 of the new Civil Procedure Law imposes another consequence on defendants who do not appear at assigned hearings. This sanction concerns court orders to take oaths. When a plaintiff requests the court to direct oath taking to an absent defendant, the court must assign a special hearing for the oath performance with proper service to the defendant ordering it to attend the assigned hearing. The defendant must appear at that hearing to take the oath; otherwise, the court may penalize the defendant for disobedience by ruling for the plaintiff

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*Alkhadamat..Almawt Alraheem ["Suspending services" ... Euthanasia]*, ALARABIYA (Feb. 12, 2019), <https://www.alarabiya.net/ar/saudi-today/views/2019/02/12/-%D8%A7%D9%8A%D9%82%D8%A7%D9%81-%D8%A7%D9%84%D8%AE%D8%AF%D9%85%D8%A7%D8%AA-%D8%A7%D9%84%D9%85%D9%88%D8%AA-%D8%A7%D9%84%D8%B1%D8%AD%D9%8A%D9%85>.

<sup>986</sup> @MojKsa, TWITTER (May 16, 2019, 8:07 AM), <https://twitter.com/mojksa/status/1128995499913154561?lang=ar> [hereinafter <https://twitter.com/mojksa/status/1128995499913154561?lang=ar>]; see also Aladl Talgee Eqaf Alkhadamat Ella fy Halat Mahdooda [*The Ministry of Justice Abolishes the Suspension of Services, Except in Limited Circumstances*], ALMADINA (May 16, 2019), <https://www.al-madina.com/article/631262> [hereinafter <https://www.al-madina.com/article/631262>].

<sup>987</sup> <https://twitter.com/mojksa/status/1128995499913154561?lang=ar>, *supra* note 985; see also <https://www.al-madina.com/article/631262>, *supra* note 985.

and granting a verdict in its favor. As a protection for the defendant's legal rights, however, if the defendant appears later in court and provides a legitimate justification for its absence, the court must assign another hearing for the oath taking and notify the plaintiff of its time and any other updates.<sup>988</sup> This may implicate the issue of the validity or wisdom of the policy of coercion appearance in court. It also raises the issue of the place of the oath in the legal system and its relationship with the coercion appearance.

### **5.1.3 Evidence Disclosure Rules**

Some rules of the new Saudi Civil Procedure Law should be considered as disclosure rules. For instance, Clause 2 of Article 149 states that the court may, on its own or by a motion, order the disclosure of materials by bringing a third party to a proceeding and force this party to submit materials in its possession, which are necessary to decide on the proceeding.<sup>989</sup> This clause is an improvement in the new Saudi Civil Procedure Law to acknowledge the concept of disclosing materials from others. No such clause exists in Article 148 of the old Saudi Civil Procedure Law allowing courts to force a non-party to disclose evidentiary materials in its possession.<sup>990</sup> This may not be a discovery rule similar to the applied discovery rules in the United States legal system. Although the discovery rules in the Federal Rules of Civil Procedure (FRCP) do provide for access

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<sup>988</sup> Civil Procedure Law, *supra* note 6, Art. 57, Clause 5.

<sup>989</sup> *Id.* Art. 149.

<sup>990</sup> Old Civil Procedure Law, *supra* note 349, Art. 148.

to materials and information held by a non-party (primarily through depositions),<sup>991</sup> most of the rules are limited to disclosure of materials and information held by a party in the case. On the other hand, a litigant in the Saudi system practicing under the current rules, does not have to disclose material or information upon the request of another party.

Another rule in the new Saudi Civil Procedure Law that is considered as a disclosure rule is Clause 1 of Article 149 states that courts may order any governmental entity to provide the court with any information or documents necessary to decide on a proceeding.<sup>992</sup> This clause of the new law is not entirely recent in the Saudi legal system since a similar rule was stated in Article 148 of the old Civil Procedure Law, and courts applied it prior the new Civil Procedure Law came into effect in 2013.<sup>993</sup>

#### **5.1.4 Compelling Non-Parties to Submit Evidence**

Article 80 of the new Saudi Civil Procedure Law can also be considered an improvement on the old Civil Procedure Law in regard to providing and exchanging materials. The new law grants tribunals more influence to enjoin non-parties to proceedings to provide any materials in their possession, whether these non-parties have an interest in the subject matter of the proceeding

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<sup>991</sup> FED. R. CIV. P. 45 (Subpoenas)

<sup>992</sup> Civil Procedure Law, *supra* note 6, Art. 149.

<sup>993</sup> Old Civil Procedure Law, *supra* note 349, Art. 148.

or not. They may be joined to the proceedings so long as the court believes that the joinder of the non-party is indispensable for the proceeding and that justice requires it.<sup>994</sup>

The old Saudi Civil Procedure Law mentions in Article 76 only specific incidents in which courts have the authority to order the joinder of non-party to a lawsuit regardless of to what extent this joinder is indispensable to achieve justice.<sup>995</sup> The joinder should be considered as a device available against non-parties to find facts and obtain materials. The joinder is also available for other legal purposes, some of them having a dispositive impact, which may be relevant to the purposes of a discovery regime.

Article 80 of the new Civil Procedure Law is considered as an improved version of Article 76 of the law, because Article 80 of the new law grants courts general discretionary authority over all cases in which courts believe the joinder of a non-party is required to finalize the dispute before the court of law. Article 80 of the new law includes all the cases stated in Article 76 of the old law regarding the joinder of others to a lawsuit.<sup>996</sup>

### **5.1.5 The Representation Rules**

Clause 3 of the executive regulation of Article 50 of the Civil Procedure Law also contains another improvement in the law. This clause states that litigants' representatives in court, including attorneys, must be expressly authorized by their clients to conduct certain legal actions on their

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<sup>994</sup> Civil Procedure Law, *supra* note 6, Art. 80.

<sup>995</sup> Old Civil Procedure Law, *supra* note 349, Art. 76.

<sup>996</sup> Civil Procedure Law, *supra* note 6, Art. 80; see also Awad, *supra* note 29, at 279.

behalf. Note here that the Saudi Advocacy Law does not restrict representation in court to certain people since no formal qualifications exists for representatives who act on behalf of litigants in court. The legal representative may be a licensed attorney or any layperson, such as a family member, an administrator, or a guardian.<sup>997</sup> Article 18 of the Saudi Advocacy Law also specifies some types of people who may, as an exception to the general rule, represent litigants in courts of law in addition to licensed attorneys. This article permits any layperson to represent others in court in up to (3) lawsuits.<sup>998</sup>

If a court finds that any representative does not have the legal authority to conduct a legal action on behalf of its client, the court must inform the representative that it must obtain its client's written authorization to perform specific legal actions before courts of law.<sup>999</sup> If the representative does not bring its client's written consent by the next assigned judicial hearing or as directed by the court, then the court's reaction differs depending on the position of the representative. If the representative appears on behalf of a defendant, then the court may grant the representative another time limit to bring its client's consent. Beyond the second time limit, the court must consider the defendant as absent, and its representative is no longer its legal representative until the representative submits to the court what is required to prove the defendant's consent to proceed in the case as its legal representative.<sup>1000</sup> If the representative appears in court on behalf of a plaintiff,

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<sup>997</sup> Advocacy Law, *supra* note 314, Art. 18.

<sup>998</sup> Advocacy Law, *supra* note 314, Art. 18.

<sup>999</sup> Civil Procedure Law, *supra* note 6, Art. 57 & Clause 3 of the executive regulation of Art. 50.

<sup>1000</sup> Civil Procedure Law, *supra* note 6, Art. 57 & Clause 3 of the executive regulation of Art. 50.

then it may not be granted another time limit to prove their authority to conduct a legal action on behalf of the plaintiff, and the court may dismiss the case.<sup>1001</sup> Such a reaction to litigants' failure to comply with court directions encourages litigants to act properly and in a timely manner, which improves the efficiency of judicial hearings.<sup>1002</sup>

In sum, Section 5.1 of this chapter covered some improvements established under the new Saudi Civil Procedure Law, including improvements in the process of serving summons to adverse parties, the appearance of defendants in court, the rules of materials disclosure, the rules to compel non-parties to submit pieces of evidence, and the rules of representation in court.

The subsequent section, Section 5.2, discusses some amendments that took place in the Saudi commercial system to favor the early disclosure of evidentiary materials. These amendments include some recent improvements in the commercial litigation process to favor expedited litigation as well as the early disclosure of information between parties in commercial cases. Section 5.2 also discusses a recent amendment to the rules to allow parties in commercial litigation to exchange their memorandums and other legal documents using electronic means to ease and speed up the litigation process in commercial cases. Section 5.2 also examines the newly enforced rules regarding holding compulsory preliminary sessions in commercial litigation prior to pleading sessions to draw the roadmap of the case. Finally, Section 5.2 addresses some articles of the newly enacted procedural law in Saudi Arabia, the Commercial Courts Law and Procedures. This new

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<sup>1001</sup> *Id.* Art. 50&55.

<sup>1002</sup> *Id.* Art. 53.

law adopts some aspects of discovery in the commercial judiciary in Saudi Arabia that have some similarities with the discovery rules stated in the United States' FRCP, which this dissertation proposes to adopt as part of the Saudi Civil Procedure Law.

This dissertation considers the enactments of the Saudi Commercial Courts Law and Procedures discussed in the following section as an incremental step to revamping the legal system since this law adopts some rules to involve parties in the fact finding and to practice discovery in their cases. This dissertation, therefore, believes that this new commercial law contains the outset of adopting discovery rules the Saudi legal system.

## 5.2 Recent Amendment to the Saudi Commercial Judicial System: Preferring Early Disclosure

### 5.2.1 Amendments to the Litigation Process Favoring Expedited Litigation and Early Disclosure of Information

One improvement to the current judicial system in Saudi Arabia occurred in 2019 when the president of the Supreme Judicial Council supplied amendments to the executive regulation of the Saudi Civil Procedure Law regarding commercial cases.<sup>1003</sup> The Supreme Judicial Council imposed these amendments specifically to expedite commercial litigation in the Saudi courts of law.<sup>1004</sup>

One of these amendments requires courts to appoint first hearings in commercial cases within (20) days of the filing of the lawsuit in court, and to hold second hearings not more than (60) days after the first ones.<sup>1005</sup> This amendment also directs courts of law to limit the number of

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<sup>1003</sup> The Ministry of Justice website; see also Hazim Almadani, *Amendments to the Executive Regulation of the Shariah Pleading System, Concerning the Commercial Court*, THE LAW FIRM OF HAZIM ALMADANI (May 27, 2018), <https://www.almadani.com/articles-details.php?aid=1106>. This is one of the administrative circulars issued by the Supreme Judicial Council, which should be included in the executive regulations of the Civil Procedure Law provisions.

<sup>1004</sup> The Ministry of Justice website; see also Almadani, *supra* note 1002.

<sup>1005</sup> Almadani, *supra* note 1002.

hearings<sup>1006</sup> in commercial cases to (3) hearings at most, after serving summonses on defendants.<sup>1007</sup>

Another amendment to the executive regulation requires courts of law to decide the matter of admission and jurisdiction before they consider the merits of the case to safeguard litigants' resources as much as possible.<sup>1008</sup> Courts must decide in the first hearing whether they have jurisdiction over the cases.<sup>1009</sup> This amendment must also be applied to all civil matters, since the executive regulation of the Civil Procedure Law applies to all civil cases in Saudi Arabia.<sup>1010</sup>

The third amendment permits litigants, upon the tribunal's approval and instructions, to exchange memorandums and documents through the administrative department of the courts.<sup>1011</sup>

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<sup>1006</sup> There are two fundamental differences between civil law jurisdictions and Anglo-American civil procedure. These differences lead in turn to many others. "First, the court rather than the parties' lawyers take the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require." See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985).

<sup>1007</sup> Almadani, *supra* note 1002.

<sup>1008</sup> Civil Procedure Law, *supra* note 6, Art. 240 and its executive regulation; see also Almadani, *supra* note 1002.

<sup>1009</sup> Civil Procedure Law, *supra* note 6, Art. 240 and its executive regulation.

<sup>1010</sup> *Id.*

<sup>1011</sup> *Itdaq kidmat eda' mothakerat aldefa' alola elektronian fy alqadaya altejareya [Launching the Service of Submitting the First Defense Memorandum Electronically in Commercial Cases]*, ALMADINA (Mar. 13, 2018), <https://www.al-madina.com/article/565174>.

This is done outside of courtrooms and without judges' attendance and within the first (90) days of filing lawsuits.<sup>1012</sup>

The Saudi Ministry of Justice has stated that the main purpose for adopting these amendments is to minimize the duration of litigation in commercial cases, enhance the efficiency in courts of law, and raise the Kingdom's ranking on global competitiveness indicators.<sup>1013</sup> These purposes reflect some of the desired achievements that the adoption of a discovery regime in Saudi legal system would achieve. Because these regulations are a part of pleading or briefing requirements, they are not directly related to adopting discovery. They are considered, however, an improvement in the Saudi legal system because they create a better disclosure requirement in the Civil Procedure Law. Reforming the initial disclosures requirements is considered an incremental step to adopt a formal regime to practice discovery in the Saudi legal system since requiring initial disclosures is a major aspect in any discovery regime.

Another improvement in the Saudi Civil Procedure Law is the amendment of the executive regulation of the Civil Procedure Law to allow litigants themselves in commercial cases to cross-examine witnesses about their testimonies to find out the facts of the cases and to clarify their truth. This must take place under the supervision of commercial judges.<sup>1014</sup>

One other amendment to the executive regulation of the law has added new clauses that authorize litigants in commercial cases to obtain any legal documents related to their lawsuits that

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<sup>1012</sup> *Id.*; see also Almadani, *supra* note 1002.

<sup>1013</sup> Almadani, *supra* note 1002.

<sup>1014</sup> Almadani, *supra* note 1002.

other parties possess.<sup>1015</sup> Litigants may seek a court order to compel if a litigant does not comply with another party's demands and refuses to provide any related documents to the case.<sup>1016</sup> This process to exchange materials out of court represents one of the main purposes of establishing the discovery practice in the United States legal system. These amendments to the executive regulation of the Saudi Civil Procedure Law should be considered as progress toward enforcing discovery rules in Saudi Arabia, like the discovery rules in the FRCP. This is because parties may request evidentiary materials from adverse parties directly without the court's involvement as it is the case during the discovery phase in the United States civil litigation.

### **5.2.2 Amendment to Permit Electronic Exchange of Legal Documents**

The Saudi Ministry of Justice has created a new service that allows parties to a lawsuit to review and exchange electronically their memorandums and legal documents with adverse parties through the website of the Commercial Judicial System. This process must take place according to tribunals' directions, and without the need to visit the court to submit these documents.<sup>1017</sup> The

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<sup>1015</sup> The executive regulation of a law is a further explanation of the law's articles. There should not be any conflict between any law and its executive regulation, but if there is, the general rule demands that the laws have supremacy over the regulations. Executive regulations are interpretive devices for courts. Courts are encouraged to comply with these regulations unless they contradict Islamic Law rules. Tribunals, in this case, would not apply these regulations until they are amended.

<sup>1016</sup> Almadani, *supra* note 1002.

<sup>1017</sup> DALIL AL-MUSTAKHDM LEKHDMAT TABADUL AL-MUTHKERAT ELECTRONEAN FI NIZAM AL-QADA AL-TEJARI [THE USER GUIDE FOR ELECTRONIC MEMO EXCHANGE SERVICE IN THE COMMERCIAL COURT SYSTEM (THE

Ministry of Justice specified (3) features for this new service: 1) preserving parties' time and effort spent in depositing memos and legal documents; 2) dispensing with the need to go to court to deposit or review these documents, and 3) permitting parties under the commercial judicial system, whether the clients themselves or their attorneys, to deposit memos to adverse parties.<sup>1018</sup>

The targeted advantages from establishing this new service include: 1) reducing the time length of commercial lawsuits; 2) establishing a new role for judges in commercial cases as observers of parties' legal practice; 3) assisting in increasing the number of cases ready for adjudication without major involvement of judges; 4) enhancing the efficiency of the cases' management process; 5) reinforcing the effectiveness of the commercial judicial system; and 6) simplifying the civil procedures for commercial litigants.<sup>1019</sup>

These amendments to the procedural process in the commercial courts are positive incremental steps to adopt discovery in the Saudi legal system. This is because the discovery practice requires such reforms to be made to allow a proper discovery application.

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EXTERNAL CONCIERGE AT MINISTRY OF JUSTICE, 2020), *available at:*  
<https://www.moj.gov.sa/PublishingImages/notes.pdf>

<sup>1018</sup> *Id.*

<sup>1019</sup> *Id.*

### 5.2.3 New Compulsory Preliminary Sessions to Set Roadmaps in Commercial Cases

#### Before the Pleading Sessions

As part of the recent efforts to improve the Saudi commercial judicial system and enhance the case management process, one amendment to the executive regulations of the Civil Procedure Law took place on February 24, 2020, in regard to commercial cases.<sup>1020</sup> The new regulation binds commercial litigants to attend preliminary sessions as part of the current wave of judicial reforms to speed up adjudicating commercial disputes through reinforcing the process of preparing the case

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<sup>1020</sup> Civil Procedure Law, *supra* note 6, Art. 65, Clause 3 of its executive regulation; see also *Wazeer Aladel Yosder Qarar Beta'deel Allaeha Altanfetheya Lenetham Almorafa'at Alshareyah [The Minister of Justice Issues a Decree to Amend the Executive Regulations of the Civil Procedure Law]*, SAUDI PRESS AGENCY (Feb. 24, 2020), <https://www.spa.gov.sa/2038531> [hereinafter <https://www.spa.gov.sa/2038531>]; see also @MojKsa, TWITTER (Feb. 24, 2020, 5:32 AM), <https://twitter.com/MojKsa/status/1231889682964910081>; see also *Tadelat Ala Alaeha Altanfetheya Lenetham Almorafa'at Alshareyah [Amendments to the Executive Regulation of the Civil Procedure Law]*, AL JAZIRAH (Feb. 25, 2020), <http://www.al-jazirah.com/2020/20200225/ln15.htm> [hereinafter <http://www.al-jazirah.com/2020/20200225/ln15.htm>]; see also *Enha' Altanazo Fy Alekhtesas Alnawee Bayn Almahakem [Ending the Conflict of Jurisdiction between Courts]*, AL RIYADH (Feb. 24, 2020, 1:37 PM), <http://www.alriyadh.com/1806539> [hereinafter <http://www.alriyadh.com/1806539>]; see also *Tadelat Ala Alaeha Altanfetheya Lenetham Almorafa'at Alshareyah ... Enha Altanazo Fy Alekhtesas Alnawee [Amendments to the Executive Regulation of the Civil Procedure Law ... Ending the Conflict of Jurisdiction]*, SABQ (Feb. 24, 2020, 2:51 AM), <https://sabq.org/pj7Kgf> [hereinafter <https://sabq.org/pj7Kgf>]

to be ready for adjudication or settlement before getting to trial.<sup>1021</sup> At the end of the preliminary session, the tribunal must prepare a written report about what took place during this session.<sup>1022</sup>

This amendment to the rules establishes a new stage in the commercial litigation procedure since it binds parties to appear in the preliminary session to draw a roadmap for the litigation process before entering into the pleading.<sup>1023</sup> In this preliminary session, the court and parties must investigate the main elements of the dispute as a way to achieve the best resolution of the dispute as early as possible.<sup>1024</sup>

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<sup>1021</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also

<http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

<sup>1022</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also

<http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

<sup>1023</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also

<http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

<sup>1024</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also

<http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

During this preliminary session, tribunals must examine the jurisdiction, the cause of action and the legal conditions for accepting the lawsuit. They must also determine the essence of the dispute and examine the complexity of the case.<sup>1025</sup> The court must order parties to identify and enclose all claims, requests and defenses related to the dispute in this session. The court and parties must work together in this preliminary session to determine the scope of evidence and prepare a list of the witnesses who will testify in the trial.<sup>1026</sup> The court determines, by the end of this session, the timeframe for the litigation's procedures and the expected length of the trial. The tribunals must also discuss with the parties in this session the possibility of settling the dispute without the court's adjudication.<sup>1027</sup>

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<sup>1025</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also <http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

<sup>1026</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also <http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

<sup>1027</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also <http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

To enhance the case management process and expedite the litigations procedures, this recent amendment to the executive regulation of the Civil Procedure Law permits the judge to authorize another judge, or delegate his aids or any legal specialist working in court to be in charge of supervising the preliminary session if the judge is not available or needs assistance to administer the session properly.<sup>1028</sup> This amendment of the law also allows preliminary sessions to be held through any electronic means and eliminates the need to come to court in person if a party is not able to do so.<sup>1029</sup>

This amendment to the Civil Procedure Law, which includes parties with the court in the fact finding, is a step toward improving the judicial system so that it can accommodate a new procedural stage for discovery practice. Holding a special preliminary session to draw a roadmap for the litigation process before trial and to investigate the main elements of the parties' dispute as well as examining the jurisdiction, the cause of action, the conditions to admit the case in court, and the complexity of the case should be part of a future discovery stage when Saudi Arabia adopts

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<sup>1028</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also <http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

<sup>1029</sup> <https://www.spa.gov.sa/2038531>, *supra* note 1019; see also

<https://twitter.com/MojKsa/status/1231889682964910081>, *supra* note 1019; see also <http://www.al-jazirah.com/2020/20200225/ln15.htm>, *supra* note 1019; see also <http://www.alriyadh.com/1806539>, *supra* note 1019; see also <https://sabq.org/pi7Kgf>, *supra* note 1019.

a discovery regime. This will be in addition to the court orders to determine the claims, defenses, pieces of evidence, and witnesses' information, during the preliminary session,

Holding this preliminary session satisfies some of the desired results of establishing a discovery stage in the Saudi civil proceedings. This is because both the discovery stage and the preliminary session facilitate setting the duration of the trial, distinguishing the scope of evidence, and helping to bring parties to the settlement table to settle their disputes without a tribunal's adjudication. One more common feature between the discovery stage and the preliminary session is that, in both, the judges' assistants may oversee the practice of the parties, even though in the preliminary session the assistants' involvement is more extensive than it is in the discovery stage. Finally, permitting the preliminary sessions to be held through electronic means out of court is also a step forward towards shifting some of the judicial responsibility, including the fact finding, from tribunals to parties.

#### **5.2.4 Enacting New Procedural Law in Saudi Arabia to Govern Commercial Disputes: The Commercial Courts Law and Procedures**

On April 7, 2020, the legislature in Saudi Arabia passed a new procedural law (the Commercial Courts Law and Procedures) to govern procedures of the cases being considered in Saudi commercial courts.<sup>1030</sup> Many legal experts in Saudi Arabia consider this law as revolutionary

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<sup>1030</sup> *Wazeer Aladel Yothmen Lelqeyadah Almowafaqah Ala Nezam Almahakem Altejareyyah [The Minister of Justice Appreciates the Leadership's Approval of the Commercial Courts Law]*, SAUDI PRESS AGENCY (Apr. 7, 2020),

improvement in the Saudi legal system, since the law includes provisions that resolve many current legal issues in the land of commercial law, especially commercial procedural problems.<sup>1031</sup> The Commercial Court Law and Procedures adopts new modern rules into the Saudi legal system, including incorporating legal methods from other legal systems. This includes adopting discovery rules and other legal aspects from common law jurisdictions. The main purpose of adopting these methods was to improve the speed and trust between merchants in commercial dealings as well as encourage foreign investments in the Saudi Arabia markets.<sup>1032</sup>

One main advantage of this law is to enforce new rules to expedite commercial disputes.<sup>1033</sup> The aims of the Commercial Courts Law and Procedures include: raising the Kingdom's ranking in international indicators related to the commercial judiciary in its legal and applied aspects, reducing the length of commercial litigation, and accelerating achieving adjudications.<sup>1034</sup> This law is also intended to grant a greater role to lawyers, judicial aides, and those involved in

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<https://www.spa.gov.sa/2071426> [hereinafter <https://www.spa.gov.sa/2071426>]; see also

<https://www.uqn.gov.sa/articles/1587045954220859300/>

<sup>1031</sup> <https://www.spa.gov.sa/2071426>, *supra* note 1029; see also <https://www.uqn.gov.sa/articles/1587045954220859300/>, *supra* note 1029.

<sup>1032</sup> <https://www.spa.gov.sa/2071426>, *supra* note 1029; see also

<https://www.uqn.gov.sa/articles/1587045954220859300/>, *supra* note 1029

<sup>1033</sup> <https://www.spa.gov.sa/2071426>, *supra* note 1029; see also

<https://www.uqn.gov.sa/articles/1587045954220859300/>, *supra* note 1029

<sup>1034</sup> <https://www.spa.gov.sa/2071426>, *supra* note 1029; see also

<https://www.uqn.gov.sa/articles/1587045954220859300/>, *supra* note 1029

commercial disputes. This law is also aimed to formally establish the shifting to electronic means (paperless) and to enhance procedural and judicial transparency.<sup>1035</sup> The Commercial Courts Law and Procedures is also aimed to support and enhance the investment environment in Saudi Arabia and keep pace with the latest experiences of other international jurisdictions related to commercial disputes, raise the quality of commercial judicial outputs, and establish methods to support alternative dispute resolutions.<sup>1036</sup>

This subsection refers to some articles of the new law that this dissertation considers as new enacted rules to implement a discovery practice in the Saudi legal system similar to the United States discovery regime. This subsection also suggests that the Saudi legislature should partially adopt, or, at least, take forward steps toward adopting similar rules in the Civil Procedure Law.

In an unprecedented move, Article 5 of the Commercial Courts Law and Procedures allows commercial courts to seek help, if needed, from the private sector in the country to conduct certain legal actions.<sup>1037</sup> Some of these actions are helping courts in processing settlements and mediations, administering court rooms, overseeing the exchange of memorandums and examining

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<sup>1035</sup> <https://www.spa.gov.sa/2071426>, *supra* note 1029; see also

<https://www.uqn.gov.sa/articles/1587045954220859300/>, *supra* note 1029

<sup>1036</sup> <https://www.spa.gov.sa/2071426>, *supra* note 1029; see also

<https://www.uqn.gov.sa/articles/1587045954220859300/>, *supra* note 1029

<sup>1037</sup> NIZAM AL-MAHAKEM AL-TEJARIAH WA EJRA'ATAHA, [THE SAUDI COMMERCIAL COURTS LAW AND PROCEDURES] Royal Decree No. (M/93) 15 Shaban 1441 H [8 April 2020], Cabinet Resolution (No. 511) 14 Shaban 1441 H [7 April 2020], Art. 5, [hereinafter Commercial Courts Law].

legal documents, and validating evidence procedures.<sup>1038</sup> This new rule also authorizes the court as well as parties to hire private experts or investigators for discovery purposes upon discovery adoption the legal system.

Article 6 of the Commercial Courts Law and Procedures, as an exception from the rules of this law and the rules of the Civil Procedure Law, permits parties in commercial cases, if both are merchants, to agree on specific procedures for their pleading and related matters, which they will follow to resolve their dispute.<sup>1039</sup> The court must endorse the parties' agreement so long as this agreement does not contradict the Public Policy or the applied rules of justice in Saudi Arabia.<sup>1040</sup> Merchants may agree on whatever pleading procedures and set a dispute resolution plan that suits them.<sup>1041</sup> This agreement may include setting certain rules of evidence that will be followed by both parties to settle the dispute.<sup>1042</sup> This article creates the legal grounds for people in the commercial sector to come into an agreement to have a discovery phase as part of their plan to resolve their dispute. This makes the court overseeing their case involved in this discovery process. Article 6 is also one of the rules in this new law that indirectly permits the discovery practice in the Saudi legal system.

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<sup>1038</sup> Commercial Courts Law, *supra* note 1036, Art. 5.

<sup>1039</sup> *Id.* Art. 6.

<sup>1040</sup> *Id.*

<sup>1041</sup> *Id.*

<sup>1042</sup> *Id.*

Clause 1 of Article 8 of the Commercial Courts Law and Procedures also states that the executive regulation of this article must determine the procedures for mediations and reconciliation among commercial parties.<sup>1043</sup> Article 8 also states that this determination in the executive regulation must also specify the cases in which mediations and reconciliations must take place before proceeding to trial.<sup>1044</sup> This article states that the time spent on these alternative procedures to resolve disputes must not exceed (30) days from the start date, unless the parties agree to a longer period.<sup>1045</sup> This article establishes a new mechanism to encourage litigants in commercial disputes to settle their cases prior to filing their cases in court. This rule is a great improvement as it obligates commercial parties to discuss settling their dispute. Before the enactment of this law, commercial judges were not obligated to allow parties to commercial disputes to hold settlement sessions before filing their cases in court. Article 8 of the new law shares with discovery the advantage of encouraging parties to settle their dispute before trial.

Article 19 of the Commercial Courts Law and Procedures establishes new and unprecedented rules in the Saudi legal system. Clause 1 of this article states that in certain types of cases, stated in the executive regulations of the law, the plaintiff must demand in writing that the defendant must perform the claimed rights or to pay a certain amount of money due for the plaintiff.<sup>1046</sup> This demand letter must be sent to the defendant at least (15) days prior to filing the

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<sup>1043</sup> *Id.* Art. 8.

<sup>1044</sup> Commercial Courts Law, *supra* note 1036, Art. 8.

<sup>1045</sup> *Id.*

<sup>1046</sup> *Id.* Art. 19.

case in the commercial court.<sup>1047</sup> No such rule exists in any other law in Saudi legal system. This rule is considered as a partial adoption of discovery because, under this rule (and the rules stated in Article 46), parties to a commercial dispute may also direct requests to each other to disclose materials in their possession that are related to the dispute and most likely will help to resolve it. If a party does not respond or refuses to submit the requested materials within the 15-day period, the interested party may submit a request to the commercial court to order the adverse party to provide the requested materials. If the court orders the adverse party to submit what is requested, and the party refuses without a valid reason, then the court will consider this action as a presumption against this party.<sup>1048</sup> The presumption is a supportive method of proof stated under Article 46 of the Commercial Courts Law and Procedures that courts may, to a limited extent, rely upon to adjudicate commercial disputes. Note that this rule of Article 19 is similar to Act 45 CFR § 30.11 in the United States regarding sending letters to an adverse party demanding payment or performance before filing the case in court.<sup>1049</sup>

Article 46 of the Commercial Courts Law and Procedures authorizes the commercial court, upon its discretion or upon a request from an interested party, to order any party to a dispute to provide any materials it possesses related to the dispute.<sup>1050</sup> The commercial court may not force any party to disclose materials or impose a sanction on it. The court, however, will consider

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<sup>1047</sup> *Id.*

<sup>1048</sup> Commercial Courts Law, *supra* note 1036, Art. 46

<sup>1049</sup> 45 CFR § 30.11 - Demand for payment

<sup>1050</sup> Commercial Courts Law, *supra* note 1036, Art. 46.

refraining from disclosing materials a presumption against the party that does so.<sup>1051</sup> This, accordingly, may lead the court to rule against this party. This encourages parties to submit whatever the court requests. Article 46 also permits the court, only upon a request from a party, to enjoin a nonparty to obligate it to disclose materials in its possession that are substantially related to the parties' dispute.<sup>1052</sup> This article should be considered as a new disclosure rule in the Saudi legal system and a further step to adopt a comprehensive discovery process through which parties can exchange legal materials directly without the court being involved in this process.

Clause 2 of Article 19 allows commercial parties, before filing their dispute in court but under the court's supervision, to perform the following actions out of courtrooms: conducting settlements and mediations; exchanging memos and legal documents; including pieces of evidence; and/or holding a conference to specify the parties' claims, defenses and pieces of evidence that will be used by both in the trial court.<sup>1053</sup> The executive regulation of the Commercial Courts Law and Procedures contains more detailed information about performing and authenticating these actions. This new rule is quite similar to the legal actions, required by Rule 26 of the FRCP, that parties to a civil lawsuit in the United States must conduct during the discovery phase.

Clause 2 of Article 20 of the Commercial Courts Law and Procedures also obliges the plaintiff to exclusively specify in the pleading all its claims against the defendant and include all

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<sup>1051</sup> *Id.*

<sup>1052</sup> *Id.*

<sup>1053</sup> Commercial Courts Law, *supra* note 1036, Art. 19

pieces of evidence that the plaintiff intends to use in court.<sup>1054</sup> The plaintiff will not be able to modify its claims or supportive materials after this time except in very limited circumstances.<sup>1055</sup> Articles 20 and 73 of the Commercial Courts Law and Procedures also state that the executive regulations of these two articles must determine the types of cases, pleadings, objections and petitions that must be submitted only by licensed lawyers.<sup>1056</sup> Commercial litigants involved in these cases must hire lawyers to represent them since self-representation (pro se) is not permitted.<sup>1057</sup> As previously recommended in this dissertation, upon adopting a discovery regime to be part of the civil procedure rules in Saudi Arabia, a similar rule to restrict some cases to licensed lawyers must be enforced under the Civil Procedure Law as well. This new rule would be applied to specified major civil cases that involve discovery practice and require experienced attorneys to conduct the discovery of evidence.

Similar to the new amendments to the executive regulation of the Saudi Civil Procedure Law, Articles 23 and 28 of the Commercial Courts Law and Procedures direct commercial court administrative departments to engage, upon tribunals' request, in preparing the case files to be ready for the trial.<sup>1058</sup> The contexts of these articles include permitting the commercial judge to allow the exchange of memos and legal documents to be conducted directly between commercial

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<sup>1054</sup> *Id.* Art. 20

<sup>1055</sup> *Id.*

<sup>1056</sup> *Id.* Art. 20&73

<sup>1057</sup> *Id.*

<sup>1058</sup> Commercial Courts Law, *supra* note 1036, Art. 23&28

parties without the court being engaged, which is unavailable under the Civil Procedure Law; or to take place under the supervision of the administrative departments in commercial courts.<sup>1059</sup> This rule is also a forward step to permit parties to identify and exchange materials out of courtroom, which is one main purpose of demanding setting a discovery phase as part of the Saudi civil litigation process.

Article 38 of the Commercial Courts Law and Procedures states that no specific methods are required to prove a party's obligation toward another.<sup>1060</sup> This flexibility in choosing the suitable methods of proof in commercial law is a very common feature in most other legal jurisdictions. This is because commercial dealings depend considerably on speed and trust among merchants, which makes maintaining a certain method to prove deals disruptive and very difficult. The concept of speed and trust that distinguish commercial deals demands simplifying dealing procedures and enhancing creditability to conclude commercial deals. This flexibility to prove deals in commercial law stated under Article 38 applies unless the parties to a commercial contract agree to use limited methods.<sup>1061</sup> In this case, commercial parties, for example, may agree to rely

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<sup>1059</sup> *Id.* The Ministry of Justice has recently amended the executive regulation of the Civil Procedure Law to allow parties in civil cases to exchange their memos and legal documents through the administrative departments in court with no need to be in presence of a judge. The difference here is that the Commercial Courts Law and Procedures allows the direct exchange of legal documents between parties. Also, the issue of exchanging legal documents is stated in the context of the Commercial Courts Law and Procedures and not in its executive regulation issued by the Ministry of Justice as it is the case with the Civil Procedure Law.

<sup>1060</sup> Commercial Courts Law, *supra* note 1036, Art. 38

<sup>1061</sup> Commercial Courts Law, *supra* note 1036, Art. 38

only on written materials to prove their allegations against each other, or to set specific conditions on using methods of proof in court to protect their commercial dealings from any penetration or fabrication.<sup>1062</sup> Otherwise, a commercial plaintiff is open to exhaust all options and available means to prove its legal rights against its defendant and vice versa. If parties to a contract agreed to use only particular methods of proof, then the court must implement the parties' agreement in this regard.<sup>1063</sup> This rule of Article 38 adopts several aspects of the discovery plan that parties in a civil litigation in the United States must prepare in their Rule 26(f) conference. This new Saudi law officially permits commercial parties to set agreements regarding the methods to prove their allegations in court.

Clause 3 of Article 38 also permits commercial courts to admit any evidence procedures that occurred in any foreign country as long as these procedures do not violate the Saudi Public Policy.<sup>1064</sup> This includes admitting the evidence procedures that were conducted in legal jurisdictions, mainly common law countries such as the United States, that adopt a discovery regime in their civil procedures as a formal mechanism to disclose evidentiary materials related to the parties' case. The Saudi Commercial Courts Law and Procedures indirectly recognizes the validity of the materials that were obtained through discovery practice in common law jurisdictions. This recognition will make discovery more likely to be practiced in the Saudi legal system in the near future.

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<sup>1062</sup> *Id.*

<sup>1063</sup> *Id.*

<sup>1064</sup> *Id.*

Article 38 also allows commercial parties to agree in their contract to move the burden of proof from one party to another.<sup>1065</sup> The court also must execute this agreement when considering the dispute.<sup>1066</sup> This is an excellent new feature in commercial law procedures since the burden of proof will not always be imposed on one party to a contract and not the other. For example, the seller party will not have to prove every allegation it raises. This rule is also a distinguished feature of this new law since it authorizes parties to shift the burden of proof from one party to another by agreement.

In term of mailing authenticity in commercial matters, Article 44 of the Commercial Courts Law and Procedures states that all signed mailings are considered authentic and creditable to all parties, as any signed legal documents among parties to a contract are unless the sending party proves that it did not post a specific mail.<sup>1067</sup> This rule is also official recognition of parties' communication out of court, which is one of the main requirements of discovery practice. This is an improvement in the Saudi legal system that will facilitate the adoption of a formal discovery regime.

In terms of witness testimony in commercial cases, Clause 1 of Article 50 of the Commercial Courts Law and Procedures, similar to the testimony rules in the Civil Procedure Law, authorizes the court to interrogate the witness and ask whatever questions the court believes it

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<sup>1065</sup> Commercial Courts Law, *supra* note 1036, Art. 38.

<sup>1066</sup> *Id.*

<sup>1067</sup> *Id.* Art. 44.

needs to find the facts and clarify the truth about the parties' dispute.<sup>1068</sup> Clause 2 of Article 50 in the Commercial Courts Law and Procedures is unprecedented in Saudi laws because it permits adverse parties to be involved in the fact-finding process by cross-examining witnesses directly outside of the courtroom under the court supervision.<sup>1069</sup> The executive regulation of Article 50 of the Commercial Courts Law and Procedures specifies the conditions and legal procedures needed to conduct this kind of cross-examination to find the facts.<sup>1070</sup> This new legal procedure allowed in the Saudi legal system is quite similar to the cross-examination procedure under the FRCP in the United States legal system. This is a step forward establishing a formal regime for Saudi litigants, such as the discovery regime in the United States, to engage considerably in the fact-finding process in their cases.

Article 54 of the Commercial Courts Law and Procedures is also unprecedented in Saudi laws since it grants parties in commercial disputes the right to cross-examine each other directly to find the facts about their disputes without the court being involved in this cross-examination.<sup>1071</sup> The executive regulation of Article 54 provides more detailed information about the procedures, conditions and circumstances in which this direct cross-examination may take place.<sup>1072</sup> Article 54 of this law is also a step forward in establishing a comprehensive regime through which litigants

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<sup>1068</sup> *Id.* Art. 50

<sup>1069</sup> Commercial Courts Law, *supra* note 1036, Art. 50.

<sup>1070</sup> *Id.*

<sup>1071</sup> *Id.* Art. 54

<sup>1072</sup> *Id.*

in Saudi proceedings can substantially be engaged in finding the facts about their disputes (discovery of evidence), which is the main goal of producing this dissertation.

Article 55 of the Commercial Courts Law and Procedures widens the scope of reliable pieces of evidence in commercial cases.<sup>1073</sup> This article establishes the unprescribed credibility of the electronic means by considering it as independent valid evidence to prove allegations before commercial courts.<sup>1074</sup> Article 55 stipulates that the drafters of the executive regulation of this law must specify the methods to examine the validity of any electronic materials and the procedures through which these materials must be submitted to court and to adverse parties.<sup>1075</sup> Note that electronic proofs are considered in Islamic Law as well as Saudi laws in general as presumptions and supporting materials only. Courts mostly do not ground their rulings on these types of materials but use them as secondary persuasive means only. The electronic methods of proofs may be considered as solid independent proofs only if the party who produces them can prove their authenticity.<sup>1076</sup>

These electronic means include, but are not limited to, electronic documents, electronic media, emails, electronic means of communication, electronic records, and any other electronic means of proof specified in the executive regulation of Article 55 of the Commercial Courts Law

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<sup>1073</sup> *Id.* Art. 55

<sup>1074</sup> *Id.*

<sup>1075</sup> Commercial Courts Law, *supra* note 1036, Art. 55.

<sup>1076</sup> *Id.*

and Procedures.<sup>1077</sup> This article is considered as an unprecedented legal recognition of electronic means providing valid evidence without requiring any other supportive materials. This recognition considerably facilitates the revolutionary alteration in the scope and limits of valid supportive materials that would most likely occur after the adoption of a discovery regime in the Saudi legal system. This recognition in commercial law can also result in greater judicial recognition of electronic methods of proof as solid proof on which the court's adjudication is grounded in other civil courts.

Article 93 of the Commercial Courts Law and Procedures states that the rules of the Civil Procedure Law are the main reference for the Commercial Courts Law and Procedures in the event that a legal matter is not precisely discussed in the law.<sup>1078</sup> In this circumstance, the Civil Procedure Law rules will apply to all the commercial cases that fall within the jurisdiction of commercial courts.<sup>1079</sup> This application of the rules Civil Procedure Law is to fulfill any legal gap that may exist during the application of the newly enacted law, the Commercial Courts Law and Procedures. This application, however, must not contradict the legal nature of commercial lawsuits, which considers the importance of speed and trust among parties in the commercial sector.<sup>1080</sup>

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<sup>1077</sup> *Id.*

<sup>1078</sup> *Id.* Art. 93

<sup>1079</sup> The reason for this referral is because the legislation in Saudi Arabia considers the Civil Procedure Law as the main procedural source for all the other procedural laws in the country, including the Commercial Courts Law and Procedures.

<sup>1080</sup> Commercial Courts Law, *supra* note 1036, Art. 93.

Article 94 of the Commercial Courts Law and Procedures points to the Ministry of Justice to establish within its organizational structure a new department that conducts commercial judicial studies.<sup>1081</sup> The personnel of this department must consist of judges, legal researchers, and technicians. The main goal of this department would be to conduct legal research and prepare studies related to improving the practice of commercial law.<sup>1082</sup> This department would also have to monitor the enforcement the Commercial Courts Law and Procedures and its executive regulation.<sup>1083</sup> One additional duty of this department would be to provide legal advice in matters referred to it by commercial tribunals or any other official legal entity.<sup>1084</sup>

Due to the crucial practical role that this new study department will play in commercial law, this dissertation will be submitted to this department, in addition to other legal and legislative entities in Saudi Arabia. The reason for this submission is to allow the experts in this department to be able to examine the proposal of this dissertation and consider how the Saudi legal system can take advantage of adopting a discovery regime, especially in the land of commercial law.

In sum, Section 5.2 addressed recent amendments in the Saudi commercial system that encourage the early disclosure of evidentiary materials, including some improvements favoring expedited litigation as well as early disclosure of information in commercial cases. Section 5.2 also discussed amendments to allow parties in commercial cases to exchange their legal documents

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<sup>1081</sup> *Id.* Art. 94

<sup>1082</sup> *Id.*

<sup>1083</sup> *Id.*

<sup>1084</sup> *Id.*

electronically to facilitate this process. It also considered new rules for holding compulsory preliminary sessions in commercial litigation to establish the roadmap of the case. The last subsection of Section 5.2 discussed some articles of newly enacted law in Saudi Arabia: The Commercial Courts Law and Procedures. The discussion in this subsection paid special attention to the new rules in this law that adopt some aspects of discovery practice in the commercial disputes in the Saudi legal system.

The main goal of the next section, Section 5.3, is to discuss some arguments regarding the incompatibility of the United States discovery regime with the civil law system. The arguments in Section 5.3 include a discussion about the applicability of the United States discovery practice in some European civil law jurisdictions. This includes addressing the differences in the civil procedure systems of the United States and those of civil law jurisdictions as well as examining a comparative perspective in a procedural contrast between the United States and Germany. The last subsection of Section 5.3 considers the experience of some civil law countries which have adopted a formal regime in their legal systems to practice discovery.

## 5.3 Examination of the Incompatibility of the United States Discovery with Civil Law Systems

### 5.3.1 The United States Discovery Practice and European Jurisdictions

Professor Vivian Curran,<sup>1085</sup> in her article *U.S. Discovery and Foreign Blocking Statutes*, nicely expresses the status of United States discovery practice in Europe. She also discusses enacted blocking statutes in some European countries that prevent the excessive use of United States discovery tools in these countries' judicial jurisdictions. Prof. Curran states in this regard:<sup>1086</sup>

France and Germany enacted blocking legislation in response to what those countries considered the excessive and abusive intrusion of American litigants into the affairs of their companies, often by competing companies. Further, in Continental Europe, the American-style pretrial evidence acquisition is not permissible within domestic practice. In both France and Germany, a deeply entrenched principle of law, directly derived from Roman law, shields parties from an obligation to assist their opponent in litigation. This principle of law, however, exists in an overarching legal system in which the legal representatives are committed to assisting in a search for the truth that is less partisan than the American equivalent of zealous advocacy. The judge, rather than the parties, conducts that search for the truth. ... In France and Germany, documents and other information in the possession of an adversary can be requested only through the judge and then only with specificity. Thus, in advance of the request to the judge for discovery from the other party, an adversary would need to know what information the other party possesses and be able to explain to the judge how that information is relevant to the requesting party's case. Normally, only the judge, rather than the parties, can request information in the form of documents or other pertinent facts from each party and direct the course of information gathering. Because

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<sup>1085</sup> Vivian Curran is an American lawyer and currently a distinguished faculty scholar and a Professor of Law at University of Pittsburgh School of Law. She is also the President of American Society of Comparative Law.

<sup>1086</sup> Vivian Grosswald Curran, *U.S. Discovery and Foreign Blocking Statutes*, 76 LA. L. REV. 1141, 1167-69 (2016).

American litigants are not used to seeking judicial approval for each document sought and each witness questioned, many of those litigants have a tendency to arrange for American-style discovery in France and Germany without the knowledge of French or German legal authorities. ... On the other hand, to the nation whose legal system has fundamental problems with the nature of U.S. discovery in terms of privacy and other concerns discussed herein, U.S. discovery seems both extraterritorial and a breach of its national sovereignty. Similarly, when foreign nations enact blocking statutes that forbid information from being divulged in U.S. pretrial discovery, the blocking laws have an extraterritorial effect to the extent that they will impact legal rights and options of U.S. litigants in actions brought in a U.S. court, and intrude on the jurisdiction of the U.S. court.

In regard to the applicability of the current United States discovery practice in some jurisdictions that adopt the civil law system, Professor Curran also states:<sup>1087</sup>

Of course, as of December 1, 2015, the Federal Rules of Civil Procedure as they relate to discovery also underwent amendment. Although the thrust of the amendments has been to curtail “fishing expeditions” or the excessive scope of discovery, the amendments do not impinge on the basic nature of discovery in the United States. American discovery remains vast and oriented to allowing parties to conduct their own search for information, without specific knowledge of the nature of an adversary’s information, and with a concomitant obligation to produce the same to the adversary, the very aspects that cannot be adapted to Continental European systems of law. ... An eminent French lawyer and former cabinet minister has suggested that discovery in transnational litigation as it has developed in the United States since *Aérospatiale* may constitute a violation of the European Convention on Human Rights. She argues that such discovery denies a foreign party a fair trial (*procès équitable*) inasmuch as failure to comply with discovery may deprive a foreign corporation of its own right to present evidence under the Federal Rules, a violation of one of the most fundamental rights of every French (and other Continental European and every EU Member State) litigant’s rights. This right is known in French as the right to present opposing evidence or, literally, as the principle or benefit of the contradictory (evidence): *le principe ou le bénéfice du contradictoire*. ... Clearly, the Hague

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<sup>1087</sup> Curran, *supra* note 1085, at 1171-72.

Convention on Evidence has not solved the problem of foreign evidence gathering. No doubt one can describe the problem as the insistence of United States courts to elude the treaty. The deeper problem is that discovery is an entrenched, fundamental right of the American litigant. Further, from the start, the Hague Convention has included an opt-out provision allowing foreign states to refuse such discovery. Civil law nations and their courts have a duty to protect their citizens from the reach of American discovery as much as their United States counterparts have a duty to exercise discovery.

The United States discovery rules, therefore, are not applicable in most European legal systems especially, France and Germany, which are civil law jurisdictions. This is because these countries have statutes that block taking discovery according to United States discovery style. One reason for enacting these blocking laws is that United States discovery practice infringes upon several privacy laws enacted in these countries. Conducting discovery in many civil law jurisdictions is, therefore, very difficult due to such blocking statutes.

Even though few privacy regulations exist in the Saudi legal system, which is closer to being a civil law system, the legislature in Saudi Arabia may need to revise privacy provisions to accommodate a discovery regime in legal system. One example for this revision occurred upon the enactment of the Saudi Commercial Courts Law and Procedures, which is discussed in the previous section. The reason for this revision of the privacy laws is to accommodate the initial disclosures and discovery rules that this law adopts.

### 5.3.2 Differences in Civil Procedure Between the United States and Civil Law Jurisdictions

The most important difference in the civil litigation system between the common law and civil law countries is related to the process of pretrial discovery.<sup>1088</sup> This is because the "scope of discovery differs greatly between common law and civil code jurisdictions and is seen as a fundamental part of the litigation process in the former. The ability to obtain and the obligation to provide information in the course of litigation is part of the process in common law jurisdictions."<sup>1089</sup> The ground for this fundamental distinction between the two systems is the belief inherent in the legislation in common law countries that "the most efficient method for identifying the issues in dispute is the extensive exchange of information prior to the matter being heard by

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<sup>1088</sup> Langbein, *supra* note 1005, at 831, where *Langbein* states that "part of what makes our discovery system so complex is that, on account of our division into pretrial and trial, we have to discover for the entire case. We investigate everything that could possibly come up at trial, because once we enter the trial phase we can seldom go back and search for further evidence. By contrast, the episodic character of German fact-gathering largely eliminates the danger of surprise; if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time. Because there is no pretrial discovery phase, fact-gathering occurs only once; and because the court establishes the sequence of fact-gathering according to criteria of relevance, unnecessary investigation is minimized. In the Anglo-American procedural world, we value the early-disposition mechanism, especially summary judgment, for issues of law. But for fact laden issues, our fixed sequence rule (plaintiff's case before defendant's case) and our single-continuous-trial rule largely foreclose it."

<sup>1089</sup> Council Directive 95/46, art. 29, 2009 O.J., Pre-Trial Discovery for Cross Border Civil Litigation (EC), at 3 [hereinafter Council Directive 95/46].

the court. This is particularly the case in the United States where the scope of pre-trial discovery is the widest of any common law country."<sup>1090</sup>

To distinguish the difference between the European and the American civil procedure systems more, some legal scholars of the European laws write:<sup>1091</sup>

In the US, once litigation has been commenced, companies must comply with the obligations imposed by US litigation procedure, not just under Federal but also under the State rules of civil procedure which encourage parties to exchange materials prior to trial. This includes not just the discovery of relevant information but also of information that itself may not be of direct relevance but could lead to the discovery of relevant information (the so-called 'smoking gun'). This is in contrast to the situation that exists in many European civil code jurisdictions where 'fishing expeditions' are forbidden. ... However, US courts too can restrict via stipulative protective order voluntarily or if one party requests it, the scope of excessively broad pre-trial discovery requests as they have the power under the Rules to limit the frequency or extent of use of discovery methods for various reasons including obtaining the information from a more convenient source, or where the burden or expense of the proposed discovery outweighs its likely benefit. The courts may also make via this Protective Order to protect a person or party from annoyance, embarrassment, oppression or undue burden or expense by, for example, ordering that disclosure or discovery may be had only on specified terms and conditions, including the method or the matters to be considered. ... It is likely therefore that a judge in a US court will grant a request for discovery as long as that request is reasonably aimed at the discovery of admissible evidence and does not contain impracticable demands.

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<sup>1090</sup> *Id.*

<sup>1091</sup> *Id.* at 4.

Professor Hein Kötz<sup>1092</sup> in his article *Civil Justice Systems in Europe and the United States* discusses the different methods of finding the facts of a case between Europe and the United States.<sup>1093</sup> He addresses the procedure of testimony in the German civil justice system and how it

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<sup>1092</sup> Professor Hein Kötz is the Emeritus Director, Max Planck Institute for Comparative and International Private Law, former president of the Bucerius Law School. Professor Kötz delivered the inaugural Herbert L. Bernstein Memorial Lecture on September 10, 2002, at Duke University School of Law. A friend and colleague of Professor Bernstein, Professor Kötz is co-author of Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (3rd ed. transl. Tony Weir 1998).

<sup>1093</sup> Many legal scholars have described the system of civil procedure in the civil law jurisdictions. Some European scholars who examined the systems of civil procedure in different European civil law countries state that "[b]y way of contrast with the transparency required discovery process in the US and other common law countries, most civil code jurisdictions have a more restrictive approach and often have no formal discovery process. Many such jurisdictions limit disclosure of evidence to what is needed for the scope of the trial and prohibit disclosure beyond this. It is for the party to the litigation to offer evidence in support of its case. Should the other side require that information, the burden is upon them to be able to know and identify it. The French and Spanish systems, for example, restrict disclosure to only those documents that are admissible at trial. Document disclosure is supervised by the judge who decides on the relevance and admissibility of the evidence proposed by the parties. ... In Germany e.g., litigants are not required to disclose documents to the other party; instead, a party needs only to produce those documents that will support its case. Those documents must be authentic, original and certified but the party seeking the document must appeal to the court to order the production of the document. This appeal must be specific in the description of the document and must include the facts that the document would prove and the justification for having the document produced. If the document is in the possession of a third party, the document seeker must obtain permission from the third party. If permission is refused, the seeker must commence proceedings against the holder of the documents." See Council Directive 95/46, *supra* note 1088, at 4-5.

is dissimilar to the United States witness testimony procedure under the discovery process. Professor Kötz states in this regard:<sup>1094</sup>

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<sup>1094</sup> Hein Kötz, *Civil Justice Systems in Europe and the United States*, 1 CENTER FOR INTERNATIONAL & COMPARATIVE LAW OCCASIONAL PAPERS 1, 3-4 (2009); see also Langbein, *supra* note 1005, at 834-40, where *Langbein* writes that "German civil procedure preserves party interests in fact-gathering. The lawyers nominate witnesses, attend and supplement court questioning, and develop adversary positions on the significance of the evidence. Yet German procedure totally avoids the distortions incident to our partisan witness practice." In addition, *Langbein* in regard of experts' roles in both American and German civil proceedings states that "[t]he European jurist who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. In the Continental tradition experts are selected and commissioned by the court, although with great attention to safeguarding party interests. In the German system, experts are not even called witnesses. They are thought of as 'judges' aides.' ... Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side. ... At trial, the battle of experts tends to baffle the trier, especially in jury courts. If the experts do not cancel each other out, the advantage is likely to be with the expert whose forensic skills are the more enticing. The system invites abusive cross-examination. Since each expert is party-selected and party-paid, he is vulnerable to attack on credibility regardless of the merits of his testimony." *Langbein* concludes his arguments about experts by stating that "[i]n the use of expertise German civil procedure strikes an adroit balance between nonadversarial and adversarial values. Expertise is kept impartial, but litigants are protected against error or caprice through a variety of opportunities for consultation, confrontation, and rebuttal."

It is indeed a routine business meeting an American lawyer will believe he is attending when he is led into a German courtroom. What is most likely to strike him is the fact that mainly the court conducts the interrogation of witnesses. It is the court that will ask for the witness's name, age, occupation, and residence. It is the court that will then invite the witness to narrate, without undue interruption, what he knows about the matter on which he has been called. After the witness has given his story in his or her own words the court will ask questions designed to test, clarify, and amplify it. It is then the turn of counsel for the parties to formulate pertinent questions. But in an ordinary case there is relatively little questioning by counsel for the parties, at least by common law standards. One reason is that the judge will normally have covered the ground. Another reason is that for counsel to examine at length after the court seemingly has exhausted the witness might appear to imply that the court does not know its business, which is a dubious tactic. There is no cross-examination in the sense of the common law, nor is there a full stenographic transcript of the testimony. Instead, the judge himself pauses from time to time to dictate a summary of what the witness has said so far. At the close of testimony, the clerk will read back the dictated summary in full, and either witness or counsel may suggest improvements in the wording. If the exact phrasing of a particular part of the testimony is believed to be of critical importance, counsel may insist on having it set down verbatim in the minutes. ... A similar system is used with respect to expert witnesses. ... In Germany, as indeed, in most Continental countries, the expert will be selected and appointed by the court after consultation with the parties. It is the court that will conduct his examination, and it is the court that will advance the expert's fees eventually to be borne by the losing party. In the common law it is up to the parties, or rather their lawyers, to find suitable experts who will then be examined and cross-examined in the same way as ordinary witnesses...

In regard to judges' engagement in the process of fact finding in civil cases in both the German and the United States systems, Professor Hein Kötz states:<sup>1095</sup>

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<sup>1095</sup> Kötz, *supra* note 1093, at 5-6; see also Langbein, *supra* note 1005, at 827-28, where the author states "Unlike an American complaint, however, the German document proposes means of proof for its main factual contentions. The major documents in the plaintiff's possession that support his claim are scheduled and often appended; other

After all, it is fairly clear to an attorney that the judge would take a dim view of the reliability of a witness who previously had been closeted for long periods with counsel. ... Civil procedure in Germany and in other civil law jurisdictions differs from the American system by making the judge responsible for the selection of expert witnesses, for the examination-in-chief of both fact and expert witnesses, and for creating the record based on those examinations. The judge's conspicuous role in the actual taking of evidence, especially in the taking of witness testimony, has led common lawyers to label Continental civil procedure as "inquisitorial" or "nonadversarial." ... In my view, however, this is not only misleading, but also downright wrong. All arguments generally praising the virtues of the adversarial

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documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified. The defendant's answer follows the same pattern. It should be emphasized, however, that neither plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client. Digging for facts is primarily the work of the judge. ... The judge to whom the case is entrusted examines these pleadings and appended documents. He routinely sends for relevant public records. These materials form the beginnings of the official dossier, the court file. All subsequent submissions of counsel, and all subsequent evidence-gathering, will be entered in the dossier, which is open to counsel's inspection continuously. ... When the judge develops a first sense of the dispute from these materials, he will schedule a hearing and notify the lawyers. He will often invite and sometimes summon the parties as well as their lawyers to this or subsequent hearings. If the pleadings have identified witnesses whose testimony seems central, the judge may summon them to the initial hearing as well." *Langbein* also writes in regard of the judge's role in finding the facts in the German civil cases that "the judge who gathers the facts soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved. As the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the likely outcome. He is, therefore, strongly positioned to encourage a litigant to abandon a case that is turning out to be weak or hopeless, or to recommend settlement. The loser pays system of allocating the costs of litigation gives the parties further incentive to settle short of judgment." *See Langbein, supra* note 1005, at 831-32.

system of the common law and contrasting them with the vices of the inquisitorial system ascribed to the civil law are misguided and, in Herbert Bernstein's words, 'cannot advance, even by an inch, the comparative analysis of German and American civil procedure.' ... The truth is that both in the American and Continental civil justice systems, the power to establish the facts on which the judicial decision rests is reserved to the decision-makers, whether the trial judge or jury in the United States, or the court on the Continent. On the other hand, it is in both systems exclusively for the parties and their lawyers to identify the facts they think will support the claim or defense, to make the appropriate factual allegations, and to nominate the witnesses and the facts of which they allegedly have knowledge.

Professor Hein Kötz concludes his argument about the distinction between civil procedures in Germany and the United States by writing:<sup>1096</sup>

It follows that in their own ways both the German and American systems are adversary systems of civil procedure. In both systems the lawyers advance partisan positions from first pleadings to final arguments. In both systems the parties and their lawyers investigate and identify in their briefs the facts they think will support their claims and defenses. In both systems the court cannot go beyond the parties' factual contentions nor can the court strike out on its own in the search for what it believes might be the real truth.

The reasons for this distinction between civil and common law jurisdictions should be addressed to evaluate the basis on which each system relies. Professor Hein Kötz states some reasons for the current system of civil procedure in the United States. He writes in this regard:<sup>1097</sup>

I do not think, however, that the civil jury is the only or even major villain of the piece. True, it is because of the jury that the trial must be carried out as a single-episode courtroom drama, and it is because of the trial as a concentrated event that pre-

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<sup>1096</sup> Kötz, *supra* note 1093, at 7.

<sup>1097</sup> Kötz, *supra* note 1093, at 13.

trial discovery procedures are needed to handle the surprise problem. But it seems to me that discovery in the form practiced today in the United States goes far beyond the mere prevention of courtroom ambush. Rather, discovery allows a party to search and indeed 'fish' for information in opponent's and non-parties' hands under a very liberal standard of relevancy requiring only that the search be 'reasonably calculated to lead to the discovery of admissible evidence.' It has been said that it is possible and by no means rare in the United States for a plaintiff to bring a lawsuit in order to discover whether he might actually have one. Aggressive discovery in the American style is unknown not only in Continental procedure but also in English procedure as well. Of course, all procedural systems must balance the importance of truth for the fact-finding process against the need to protect areas of business and personal privacy from unreasonable invasion. But not all systems will strike the same balance between the two goals. It is evident that the breadth of American discovery rules comes down more heavily on the side of privacy in civil litigation. ... Nonetheless, I think an argument can be made for American discovery methods despite the excesses to which they are prone. Consider the type of case in which full-dress discovery proceedings will normally take place. In many of those cases, the lawsuit is not only a dispute between private individuals about private rights, but also a grievance about the operation of public policy or the vindication of the public interest.

According to these excerpts of scholarly publications, fundamental civil procedural differences exist between the United States system and civil law systems, especially in the pretrial discovery practice. Discovery is a major part of the civil litigation in the United States since the main method to find facts and identify issues is conducted by the parties themselves through initial disclosures and discovery. This is unlike the methods to collect facts and evidentiary materials in most civil law jurisdictions, in which the court plays the main role in the facts finding process, including examining evidentiary materials and hearing testimonies. The court's involvement in civil litigation also differs between the United States and European civil law jurisdictions.

Due to these major differences between common and civil law systems, the Saudi legislature must consider these distinctions upon setting discovery rules in the legal system. This

is because the civil litigation in Saudi Arabia depends mainly on tribunals in terms of fact finding. Judges are the ones in charge of the litigation management with minor involvement of parties upon the judge's directions. This judge's role would be altered to some extent upon adopting a discovery regime in the Saudi legal system, since parties would be fundamentally engaged in finding the fact and identifying the issues in their case by cooperating with each other and with the court.

Because of these major distinctions between the United States discovery system and the civil law jurisdictions, including Saudi Arabia, the United States discovery style may not be fully compatible with the Saudi legal system. The United States discovery practice may be adopted partially in Saudi Arabia in case such distinctions exist. This is to avoid any major disagreements between the discovery practice and the main legal principles on which the Saudi legal system relies. Saudi Legislature will not pass any legal process that may conflict with the Public Policy or any superior laws in Saudi Arabia. This dissertation tries to provide a proposed discovery regime for the Saudi legal system that complies with such regulations as much as possible. Therefore, Appendix A in this dissertation provides a proposed model legislation for a discovery regime in Saudi Arabia. This model provides more information about the discovery rules that Saudi Arabia should adopt as part of its Civil Procedure Law.

### 5.3.3 A Comparative Perspective in a Procedural Contrast between the United States and Germany

Professor Hein Kötz considers Professor John Langbein's<sup>1098</sup> article *The German Advantage* to address the practical features of the German civil procedural system in contrast with the disadvantages of the United States fact-gathering system and to distinguish the differentiation between the two legal system.<sup>1099</sup> Professor Kötz examines Professor Langbein article and writes:<sup>1100</sup>

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<sup>1098</sup> *John H. Langbein* is Sterling Professor Emeritus of Law and Legal History and Professorial Lecturer in Law in Yale Law School. He is an eminent legal historian and a leading American authority on trust, probate, pension, and investment law. He teaches and writes in the fields of Anglo-American and European legal history, modern comparative law, trust and estate law, and pension and employee benefit law (ERISA). He has long been active in law reform work. For more information about Professor John H. Langbein see <https://law.yale.edu/john-h-langbein>.

<sup>1099</sup> Professor Hein Kötz concludes his article by advising to reform the current system of civil procedure in the United States to achieve more effective fairness in civil litigations. He states that "[t]he typical case at which the German system is aimed involves a comparatively small amount of money, raises no major issue of public policy, and is merely a dispute between private parties about private rights. In such cases it obviously makes sense to give the judge a leading role in the examination of witnesses and wider powers over the evidentiary process, thereby reducing considerably the amount of lawyer effort and cost in exchange for a modest increase in effort and activity on the part of the judge. This is where I think the advantages and the strength of the European procedural systems lie. If there is a desire to reform American civil procedure so as to provide effective justice for the 'little guy', either by making changes within the traditional system or by developing alternative methods of dispute resolution, then the Continental experience may well be a worthwhile object of study." See Kötz, *supra* note 1093, at 15-16.

<sup>1100</sup> Kötz, *supra* note 1093, at 8-9

In a brilliant, if controversial, article John Langbein characterized the German procedural system as one in which the gathering of the facts was entrusted to, and controlled by, the judge. In his view, judicially dominated fact-gathering is the hallmark of the German system and constitutes the major 'German advantage' as compared with the system prevailing in the United States. I am not sure whether it is wholly appropriate to describe the court's job as that of 'gathering the facts'. After all, it is the parties and their lawyers who will investigate the facts, discuss them with their clients, select what will be presented to the court, indicate means of proof, and thus 'gather' the factual materials with which the court must work. This is why the German system is an adversarial system. However, once the parties have supplied the factual materials and the time has come to investigate the truth of the parties' allegations, evaluate the evidence, and find the facts on which the decision is to be based, the German judge has fairly strong control over the procedure. He may disregard proof offers, which, according to strict criteria of relevance, might safely be overlooked. Nor are there any binding rules on sequence, such as 'plaintiff's case before defendant's case'. Instead the judge is encouraged to range over the entire case and concentrate the inquiry on those issues most likely to result in an expeditious disposal of the matter. While the court can only call witnesses nominated by the parties, it does exercise discretion as to the order and number of the witnesses and plays a vigorous role in acting as the examiner-in-chief of the witnesses. ... John Langbein's attack on American civil procedure and his praise for the German counterpart have stirred up a lively debate in this country. Some critics accept that strengthening the court's role in the evidentiary process would save time and money, reduce the wastefulness and complexity of pre-trial and trial procedure, and cut down on the distortions inherent in the system of partisan preparation and production of witnesses and experts. They argue, nevertheless, that such a move would be incompatible with the traditional roles of lawyers and judges in this country and fly in the face of significant and ineradicable features of American legal culture. On the one hand, John Langbein has rightly admonished us not 'to allow the cry of "cultural differences" to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example.' On the other hand, cultural differences do explain something of why institutional and procedural differences arise in different legal systems and why transplanting legal institutions from one society to another may be more difficult in

one case than in another. The important question is what weight to attach to this factor for present purposes. John Langbein's answer is: 'Not much'<sup>1101</sup>

Professor John H. Langbein, in his article *The German Advantage*, criticizes the current United States civil procedure system's fact finding and compares it with the German system's. Professor Langbein states:<sup>1102</sup>

Defenders of the American status quo may take too much comfort from these observations. A main virtue of German civil procedure, we recall, is that the principle of judicial control of sequence works to confine the scope of fact-gathering to those avenues of inquiry deemed most likely to resolve the case. Fact-gathering occurs when the unfolding logic of the case dictates that investigation of particular issues is needed.

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<sup>1101</sup> Also see Langbein, *supra* note 1005, at 855 where Professor *Langbein* writes about the differences in cultural values that "[c]ultural differences surely do explain something of why institutional and procedural differences arise in different legal systems. The important question for present purposes is what weight to attach to this factor, and my answer is, 'Not much.' It is all too easy to allow the cry of 'cultural differences' to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example. Cultural differences that help explain the origins of superior procedures need not restrict their spread. If Americans were to resolve to officialize the fact-gathering process while preserving the political prominence of the higher bench, we would probably turn initially to some combination of judges, magistrates, and masters for getting the job done. Over time, we would strike a new balance between bench and bar, and between higher and lower judicial office. ... The rise of American managerial judging should put us on notice that we may no longer have the leisure to decide whether we want more judicial authority over civil litigation. If greater judicial control of civil proceedings is inevitable, greater attention to safeguarding litigants' interests against abuse of judicial power must follow. The German model should inspire attention to the way judicial career incentives (above all, meritocratic selection, review, and promotion) can serve as safeguards for litigants."

<sup>1102</sup> Langbein, *supra* note 1005, at 846-47.

That practice does indeed contrast markedly with the inclination of American litigators 'to leave no stone unturned, provided, of course, they can charge by the stone.' The primary reason that German courts do less fact-gathering than American lawyers is that the Germans eliminate the waste. Likewise, when American observers notice that there is less harrying of witnesses with 'those elaborate testings of credibility familiar to American courtrooms,' I incline to think that the balance of advantage rests with the Germans, since so much of what passes for cross-examination in our procedure is deliberately truth- defeating.

Professor John H. Langbein offers many proposals to overhaul the United States civil procedure system by borrowing some judicial aspects of the German civil procedure system. One of Professor Langbein's proposals is related to the demand to enhance the United States managerial judging system to make it similar to the German system. Langbein states in this regard:<sup>1103</sup>

Viewed from the perspective of comparative law, therefore, American managerial judging displays contrasting tendencies. On the one hand, it exhibits convergence toward the Continental model of judicial domination of the fact-gathering process. On the other hand, the haphazard growth of managerial judging has not been accompanied by Continental-style attention to safeguarding litigants against the dangers inherent in the greatly augmented judicial role. The career incentives for our judiciary are primitive, and the standards of appellate review barely touch the pretrial process. ... The trend toward managerial judging is irreversible because the trend toward complexity in civil litigation that gave rise to managerial judging is irreversible. If we were to learn from the success of the long-established German tradition of managerial judging, we would not only improve our safeguards, we would encourage more complete judicial responsibility for the conduct of fact-gathering. For example, we might have the judge (or a surrogate such as a master or a magistrate) depose witnesses and assemble the rest of the proofs, working in response to adversary nomination and under adversary oversight as in German procedure. We might then be able to forbid the adversaries from contact with witnesses--in other words, we could abolish the coaching that disgraces our civil justice. We would also be able to routinize the use of court appointed experts. And if we were to concern ourselves with devising

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<sup>1103</sup> Langbein, *supra* note 1005, at 861-62&866.

a standard of appellate review appropriate to the seriousness of managerial judging, we might want to experiment with the German technique of succinct recordation of evidence. ... Regardless of where managerial judging is headed for the future, it has already routed adversary theory. I take that as further support for the view advanced in Part V that adversary theory was misapplied to fact-gathering in the first place. Nothing but inertia and vested interests justify the waste and distortion of adversary fact-gathering. The success of German civil procedure stands as an enduring reproach to those who say that we must continue to suffer adversary tricksters in the proof of fact.

In a more recent article, *Trashing "The German Advantage,"*<sup>1104</sup> about reforming the civil procedure system in the United States in light of the German system example, Professor Langbein summarizes his main reformative suggestions proposed in *The German Advantage* article in (3) points:<sup>1105</sup>

In *The German Advantage*, I had three objectives. First, I wanted to make available a concise account of the main attributes of the Continental system that I know something about, the West German. ... Beyond description, the article had the further purpose of highlighting the main advantages that arise from the German tradition of judicial control of fact-gathering: (1) By having the trier control the sequence of fact-gathering, the Germans are able to minimize unproductive investigation; in contrast, our division between pretrial discovery and trial provides incentives for excessive

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<sup>1104</sup> In this article, Professor *Langbein* responds to a paper that criticized *The German Advantage* Article. He stated: "The German Advantage has become the foil for the paper [which is *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*] that appears in the previous pages of this journal. On a host of points, the Critique seriously misrepresents both the substance of *The German Advantage* and the reality of German procedure. Accordingly, this is a paper whose sad errand is to show how the Critique has distorted *The German Advantage*." See John H. Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763, 764 (1988).

<sup>1105</sup> *Id.* at 763-64.

search. (2) By having the court examine the witnesses, the Germans prevent lawyers from having pretrial contact with nonparty witnesses, thereby precluding the coaching of witnesses that disfigures our civil justice. (3) The Germans employ neutral experts whose duty is to aid the court in finding the truth, in contrast to the litigation-biased expert witnesses that American lawyers recruit and pay to bolster preordained results. ... My third objective in *The German Advantage* was to direct attention from a comparative perspective to the rise of American managerial judging. Complex litigation has required us to superimpose upon our lawyer-driven procedure a growing component of judicial management, including judicial involvement in identifying issues, promoting settlement, and sequencing investigation. These techniques are strongly reminiscent of German-style procedure.

After addressing the last two publications, which demonstrate the major differences between the United States and the German legal systems, it is quite evident that many essential differences exist between the common and civil law system that make the United States discovery style inappropriate or unsuccessful to some extent in civil law systems. This dissertation, therefore, provides in the following subsection examples of some civil law countries' experience with the discovery adoption in their civil procedural systems. This is to provide a more comprehensive idea about the nurture of discovery application in civil law jurisdictions, which would most likely assist the Saudi legislature to examine the discovery practice in both civil and common law systems. This would help the legislature to formulate a discovery regime that fits the Saudi legal system in the best way.

#### **5.3.4 The Experience of Some Civil Law Countries with Discovery Practice**

Some Asian civil law countries have in the last few decades adopted discovery regimes into their legal systems. These countries include Taiwan, which adopted discovery during the legal

reform that took place in the year of 2000,<sup>1106</sup> and Japan, which adopted a discovery regime in its new Code of Civil Procedure of 1996.<sup>1107</sup> Adopting discovery in the legal system of these countries

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<sup>1106</sup> Taiwan's reform of 2000 to amend the Taiwan Code of Civil Procedure (TCCP) "had two main themes: moving toward a concentrated proceeding and expanding parties' means of obtaining information. The reformed process is divided into two stages: the preparatory oral-argument session and the plenary oral-argument session. The information that each party plans to introduce at the plenary stage is required to be disclosed at the preparatory stage. Failure to comply with this requirement will result in a 'stage preclusion' sanction, whereby any information not timely disclosed at the preparatory stage will be precluded from introduction at the plenary stage. These reform measures enable a party to know what evidence his or her opponent plans to introduce and prevent each party from adopting the strategy of 'showing the cards last.' The primary goal of the 2000 reform was to expedite the adjudication process by narrowing the issues at an early stage and to render a subsequent concentrated proceeding feasible by allowing parties to make necessary preparations beforehand; however, this reform was also intended to promote settlement by bringing the parties' estimates of case outcome closer through early exchange of information. Even if the 2000 reform did not explicitly provide parties with the right to seek information directly from their opponents without the court's involvement, the above-mentioned stage preclusion sanction essentially functions like Type I discovery, as far as the information that would emerge at the plenary stage is concerned. This stage preclusion sanction forces parties to disclose at an early stage of litigation all the information they intend to introduce later. However, with regard to information that would not otherwise emerge at the plenary stage without discovery, the 2000 reform's effect is, at best, moderate. Specifically, the discovery devices of deposition, interrogatory, and request for admission are simply unavailable under the 2000 reform. The only significant expansion of the means of discovering evidence was documentary discovery. Prior to the 2000 reform, a party could not ask his or her opposing party to produce documents unless one of the specifically enumerated grounds for production existed. The 2000 reform broadened the scope of discoverable documents by making it a general duty of the holding party to produce a requested document. ... Although the reform adopted by Taiwan is not a discovery system in the U.S. sense, it is

has increased the number of civil cases that have been resolved through settlements.<sup>1108</sup> Kuo-Chang Huang<sup>1109</sup> in his empirical study, *Does Discovery Promote Settlement – An Empirical Answer*, states:<sup>1110</sup>

As a member of the civil-law family, Taiwan introduced the concept of discovery into its civil procedure by a 2000 reform. This empirical study shows that the settlement rate for civil cases in all the district courts indeed increased consistently over time following Taiwan's adoption of a discovery system. This article argues that Taiwan's successful experience provides evidence to support the theoretical prediction that the civilian system can enhance the settlement rate by introducing discovery into its civil procedure. ... Facilitating settlement is often advanced as one of the most important purposes of liberal discovery under the Federal Rules of Civil Procedure (FRCP).

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certainly a mechanism under which the disclosure of information is enforceable by legal rules, as contrasted to resting on parties' voluntary decision." See Kuo-Chang Huang, *Does Discovery Promote Settlement – An Empirical Answer*, 6 J. EMPIRICAL LEGAL STUD. 241, 252-54 (2009).

<sup>1107</sup> Huang, *supra* note 1105, at 244.

<sup>1108</sup> "Under the prevailing U.S. rule where each party has to bear its own litigation costs regardless of trial outcome, the plaintiff will accept a settlement offer only if it is no less than the plaintiffs expected gain from trial. Likewise, the maximum amount of settlement the defendant will be willing to offer must be no greater than the defendant's expected loss from trial. ... This settlement condition leads to the orthodox belief that parties will settle if and only if the defendant's expected loss from trial exceeds the plaintiffs expected gain. This settlement condition also indicates that settlement occurs when both parties gain a surplus from settlement over trial. The saving of trial costs constitutes the parties' incentive to settle." See Huang, *supra* note 1105, at 245-46.

<sup>1109</sup> Kuo-Chang Huang is a Taiwanese politician, activist, legal scholar, researcher, and writer. He is one of the lead figures of the Sunflower Student Movement and joined the New Power Party shortly afterwards. He served as leader of the party from 2015 to 2019 and has represented Taipei in the Legislative Yuan on behalf of the NPP since 2016.

<sup>1110</sup> Huang, *supra* note 1105, at 241-42.

Kuo-Chang Huang also addresses in this article that civil law countries may increase the possibility of going to settlements in civil cases by introducing a discovery process into their civil procedural systems similar to the United States discovery regime. In his empirical study, Kuo-Chang Huang also examines the examples of Japan and Taiwan, which have adopted discovery practice recently into their civil procedure systems, and accordingly, the settlement rates have noticeably increased in these two jurisdictions.<sup>1111</sup> Kuo-Chang Huang states:<sup>1112</sup>

After all, discovery has been a peculiar feature of U.S. civil justice, being so foreign to most countries as to be characterized as 'American exceptionalism.' However, the prospect has improved as some members of the civil-law family have started to introduce the concept of discovery into their civil procedure. The most famous example is Japan's new Code of Civil Procedure of 1996. Another less famous, but no less significant, example is Taiwan's reform in 2000. By introducing discovery into their civil procedure, both Japan and Taiwan claimed promotion of settlement as one of the intended purposes. Interestingly, this intended purpose was purely based on the goal designated by the FRCP, without considering that discovery's effect on settlement is still disputed in the United States. Today, the experiences of these two countries' innovation provide a great opportunity to empirically test the hypothesis that the civilian system could raise the settlement rate by introducing discovery. The findings of such an empirical study would bring valuable insights for comparative civil procedure scholarship.

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<sup>1111</sup> "Informational asymmetry will lead to failure of settlement. This is how discovery comes into play. Discovery forces parties to share private information, thereby bringing both parties' respective estimates of trial outcome closer. The above mechanism leads commentators to conclude that discovery has the effect of increasing the probability of settlement." See Huang, *supra* note 1105, at 247.

<sup>1112</sup> Huang, *supra* note 1105, at 244.

Mr. Kuo-Chang Huang, in *Does Discovery Promote Settlement – An Empirical Answer*, also conducted a comprehensive analysis to determine whether introducing the discovery regime in the Taiwanese legal system would cause an increase of the number of cases settled before going to trial. In concluding this study, Kuo-Chang Huang writes:<sup>1113</sup>

This empirical study shows that settlement rates in Taiwan's district courts increased after a discovery system was adopted in 2000. Although unable to rule out completely the possibility that some unknown factor is at work, this article, after taking into consideration all other variables available in the data, finds that the most plausible explanation is indeed the introduction of discovery. Although this empirical study may not bring too many insights to the various debates over advantages and disadvantages of the discovery system in the United States, Taiwan's successful experience does provide evidence to support the theoretical prediction that the civil-law systems could enhance settlement rate by introducing discovery into their civil procedure. To be sure, whether a civilian system should embrace the concept of discovery is a question too complicated to be answered by one study, but this article's result should enrich the debate by helping relevant theoretical analyses go beyond pure speculation.

In sum, Section 5.3 considered some arguments about the incompatibility of the United States discovery regime with civil law jurisdictions with a discussion about the applicability of the United States discovery practice in some European civil law jurisdictions. Section 5.3 also considered some differences in the civil procedure systems between the United States and civil law jurisdictions as well as offered a comparative perspective in a procedural contrast between German and the United States systems. The last subsection of Section 5.3 examined the experience of some civil law countries with adopting discovery as a formal regime in their legal systems.

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<sup>1113</sup> *Id.* at 275.

The following section, Section 5.4, discusses the compatibility of the discovery practice with Islamic Law and current Saudi laws and regulations. Section 5.4 shows how Islamic law has no restrictions on methods to prove parties' allegations in civil cases, which accordingly makes the discovery process adoptable within the Islamic Law. The following section also demonstrates the flexibility of Islamic Law to include within its scope new formal approaches to find facts and exchange materials between adverse parties in civil cases. It also mentions the restricted methods to prove charges against defendants under the Islamic Criminal Law. The last subsection of Section 5.4 discusses how discovery practice satisfies the justice requirements of Islamic Law rules.

## 5.4 The Compatibility of Discovery with Islamic and Saudi Laws

### 5.4.1 Islamic Law Has No Restrictions on Methods of Proof in Civil Cases

One of Islamic Law's features is that the provisions of the *Quran* and the *Sunnah* do not restrict the legal methods of proving people's legitimate rights in court.<sup>1114</sup> Even though Islamic Law recognizes some methods to prove disputed matters, such as hearing testimonies, taking oaths and considering experts' reports, this recognition does not mean that these methods are the only methods available to litigants to prove their allegations.<sup>1115</sup> Litigants, according to many Islamic Law scholars, can use any legal channel to demonstrate their legitimate justifications for relief as long as this channel does not conflict with the practical principles of Islamic Law.<sup>1116</sup>

Mr. Frank Vogel in his book *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* addresses this approach of the unrestricted use of proofs in civil cases to support litigants' allegations in Islamic Law and therefore Saudi laws. He writes:<sup>1117</sup>

Saudi judicial theory emphasizes fact-finding, treating it as a vital form of *ijtihad* [diligence]. Once again, we find support and explanation for this approach in Ibn al-Qayyim's works. Ibn al-Qayyim argues in an entire book, *al-Turuq al-hukmiyya*

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<sup>1114</sup> Al-Sheikh, *supra* note 35, at 15.

<sup>1115</sup> MOHAMMED IBN AL-QAYYIM AL JAWZIYYAH, *AL-TOROK AL-HUKMEAH FE AL-SIYASAH ALSHAREYAH [GOVERNANCE IN SHARIAH POLICY]* (1350), at 24; see also Ibn Al-Qayyim, *supra* note 892, at 96-97; see also Al-Zahaily, *supra* note 342, at 611.

<sup>1116</sup> Ibn Al-Qayyim, *supra* note 1114, at 24; see Ibn Al-Qayyim, *supra* note 892, at 96-97.; see also Al-Zahaily, *supra* note 342, at 612&617.

<sup>1117</sup> Vogel, *supra* note 112, at 144.

(recommended to me several times by Saudi qadis on the subject of evidence), that qadis [judges] should not cling mechanically to technical Fiqh rules of evidence, but should seek to know the truth by any means available. From this he advanced the idea, learned from Ibn Taymiyya, that the justice sought by the sharia cannot be found just in doctrine with no concern for reality and practical implementation. Sharia demands justice realized in the world, as far as human capacities allow. Sharia justice, if properly understood, cannot conflict with right reason, obvious fact, or practical justice. Criticizing those who limit themselves to certain canonical methods of evidence (essentially, testimony of two witnesses, confession, and oath), forgoing other sensible, practical methods of proof (for all of which he offers sharia precedent).

The principle of unlimited methods of proof in Islamic Law corresponds, in terms of civil lawsuits only and not criminal ones, with the doctrine of freedom of proof (or free access to proofs),<sup>1118</sup> a doctrine that some scholars confirm it is adopted in the current legal systems of some developed countries, such as the United States and Germany.<sup>1119</sup> This broad evidentiary approach to civil cases exists in Islamic Law because no valid clues are found in the context of the Holy

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<sup>1118</sup> The doctrine of freedom of proof can be defined as free access to information with the absence of formal rules that restrict such access to relevant information or document to use it as evidence in the case. Litigants may accordingly prove their allegations by all available means of proof because they are not limited to use certain ones.

<sup>1119</sup> Al-Zahaily, *supra* note 342, at 617&629. The author of this publication discusses the means of proof in Islamic law. He states that this approach to proof is adopted in these two countries and others. For this statement, the author cites seven well known legal publications in civil law written by well-known Arabic legal scholars, including Abdul-Razzaq Al-Sanhuri, Ahmad Nasha'at, and Abdul-Munem Al-Saddah.

book (*Quran*) or in the prophetic rules (*Sunnah*) or in any of their interpretations that restrict the methods of proof in civil cases to specific ones.<sup>1120</sup>

Some reasonable conditions apply, however, to the methods of proof in Islamic Law, such as using only methods that are legally permitted to prove litigants' allegations. Litigants may present any document that they possess to prove their claims or defenses, but, for example, they cannot use forged or unidentifiable documents, or anonymous or false witnesses in judicial proceedings to prove their allegations in court. If they do, adverse parties may challenge these documents and witnesses by all available means to prove forgery or perjury.<sup>1121</sup>

#### **5.4.2 Islamic Law Flexibility to Include New Approaches to Finding Facts and Obtaining Evidence**

Islamic Law can accommodate within its scope any formal modern method to ascertain facts during judicial proceedings to prove parties' allegations. These methods, however, must not involve any explicit contradictions with the major evidence principles in Islamic Law rules.<sup>1122</sup> The reason for this flexibility in the methods of proof in civil cases is to simplify the burden to proof for litigants throughout the ages by allowing the litigants to prove their legal rights by all the

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<sup>1120</sup> Ibn Al-Qayyim, *supra* note 1114, at 24; see also Ibn Al-Qayyim, *supra* note 892, at 96-97; see also Al-Zahaily, *supra* note 342, at 612.

<sup>1121</sup> Vogel, *supra* note 112, at 146.

<sup>1122</sup> Al-Sheikh, *supra* note 35, at 16.

available means at that time.<sup>1123</sup> This is related to the well-known concept that Islamic Shariah is suitable for all eras and places.<sup>1124</sup> As a requirement to fulfill this concept, the Islamic legal system should be flexible in adopting any demanding modern legal rules.<sup>1125</sup>

Two main conditions mentioned in Islamic jurisprudence restrict this flexibility to adopt modern rules to be part of the practical rules of Islamic Law, including the rules related to methods of proof. One condition is that the rules in question must be scholarly proved, by legislative experts, as beneficial rules that will improve the legal practice. The other condition is that these rules must not contradict any of the major practical rules of Islamic Law.<sup>1126</sup> If these two conditions are fulfilled, these modern legal rules would most likely be recognized as new legal aspects of Islamic Law. This is one of the advantages of Shariah that makes it appropriate to be applied over time.<sup>1127</sup>

### **5.4.3 Restricted Methods of Proof in Islamic Criminal Law**

Unlike the methods of proof in criminal cases in many current legal systems, Islamic and Saudi laws restrict the method of proof in criminal cases to extremely specific methods to prove

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<sup>1123</sup> Al-Zahaily, *supra* note 342, at 619.

<sup>1124</sup> Al-Sheikh, *supra* note 35, at 54.

<sup>1125</sup> *Id.* at 11.

<sup>1126</sup> Al-Zahaily, *supra* note 342, at 620.

<sup>1127</sup> *Id.*

the commission of crimes or offences.<sup>1128</sup> Accordingly, adopting discovery in the field of criminal law, as it would be in the Saudi Civil Procedure Law, may not be possible in the Saudi legal system. This is due to the firm restrictions placed on discovering evidence enforced by Islamic jurisprudence in Saudi Arabia.<sup>1129</sup> These restrictions, however, apply only when conducting the discovery of evidence to convict defendants in criminal cases.

Adopting a formal regime to practice discovery as part of the Saudi Criminal Procedure Law, therefore, does not conflict with the Islamic and Saudi criminal laws so long as the discovery practice is conducted only in favor of defendants in criminal cases and not conducted against the defendants' best interest. Such a discovery practice in the field of criminal law would most likely be considered as a step toward fulfilling the main purposes of the rules of the Islamic criminal law (*Shariah's Maqasid*).<sup>1130</sup> This consideration of the adoption of discovery in the criminal law land is not part of the discussions in this dissertation since this research focuses only on the applicability of adopting discovery in the Saudi civil laws.

#### **5.4.4 Discovery Fulfills Islamic Law Justice Requirements**

Enforcing discovery rules as an innovative aspect in the legal practice of Islamic Law and its application in the Saudi legal system, will help to accomplish justice in a more efficient manner while not contradicting any of the judicial rules of Islamic Law. Discovery's compliance with

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<sup>1128</sup> Al-Zahaily, *supra* note 342, at 629-30

<sup>1129</sup> *Id.*

<sup>1130</sup> *Id.*

Islamic and Saudi law rules includes relying on an individual's religious beliefs to achieve a final judgment, and this is especially true with the presence of a large number of bad faith persons who are currently bringing malicious lawsuits to Saudi courts.<sup>1131</sup> Adopting a formal process for discovery practice in the Saudi legal system will decrease the number of such lawsuits, which is one of the main objectives of Islamic jurisprudence.<sup>1132</sup>

To sum up, Section 5.4 addressed the compatibility of discovery with Islamic Law by showing how Islamic law has no restrictions on the methods of proof in civil cases, and hence the discovery practice is capable of being adopted as part of the Islamic Law rules. This section also discussed Islamic Law flexibility to include new formal methods to allow adverse parties to collect evidentiary materials out of court in civil cases. The last two subsections of Section 5.4 addressed the restricted methods to prove charges under the Islamic Criminal Law and addressed how the practice of discovery fulfills the Islamic Law justice requirements.

The next section, Section 5.5, discusses some potential challenges that face the adoption of a formal discovery regime in the Saudi legal system. These challenges include the difference between the discovery process and the current means of establishing allegations in both Saudi courts and in civil law jurisdictions in general. Section 5.5 also considers some previous Saudi tribunals' reactions toward enacted civil laws, which the tribunals believed were not in compliance with Shariah (Islamic) Law. Next, Section 5.5 examines the influence of conservatives on the

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<sup>1131</sup> Al-Sheikh, *supra* note 35, at 56.

<sup>1132</sup> *Id.*

legislation process in Saudi Arabia and how their power has affected the enforcement of some enacted laws in the past. The final part of Section 5.5 discusses the differences between civil law and common law jurisdictions that complicate legal transplantation from one legal system to another.

## 5.5 Challenges of Adopting a Discovery Regime in Saudi Arabia

### 5.5.1 Discovery and the Process of Establishing Allegations in Saudi Courts

One of the main conditions that must be met to establish allegations in Islamic Law is that the process of proving must be conducted before tribunals to be legitimate. One reason is that the purpose of examining materials is to reach final judgments on disputed matters, and this will not happen if judges are not present during the process of providing evidentiary materials. According to some rules in Islamic Law, judicial verdicts must be granted based on conclusions reached after examining the materials in each case, and this examination must take place within courtrooms.<sup>1133</sup>

Oaths in Islamic Law must be performed in the presence of judges. This principle is mandatory in Shariah, and litigants cannot concur to override this rule by reaching agreements to take oaths out of court because such legal action is not valid without the tribunals' approval. This is because Islamic Law considers oath taking to be a judge's prerogative while considering cases upon litigants' requests and not a legal right solely for litigants to prove or deny a litigant's allegations.<sup>1134</sup>

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<sup>1133</sup> Al-Zahaily, *supra* note 342, at 53.

<sup>1134</sup> *Id.* at 54.

This may present a challenge when trying to adopt discovery in the Saudi legal system since this Islamic Law principle is applied in Saudi courts.<sup>1135</sup> At the same time, this principle and the practice of discovery are not necessarily contradictory since the tribunal would have the authority to oversee the whole discovery practice. If the case proceeds to trial, the tribunal will have the opportunity to examine the litigants' arguments and evidentiary materials before issuing

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<sup>1135</sup> In regard of transplanting foreign procedural process to be adopted in a legal system, Professor Kötz states that "[t]here is much to be said for the view that all rules organizing constitutional, legislative, administrative, or judicial procedures are deeply rooted in a country's peculiar features of history, social structure, and political consensus and as such are more resistant to transplantation. 'Procedural law is a tough law,' said Otto Kahn-Freund. Since 'all that concerns the technique of legal practice is likely to resist change' he concluded that 'comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organization and procedure may lead to frustration and may thus be a misuse of the comparative method.'" On the other hand, however, "[a]nother distinguished comparative lawyer and proceduralist, Arthur von Mehren, reached a different conclusion. While not challenging the view that a procedural system's general structure and principal features express society's social and political values and goals he nevertheless said that 'very real differences between first-instance procedural arrangements in the United States, on the one hand, and in France and Germany, on the other, derive much less from differences in social or political values or in institutional, sociological, or psychological assumptions than from the institutional fact of the concentrated or discontinuous nature of the trial.'" To read more about this debate, see Kötz, *supra* note 1093, at 10-11; see also Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 20 n. 33 (1974); see also Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. L. REV. 198 (1977); see also Arthur von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in: 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART, FESTSCHRIFT FÜR HELMUT COING 361, 362 (München 1982).

its final judgment. This includes oath taking, if this is the only way to end the disputes due to a lack of other evidence. In this incident, the oath must be taken before the tribunal to authenticate it, and the court would have to issue the adjudication in favor of the litigant who took the oath to finalize the dispute before courts of law.

### **5.5.2 Tribunals' Reactions to Enacted Laws in Saudi Arabia**

One of the main challenges to adopting a discovery regime in Saudi Arabia is the possible reactions of tribunals after applying discovery rules in the legal system as provisions of the Civil Procedure Law. If tribunals of law believe that applying all or some of the discovery rules conflicts with any of the major rules of Islamic Law, then they most likely will refuse to allow litigants to use the discovery methods even though the law states that the discovery of evidence must be permitted, when applicable. This would be because Shariah laws are considered in Saudi Arabia to be constitutional laws and, as such, have supremacy over all civil statutes in the country. If a law or some of its provisions conflicts in some way with Shariah laws, then courts must not apply this law or its provisions. If these provisions are modified to be compliant with Shariah laws, then they will be enforced in the judicial system, and the courts must apply them.

One incident of Saudi courts' refusal to apply enacted laws was their refusal to consider adopted modern statutes, enacted in the 1950s, to decide cases.<sup>1136</sup> A more specific and earlier example occurred when some Saudi judges refused to apply the Saudi Labor Law provisions

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<sup>1136</sup> Al-Jarbou, *supra* note 219, at 24.

enacted in 1946 because they believed that these man-made provisions clashed with Shariah laws. They argued that they would have to reject even considering cases involving the application of such provisions, because it would be illegal and unconstitutional to do so.<sup>1137</sup>

Even though it seems that no major contradictions exist between the application of discovery and the general rules of Islamic Law, and hence, discovery could be adopted into the Saudi legal system with no legitimacy problems, this power of the courts might be a challenge for the legislature in Saudi Arabia. Before adopting discovery in the Saudi legal system, the discovery regime would have to be fully examined to ensure that it is compliant with Shariah laws. Even a minor discovery rule that is in possible contrary to Shariah laws would invalidate the adopted discovery regime, either partially or entirely.

### **5.5.3 Conservatives' Influence on Legislation in Saudi Arabia**

An additional anticipated challenge to adopt a discovery regime in the current Saudi legal system is the influence of conservatives and religious scholars (*Ulama*) on some recently enacted laws. An example of this influence is the disbandment\cancelation of the Saudi Commercial Court in 1954, not long after its establishment in 1931. This cancelation was a result of a demand by conservatives and religious scholars (*Ulama*), claiming that that court was not a Shariah court that applied Islamic Law.<sup>1138</sup>

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<sup>1137</sup> *Id.*

<sup>1138</sup> Al-Jarbou, *supra* note 219, at 33.

Another important example of the recent influence of the conservatives in terminating some enacted civil laws in Saudi Arabia is the termination of an old Civil Procedure Law in 1990, one year after it was enacted. This termination was the result of objections by some Shariah judges because the enactment of this law, which governed their authorities and duties, occurred without them having first been consulted.<sup>1139</sup>

Because of the passive approach of the conservatives, especially Shariah judges, concerning applying the enacted civil laws in the judicial system, the Saudi Arbitration Law was enacted in 1983 to govern methods of alternative dispute resolution, which has since become a major approach to settling disputes out of court.<sup>1140</sup>

#### **5.5.4 The Differences between Civil Law and Common Law Systems that Complicate**

##### **Legal Transplant**

Some differences in civil procedure between civil law and common law systems exist that might be a challenge to transplanting a procedural process from one system to another. Professor Hein Kötz describes the distinction in this regard between the two types of jurisdictions, writing:<sup>1141</sup>

[o]ne salient characteristic of European civil procedure lies indeed in the fact that it is wholly unfamiliar with, and knows nothing of, the idea of a 'trial' as a single, temporally continuous presentation in which all materials are made available to the

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<sup>1139</sup> Al-Jarbou, *supra* note 101, at 206.

<sup>1140</sup> *Id.* at 208.

<sup>1141</sup> Kötz, *supra* note 1093, at 11.

adjudicator. Instead, proceedings in a civil action on the Continent may be described as a series of isolated conferences before the judge, some of which may last only a few minutes, in which written communications between the parties are exchanged and discussed, procedural rulings are made, evidence is introduced and testimony taken until the cause is finally ripe for adjudication. Procedure in the common law jurisdictions, on the other hand, has been deeply influenced by the institution of the jury. Since a jury cannot be convened, dismissed and recalled from time to time over an extended period, a common law trial must be staged as a concentrated courtroom drama, a continuous show, running steadily, once begun, toward its conclusion. This, in turn, entails a separate pre-trial process for the parties enabling them not only to gather the evidence that they may need at trial but also to prevent surprise by informing themselves of the details of all positions the opponent may advance when the controversy is ultimately presented to the court. This solution requires elaborate pre-trial interrogatory and discovery procedures because once the trial commences, there is no opportunity to go back, search for further information, and present it to the court at some later date.

Professor Kötz also addresses the civil procedure system in common law jurisdictions and how it is distinct from civil law. He states:<sup>1142</sup>

Clearly, elaborate pre-trial probing of the arguments of fact and law on which the other party proposes to rely provides a solution to the surprise problem. However, this solution is not without its cost. First, it is intrinsically duplicative. Witnesses are prepared, examined, and cross-examined during pre-trial, then prepared, examined, and cross-examined again at trial. Second, it tends to be overbroad. Only rarely can a litigator tell at the beginning precisely what issues and what facts will prove important in the end. Since the judge customarily has little contact with pre-trial investigation, he has no opportunity to signal what information he thinks relevant to his decision. As a result, litigators must strain to investigate and analyze everything that could possibly arise at trial. They tend to leave no stone unturned, provided, of course, as is often the case, that they can charge their fees by the stone. Because of their active role in the pre-trial phase, lawyers typically have a greater understanding of the case than does the judge when the controversy is presented at the trial. It follows that lawyers run the

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<sup>1142</sup> *Id.* at 11-12.

show at trial and that they frame the issues, question the witnesses, and stage and present even uncontroversial facts as if in a drama. Since the judge comes to the trial with little more understanding of the controversy than he can have from the complaint and other documents filed with the court, he is hardly in a position to act as the examiner-in-chief of the witnesses and to confine the scope of the evidentiary process to those avenues of inquiry he thinks are relevant or most likely to resolve the dispute. ... It would seem therefore that the institution of the jury is the cause of the strict segmentation of American procedure into pre-trial and trial compartments, and that this segmentation, in turn, is the cause for the waste and duplication of lawyer-dominated pre-trial discovery procedures. Strengthening the court's control over the evidentiary process would then be practicable only if the United States followed the example of most, if not all, major common law jurisdictions and abolished the civil jury.

To sum up, Section 5.5 addressed some challenges to including a discovery regime in the Saudi legal system, including the differentiation between the discovery practice and the process of establishing allegations in civil law jurisdictions. Section 5.5 also mentioned some previous tribunals' reactions toward enacted laws that they recognized conflict with Shariah. This section also considered the powerful influence of conservatives in Saudi Arabia on the legislation process and on the application of enacted laws. The last subsection of Section 5.5 considered the differences between civil law and common law jurisdictions that complicate legal transplants from one system to another.

The final section of Chapter Four, Section 5.6, discusses how to handle the challenges of adopting discovery in the Saudi legal system with some explanation of how the discovery process can cope with these challenges. Section 5.6 examines discovery's compatibility with the dominant rules of Islamic Law in Saudi Arabia. It also examines the unprescribed public interest (*Almaslaha*

*Almursalah*) as the basis of legislation in Saudi Arabia and a place to include discovery in the legal system.

Section 5.6 also proposes another method to include discovery as part of the Saudi legal practice: formulating discovery clauses and including them in commercial contracts to increase the possibility of settlement and avoid going to local courts. It also discusses the idea of setting this proposal as an alternate way of practicing discovery in case the Saudi legislation does not approve a formal discovery regime. The last subsection of Section 5.6 considers the impact of the discovery practice on the attorney-client relationship in Saudi Arabia, and how the legislature must reform the current rules that govern this relationship to facilitate a proper practice of discovery if the legal system adopts the new regime.

## **5.6 Coping with the Challenges of Adopting Discovery in the Saudi Legal System**

### **5.6.1 Discovery Agreement with Shariah Laws**

Because of the expected challenges discussed in Section 5.5 of this chapter that may encounter the adoption of a new regime to practice discovery in Saudi Arabia, it is crucial to make certain that the adopted discovery regime complies entirely with the applied rules of Islamic Law and the enacted civil modern laws in Saudi Arabia. Any proposed discovery provisions must not be adopted in the Saudi legal system if these provisions conflict in any way with Islamic Law or primary Saudi laws. Saudi courts of law will reject the application of such provisions because of their illegality in not complying with the Islamic Laws.

Note again that no discovery provisions exist that have been proven to conflict directly with the rules of Islamic Law. The purpose of this commitment to comply with Shariah laws is to ensure producing a discovery regime that should be applied in the Saudi legal system practically without the substantial possibility of confronting legal obstacles or lack of legitimacy.

## 5.6.2 The Unprescribed Public Interest (*Almaslaha Almursalah*) as a Main Legislation Basis in Saudi Arabia

The legal system in Saudi Arabia mainly governs disputes using Islamic Law rules, which are stated in Islamic heritage publications.<sup>1143</sup> Some modern statutory laws have also been adopted in the legal system because of the absence of rules in Islamic heritage publications that regulate some modern areas of law. The legal basis on which these statutory laws are adopted in the Saudi legal system is the doctrine of unprescribed public interest, which is called in Shariah Law *Almaslaha Almursalah*.<sup>1144</sup> This doctrine is defined in Islamic jurisprudence as bringing benefit or preventing harm.<sup>1145</sup>

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<sup>1143</sup> Islamic heritage publications refer to the Islamic Law publications that are not recent and were written by Islamic Law scholars hundreds of years ago. Some judges and legal experts in Saudi Arabia still use some of these publications to support the reasoning behind their judgments and legal advice.

<sup>1144</sup> Basic Law of Governance, *supra* note 85, Art. 67; see also Hanson, *supra* note 112, at 274; see also Alaa Alzafarany, *Almaslaha Almursalah [The Unprescribed Public Interest]*, ALUKAH (Jul. 29, 2015), <https://www.alukah.net/sharia/0/89749/>; see also *Almasaleh Almorsalah [The Unprescribed Public Interests]*, BIN BAZ, <https://binbaz.org.sa/fatwas/28621/%D8%A7%D9%84%D9%85%D8%B5%D8%A7%D9%84%D8%AD%D8%A7%D9%84%D9%85%D8%B1%D8%B3%D9%84%D8%A9> (last visited Mar. 9, 2020); see also Abu Jaber Aljazaery, *Almasaleh Almursalah [The Unprescribed Public Interests]*, AHL ALHADEETH (Mar. 9, 2020, 7:34 PM), <https://www.ahlalhdeth.com/vb/showthread.php?t=166520>.

<sup>1145</sup> Basic Law of Governance, *supra* note 85, Art. 67; see also Hanson, *supra* note 112, at 274; see also Alzafarany, *supra* note 1143; see also Bin Baz, *supra* note 1143; see also Aljazaery, *supra* note 1143; see also Ansary, *supra* note 98, at 69.

In Islamic Law, some conditions exist in the doctrine of *Almaslaha Almursalah* to consider it a valid basis upon which to legislate any modern laws or regulations.<sup>1146</sup> One condition states that intended regulations must comply with the principles of the Quran and Sunnah and must not conflict with any of the main purposes of Islamic Law rules (*Shariah's Maqasid*), the legitimate goals that Shariah desires to maintain to achieve the best interest of the public in Muslim societies.<sup>1147</sup> Another condition to use *Almaslaha Almursalah* as the proper doctrine for legislation is that the *Almaslaha Almursalah* intended by adopting the new regulations must not deprive another more substantial *Almaslaha Almursalah* from being applied as the legislative basis of a law that brings benefits or prevents harms.<sup>1148</sup> The last condition that must be met to consider the unprescribed public interest (*Almaslaha Almursalah*) as a valid basis for legislation (concerning bringing benefit or preventing harm) is that Islamic legal scholars must decide whether the

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<sup>1146</sup> Hanson, *supra* note 112, at 274, where the author states "[t]he Sharia is the 'common law' of the Kingdom and all legislative acts taken by the government must conform to its principles. Because the Sharia is God's law and immutable, the sultan or king has no right of legislation. However, he can enact regulations not contrary to Islamic law to enforce, supplement, and apply the Sharia. This policy of *siyasa* comprises the entire field of administrative law. Regulations are issued under the doctrine of public interest (*Al massalih al mursala*) for the welfare of its citizens. Under this doctrine, numerous codes, many of French inspiration, were promulgated to aid in the administration and development of the Kingdom."; see also Alzafarany, *supra* note 1143; see also Bin Baz, *supra* note 1143; see also Aljazaery, *supra* note 1143; see also Al Khnein, *supra* note 93, at 82.

<sup>1147</sup> Alzafarany, *supra* note 1143; see also Bin Baz, *supra* note 1143; see also Aljazaery, *supra* note 1143; see also Al Khnein, *supra* note 93, at 82&89.

<sup>1148</sup> Al Khnein, *supra* note 93, at 82.

unprescribed public interest doctrine applies to a certain law or regulation, and therefore, whether the legislature should adopt this law to help evolve the legal system. When Islamic legal scholars consider a matter a legitimate unprescribed public interest, then this matter may be adopted as a new rule to be part of Islamic Law.<sup>1149</sup>

To formulate a new law or adopt a law from another legal system into the Saudi legal system, the proposed law must either bring benefit to the public or prevent harm from occurring. The individuals who decide on these new laws must have considerable knowledge about the legal rules in Islamic Law. Therefore, to make the discovery process appropriate to be adopted in Saudi Arabia, the advantages of adopting discovery must be clearly stated. This would educate and persuade the legislature in Saudi Arabia about the importance of the discovery practice as a new aspect in the Saudi legal system, which would help to bring legal benefits to the public and eliminate legal problems.

### **5.6.3 Discovery Clause in Commercial Contracts**

One proposed method in this dissertation to adopt discovery in Saudi Arabia is including discovery as a new clause within the settlement sections in the commercial contracts. The discovery clause should be included in corporations' commercial contracts regardless of whether an entire discovery regime is adopted in the Saudi legal system. The discovery clause should also

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<sup>1149</sup> *Id.* at 83; see also Alzafarany, *supra* note 1143; see also Bin Baz, *supra* note 1143; see also Aljazaery, *supra* note 1143.

be set as a binding condition on all parties to a contract, and therefore, parties must enter a discovery stage to settle their dispute before going to court.

After conducting interviews with commercial judges, attorneys, and legal specialists in the legal departments of Saudi and foreign companies, many of them confirmed that the settlement sections in most of commercial contracts are not as effective as they should be. This is because most of these clauses do not bind the parties to a contract to settle their case out of court. These clauses only oblige the parties to inform each other of any existing dispute and allow a certain period (usually 60 days) to resolve the dispute out of court. The settlement sections, however, usually do not include obligations on parties to discuss their dispute during the specified period. In practice, even if these obligations are included in the settlement section, courts usually do not honor whether these obligations were met. After this period has passed, the interested party to the contract may file a case in the commercial court to resolve the parties' dispute. No party is required to seek a resolution of the dispute out of court during the grace period. This issue makes settlement sections in most of current commercial contracts not as effective in ending disputes between parties to a contract as it should be.<sup>1150</sup>

Encouraging parties to a contract to include a binding discovery clause in their commercial contracts helps considerably in settling disputes out of court where these disputes arise during contract performance. This would be of significant importance in resolving the issue of having

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<sup>1150</sup> After the Adoption of the Commercial Courts Law and Procedures in Saudi Arabia in April 2020, the Saudi commercial courts are obliged by Articles 6, 8, and 19 of this law to enforce the settlement agreements of parties to commercial disputes.

giant commercial corporations, especially international and foreign ones, go to local courts to recover for breach of contract or to resolve disputes branching out from performing large contracts. Incorporating a binding discovery clause in commercial contracts would minimize the number of disputes that involve tremendous amounts of money from being considered in local courts. These disputes would, instead, be settled by the parties to the contract themselves out of court or through arbitration centers.

To introduce a binding discovery clause into large contracts, corporations could prepare model clauses for discovery that could be included in all corporations' contracts. The discovery clause may be subject to negotiations or amendments with the other parties to the contract during the process of signing the agreement. Upon entering each contract, the corporation may specify whether the discovery clause in this contract is binding or only optional to be applied by the interested party. This flexibility would encourage people in the commercial sector to include a discovery clause and conduct discovery as a new formal method to reach an agreement between the parties to the contract regarding any disputed matter without (or before) going to court to end their disputes through adjudication.

This proposal to add a discovery clause to commercial contracts may also be considered an alternative legal method to include the discovery practice in Saudi Arabia if the Saudi legislature finds adopting a formal discovery regime as part of the Saudi Civil Procedure Law to be incompatible with the Saudi legal system, or undesirable to be adopted now for some reason.

#### 5.6.4 Discovery and the Attorney-Client Relationship in Saudi Arabia

Saudi regulations governing the attorney-client relationship require attorneys to keep their clients' secrets and all legal documents that they obtain throughout their relationship with their clients. This obligation extends even beyond the end of their relationship. The Saudi Advocacy Law enforces penalties on attorneys who disclose, without a valid reason specified in the law, any information they obtain through the relationship with their clients without the clients' permission.<sup>1151</sup> The duty on attorneys to keep their clients' secrets continues to exist so long as revealing these secrets might negatively prejudice the best interest of the clients.<sup>1152</sup>

In some incidents, attorneys are not obliged to keep their clients' secrets, but on the contrary, are required to reveal their clients' secrets. Examples of these incidents occur when disclosing clients' secrets may prevent a crime from occurring, and when keeping this information involves a violation of Shariah laws.<sup>1153</sup> Attorneys may also disclose some of their clients' information if needed to resolve any disputes that exist between the attorneys and their clients. Attorneys in Saudi Arabia are also required to reveal certain information or materials they obtain, related to their clients, if an authorized official entity in the country asks them to provide this information or materials. Attorneys are also required to testify against their clients upon the request of authorities, when justice requires.<sup>1154</sup>

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<sup>1151</sup> Advocacy Law, *supra* note 314, Art. 22-23.

<sup>1152</sup> Alasmi, *supra* note 316, at 106.

<sup>1153</sup> *Id.* at 103-04.

<sup>1154</sup> *Id.*

In brief, the Saudi legal system does not acknowledge the concept of privileges, such as the attorney-client privilege, as it is recognized in the United States legal system.<sup>1155</sup> Attorneys, however, are obliged as a professional duty to safeguard their clients' best interests and protect the crucial evidentiary materials supporting their allegations. The Saudi *Basic Law of Governance* preserves the privacy of all peoples' communications, which include attorney-client communications.<sup>1156</sup> As attorney-client communications are not privileged from being obtained upon formal request directed to the attorneys from any official entity in the country, attorney-client communications are also not protected from being disclosed. The attorney-client relationship is not considered as a privileged relationship under the Saudi legal system as this it is in the United States' legal system.

No one should be able to obtain the contents of attorney-client conversations except in the above-mentioned limited circumstances. Attorneys must not reveal their clients' information or legal documents, because they are obligated by law to refrain from doing do so as part of their professional duties stated in the Saudi Advocacy Law.<sup>1157</sup> Doctors have similar obligations to protect their patients' information. However, attorneys/doctors must reveal their clients'/patients' information and report the clients/patients to authorities if doing so would prevent them from committing crimes.

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<sup>1155</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 5.

<sup>1156</sup> BSA Ahmad Bin Hezeem & Associates, *supra* note 279, at 5.

<sup>1157</sup> Advocacy Law, *supra* note 314, Art. 22-23.

If a discovery regime is adopted in the Saudi legal system, the privacy terms in the Saudi *Basic Law of Governance* and some other related laws will need to be amended to be compatible with the newly adopted discovery practice. Another reason why conducting amendments to the Saudi privacy laws and provisions is important upon the adoption of discovery is to confirm the seriousness of protecting the information collected based on the attorney-client relationship from being subject to discovery without a valid reason, and from being disclosed to an official entity in the country upon a formal request as is currently the case.

This final section of Chapter Four, Section 5.6, discussed how to cope with the challenges that face adopting discovery in Saudi Arabia. It addressed the compatibility of discovery with Islamic Law rules applied in Saudi Arabia. This section also discussed the likelihood of considering the unprescribed public interest (*Almaslaha Almursalaha*) as a valid legal basis to include discovery in the legal system. Section 5.6 also provided a proposal for new legal methods to include discovery in Saudi legal practice: including discovery clauses in large commercial contracts and using them as an alternative way for discovery practice, if discovery is not adopted in the Saudi legal system. The last subsection of Section 5.6 discussed the status quo of attorney-client relationship rules in Saudi Arabia and why these rules must be reformed before adopting the discovery regime.

## 5.7 Conclusion

Chapter Four discussed some changes established under the Saudi Civil Procedure Law, including improving the process of serving summons, the defendants' appearance in court, the rules of materials disclosure, the rules to compel non-parties to submit evidentiary materials, and the rules of representation. Chapter Four also discussed some reforms in the commercial law system in Saudi Arabia, including improving the commercial litigation process to favor expedited litigation and early disclosure. This chapter also discussed amendments to allow parties to exchange legal documents electronically to speed up the commercial litigation process. It also examined the new rules to hold compulsory preliminary sessions to draw the roadmap in commercial cases. Chapter Four also addressed some articles of the Saudi Commercial Courts Law and Procedures which adopt some discovery rules that are similar to the United States discovery rules, which makes this new law the outset of adopting discovery Saudi Arabia.

Chapter Four also addressed some arguments about discovery incompatibility with the civil law system. This included discussing the applicability of the United States discovery in European civil law jurisdictions, including addressing the civil procedures differences between the United States and civil law jurisdictions, and a comparative perspective between Germany and the United States. This chapter also considered the experience of some civil law countries which have adopted a discovery regime.

Chapter Four also examined the Islamic and Saudi laws compatibility with discovery. This chapter showed how Islamic law has no restrictions on the methods to prove in civil cases. This chapter also demonstrated the Islamic Law flexibility to include new methods to find facts and

exchange materials in civil cases. It also discussed how discovery satisfies the justice requirements of Islamic Law rules.

Chapter Four also addressed some possible challenges needed to adopt discovery in Saudi Arabia, including the difference between discovery and the current means to establish allegations in Saudi courts. This chapter also mentioned previous tribunals' reactions toward enacted civil laws in Saudi Arabia. It also examined the power of conservatives in the Saudi legislation and the impacts of their power has on enacted laws in the past. This chapter also discussed the difference between civil law and common law jurisdictions regarding legal transplantation.

This chapter also provided ideas about how to cope with the challenges of discovery adoption in the Saudi legal system and examined discovery's compatibility with the dominant rules in Saudi Arabia. It also considered *Almaslaha Almursalaha* as the basis of Saudi legislation and a legal method to include discovery in the legal system. Chapter Four also proposed an alternative method to include discovery in the Saudi legal practice: including discovery clauses in commercial contracts and discusses setting this proposal as an alternate method to practice discovery in case the Saudi legislation does not approve discovery. The last part of this chapter considered the impact of discovery on the attorney-client relationship in Saudi Arabia and recommended the legislature to amend the rules that govern this relationship upon adopting discovery.

## 6.0 Dissertation's Recommendations

This dissertation provides numerous recommendations about how the Saudi legislature can overhaul the current civil procedural system by adopting a discovery regime as part of the Saudi Civil Procedure Law. These recommendations are provided also to help to improve the Saudi legal system, mainly the Civil Procedure Law, to be compatible with the discovery practice.

To highlight these recommendations, this section enumerates the most important recommendations provided in this research and directed to the legislature authorities in the Kingdom of Saudi Arabia. This section briefly addresses these recommendations as bullet-points. For more detail, please refer to the relevant sections or subsections in which they were proposed. The following are the main recommendations of this dissertation to the legislature in Saudi Arabia:

- ❖ Revamp the training methods of Saudi judges to make the discovery adoption more effective, and reform their current legal educational approach by reinforcing the hybrid type of legal education
- ❖ Amend the privacy terms in the Saudi *Basic Law of Governance* and other related laws and provisions to properly accommodate the discovery regime in the legal system to be compatible with the practice of discovery
- ❖ Overhaul the rules that govern the attorney-client relationship to facilitate the proper practice of discovery and protect information collected through this relationship from being subject to discovery or disclosed to an official entity without a valid reason

- ❖ Revise the rules of the Saudi Civil Procedure Law that govern presenting supportive evidentiary materials to be compatible with the discovery practice
- ❖ Revise the evidence disclosure process in the Saudi Civil Procedure Law to meet the discovery requirements
- ❖ Revise Article 47 and similar rules in the Saudi Civil Procedure Law in light of the discovery practice to implement serious legal consequences on defiant litigants who violate discovery rules upon adoption, including revoking the right to obtain materials from the adverse party after the discovery phase and revoking the right to use specific materials to support claims.
- ❖ Revise the incidental petition rules in the Saudi Civil Procedure Law to be compatible with the discovery practice
- ❖ Restructure the current lenient time limits in the Saudi Civil Procedure Law, and set proper time limits for the discovery practice
- ❖ Adopt the model legislation that this dissertation proposes in Appendix A for a discovery regime to be part of the Saudi civil procedural system
- ❖ Establish a new formal phase for discovery as part of the judicial procedures in civil cases, including requiring initial disclosures and holding a parties' conference to discuss their discovery plan
- ❖ Require including discovery as a new clause within the settlement sections in commercial contracts as a binding condition to help settle disputes before going to court regardless of whether the Saudi legal system adopts a discovery regime

- ❖ Assign the roles of discovery magistrates to qualified personnel; Expand the authority of judicial lieutenants to include the duties of discovery magistrates
- ❖ Require asserting explicit discovery permission in the power of attorney to authorize attorneys to practice discovery properly
- ❖ Restrict the representation in large civil and commercial cases that involve discovery practice and hence need experienced attorneys to licensed lawyers only
- ❖ Simplify the proposed rules of discovery in Saudi Arabia for self-represented litigants, especially in cases where self-representation is most common, to allow pro se litigants to use discovery, if needed
- ❖ Place the responsibility of the expenses of the initial disclosures on the party who provides them
- ❖ Place the responsibility for discovery costs, initially, on the party who requests materials through discovery methods to limit discovery to crucial materials and, therefore, reduce the legal expenses that discovery practice generates

## 7.0 Dissertation's Conclusion

This research provided a comparative legal analysis of the United States and Saudi legal systems and explored the possibility of adopting discovery in Saudi Arabia. This dissertation studied the legal status quo in both jurisdictions to explain how to employ aspects of discovery from the United States legal system in Saudi Arabia.

This dissertation considered the absence of discovery in the Saudi civil procedural system.<sup>1158</sup> It also discussed the present legal problems caused by this absence.<sup>1159</sup> This research

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<sup>1158</sup> One of the disadvantages of the absence of a discovery practice in the Saudi legal system is the rule stated in Article 66 of the Civil Procedure Law. This rule requires judges to examine plaintiffs' allegations in the first hearings and question them to make certain that the plaintiffs have sufficient evidence supporting their allegations. If the plaintiffs cannot prove their cause of action against defendants at that time, judges would most likely dismiss the plaintiffs' cases as a matter of law even before questioning their defendants. Doing so denies some plaintiffs' legal rights only because they do not possess solid pieces of evidence supporting their legal action against defendants in courts of law. Discovery will tremendously help to avoid such legal consequences.

<sup>1159</sup> If plaintiffs cannot provide any proof for their claims, then the only legal option they have is the defendant's oath. If the defendant takes the oath denying the plaintiff's allegations, the court will issue its final judgment in favor of the defendant. If the defendant refuses to take the oath refuting plaintiff's claims, the court would consider the defendant's refusal to take the oath as an indication that the plaintiff is entitled to relief and may rule for it after taking its oath on its claims. The current application of oath taking in Saudi laws is causing unfairness since justice relies merely on the defendant's righteousness and the sole way the plaintiff has in order to prove its allegations is the defendant's religious oath. Legal systems and justice must rely on a formal legal process and not on litigants'

also examined the disclosure and discovery rules in the United States' Federal Rules of Civil Procedure to determine if adopting discovery rules would be beneficial to the Saudi civil procedure system. In addition, it provided recommendations about how Saudi Arabia should reform its civil procedure system by adopting a discovery regime. This dissertation also addressed the challenges of adopting discovery in Saudi Arabia under the current legal status quo and demonstrated how these challenges may be practically confronted.

This research conducted its comparative analysis on the latest version of the discovery rules in the Federal Rules of Civil Procedure in the United States (2019) and the Saudi Civil Procedure Law (2013). The analysis focused on the advantages and disadvantages of discovery in the United States and the prospective advantages and disadvantages of discovery adoption in Saudi Arabia.

This dissertation questioned whether the United States' civil discovery regime may be adopted in Saudi Arabia and if so, to what extent. It examined whether adopting United States' discovery can remedy existing legal problems in Saudi Arabia. This research sought to understand discovery inefficiencies in Saudi Arabia through a comparison with inefficiencies in United States discovery. Conducting a critical review of the literature concerning the civil procedure systems regarding discovery in both jurisdictions provided a better understanding of the applicability of discovery in Saudi Arabia. Reviewing the critical literature also helped to locate methods to adopt discovery and overhaul the Saudi legal system.

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religious beliefs. To be more specific, performing oaths must not be the sole approach to resolve disputes, if the plaintiff does not have proof in their possession supporting their claims.

This research explained how discovery adoption in Saudi Arabia would help to resolve some problems in the Saudi legal system such as unreasonable delays in achieving justice. This dissertation showed how discovery could prevent undue delay in the Saudi legal system. It also explained how adopting mandatory pretrial discovery would help courts to provide for the exchange of materials. It also addressed how the pretrial exchange of materials would shorten the length and complexity of trials and assist with judicial procedures in a system facing a significant shortage of judges.

This research examined some comprehensive legal sources to fully understand the United States discovery process. It also considered legal scholarship by both critics and proponents of the United States civil discovery regime. This dissertation addressed the judicial problems that could be resolved if discovery were adopted in Saudi Arabia. It also provided for the best methods to achieve the adoption of discovery into the Saudi Civil Procedure Law and the legal mechanisms to enforce discovery in the legal system. The following is a brief of the four chapters of the dissertation.

Chapter One examined the rules of Islamic Law and the practical role of Islamic Law in the Saudi legal system. It also discussed the Saudi legal system and its mixture of Shariah laws and modern civil laws. Chapter One also discussed civil procedure in both Islamic and Saudi laws as well as the rules of exchanging materials in Saudi civil proceedings. It considered the branches of authorities in Saudi Arabia and the structure of the government as well as the separation of powers and the process of formulating laws. This chapter examined the monarch's power over the branches of authorities. It also addressed the three types of legal education in Saudi Arabia and the Saudi concepts in training judges. It considered the educational requirements for judgeship

candidacy in Saudi Arabia and some attempts to overhaul the current methods of legal education. Chapter One provided an overview of the civil litigation system in Saudi Arabia, including the recent wave to revamp the Saudi judicial system in all respects. It also explained the judicial structure of the Saudi legal system, including the two courts system and quasi-judicial committees. This chapter discussed the plaintiff's initial obligations, the methods of disclosing materials, the challenges that the plaintiff confronts without discovery, and the defendant's responsibilities during civil proceedings. Chapter One addressed the rules that governs taking oaths and authenticating witness testimony in Saudi civil proceedings and discussed some problems that exist with relying on oath taking. It addressed some consequences of the absence of discovery in Saudi Arabia and different legal issues that exist currently in the legal system.

Chapter Two of this dissertation discussed the limits, scope and purposes of practicing document discovery and E-discovery under the FRCP. It also considered the discovery rules in FRCP and the discoverable materials under discovery. It also considered the principle of privilege in the United States and the protective orders related to discovery matters. This chapter also addressed amendments to the FRCP to alter or narrow the scope of discovery. Chapter Two also discussed the rules that govern initial disclosures under the FRCP. It discussed the discovery phase, including holding Rule 26(f) conference and preparing the joint discovery plan. It examined the legal methods to take discovery and explained how each method is used to obtain materials. These methods are depositions, interrogatories, requests for production, requests for admission, physical and mental examinations, and subpoenas. Chapter Two addressed how to supplement initial disclosures and discovery responses. It also discussed pretrial disclosure and the burden of litigation costs in the United States, including discovery expenses. Chapter Two also discussed the

sanctions that courts may apply on defiant litigants violating the discovery rules. It discussed the advantages and disadvantages of discovery practice in the United States in terms of incurred expenses and time consumed to conduct discovery. Chapter Two also discussed the discovery impacts on litigants in the United States, the role of judges in pretrial discovery, the tribunals' reluctance in imposing discovery sanctions on defiant litigants, and the quantity of discovery in the United States' civil litigations. Chapter Two also mentioned some empirical studies and statistical evidence regarding the impacts of discovery on litigation and settlement in the United States.

Chapter Three of this research discussed some arguments that examine the benefits, problems and abuses inherent in the discovery practice in the United States. It addressed some suggestions to revamp the United States discovery such as demanding more tribunal involvement in discovery. It also examined some reformative proposals to enhance the efficiency of discovery and to confront the negative effects of discovery, including how to minimize the costs of discovery in United States civil proceedings. Chapter Three considered existing problems because of the absence of discovery in Saudi Arabia. It addressed the purposes of adopting discovery in the Saudi legal system, and the advantages of this adoption. Chapter Three also discussed prospective development in the Saudi legal system if Saudi Arabia adopted a discovery regime. It also examined Islamic Law's standpoint about settlements and how the discovery adoption in Saudi Arabia would affect the current legal situation. Chapter Three discussed the mechanisms to amend the Saudi Civil Procedure Law to adopt discovery rules and mechanisms to stimulate this adoption in the legal system, such as establishing a new stage for initial disclosures and discovery and revising the rules of presenting evidence. This chapter also provided suggestions to revise several

rules of the Saudi Civil Procedure Law to be compliant with discovery. Chapter Three provided some methods to activate the discovery application in the Saudi legal system, such as considering legitimate interest as the legal ground for discovery requests. Chapter Three also discussed how to improve methods of educating Saudi judges to make them more familiar with civil laws and discovery. It addressed the legal approaches to appointing discovery magistrates, including assigning judicial lieutenants as magistrates to save tribunals' resources. Chapter Three provided for the allocation of discovery costs upon adopting discovery in Saudi Arabia. It also provided some recommendations that this dissertation proposes for allocating discovery costs.

Chapter Four of this dissertation addressed recent improvements in the Saudi civil procedural system, including improvements in serving summons, defendants' appearances, evidence disclosure rules, compelling non-parties to submit evidence, and the rules of representation. This chapter also considered recent reforms in the Saudi commercial judicial system to adopt new rules that encourage expedited litigation and early disclosure. It also discussed recent amendments to commercial regulations that permit electronic exchange of legal documents and require a preliminary session in commercial cases to discuss dispute and layout a roadmap before the pleading sessions. Chapter Four addressed arguments about the incompatibility of United States discovery with the civil law system. It discussed how similar proposals to adopt discovery were received in Europe. This chapter also discussed the experience of some civil law jurisdictions in applying the United States discovery methods in their legal systems. Chapter Four proved the compatibility of discovery with Islamic and Saudi laws and showed how no major restrictions on the methods of proof in civil cases exist in these laws. It considered Islamic Law flexibility to adopt new methods to obtain materials and demonstrated how discovery fulfills some

Islamic Law justice requirements. Chapter Four also provided for the best approaches to confront the challenges of adopting discovery in Saudi Arabia, including assuring discovery's compatibility with Islamic and Saudi laws. It considered the unprescribed public interest (*Almaslaha Almursalaha*) as a legal method to cope with the challenges of adopting discovery. Chapter Four also discussed revising the rules that govern the attorney-client relationship in Saudi Arabia upon adopting discovery to protect clients' crucial information from being inappropriately disclosed.

After conducting this research, it should be concluded that the current civil discovery system in the United States as it currently is should not be entirely adopted in the Saudi legal system. This is due to existing issues that broad discovery generates in the United States legal system. This dissertation concluded, therefore, that Saudi Arabia should revamp its legal system by adopting a civil discovery regime, but prior to formulating a discovery regime, the Saudi legislature must consider the problems mentioned in this dissertation that discovery causes in the United States' civil proceedings. The proposed regime to practice discovery in Saudi Arabia must be stricter than that of the United States. The United States permits excessively broad discovery practice and overuse of discovery, and these can lead to discovery abuse and tremendously increased discovery expenditures. The proposed discovery regime for Saudi Arabia must also impose more tribunals' and judicial lieutenants' involvement in the discovery phase to supervise parties' discovery practice and interfere to eliminate any abusive discovery practice.

Finally, there are (3) appendices attached to this dissertation. Appendix A contains a model legislation that this dissertation recommends the Saudi legislature to review upon formulating a discovery regime to be adopted in the Saudi civil procedural system. This model legislation is greatly influenced by the discovery rules in the United States' Federal Rules of Civil Procedure.

Appendix B, discusses the rules of discovery in The Hague Conference, to which Saudi Arabia and the United States are members. The last appendix, Appendix C, contains a guide to the Saudi Civil Procedure Law to provide non-Arabic readers with an English translation of the main Saudi law that this dissertation examined.

## **Appendix A Proposed Model Legislation for a Discovery Regime in the Saudi Civil Procedural System**

### **Introduction**

This model legislation for discovery in Saudi Arabia is prepared to provide further information for the rules of discovery in the United States' Federal Rules of Civil Procedure. The proposed discovery articles stated in this appendix are greatly influenced by Title V of the United States Federal Rules of Civil Procedure. Title V contains the disclosure and discovery rules, which are Rule 26 to Rule 37.<sup>1160</sup> Subpoenas, stated in Rule 45 of the FRCP, is also a discovery rule, and therefore, is included in this model legislation.<sup>1161</sup>

Since the discovery rules are the main subject in this dissertation, the purpose of providing this model legislation is to allow the legal and legislature entities in Saudi Arabia to examine these proposed discovery articles that are near-identical to the discovery rules that govern the discovery practice in United States legal system. This examination would provide these entities, to which this dissertation will also be submitted, the opportunity to recognize the discovery rules that would be most appropriately applied to the Saudi legal system. These Saudi entities include: The Consultative Council, the Bureau of Experts at The Council of Ministers, the Ministry of Justice, the Supreme Judicial Council, and King Abdullah Program for Judicial Reform.

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<sup>1160</sup> FED. R. CIV. P. 26-37

<sup>1161</sup> FED. R. CIV. P. 45

The following are the proposed discovery articles to be part of the Saudi Civil Procedure Law. These articles are cited from the rules of discovery in the 2019 Edition of the Federal Rules of Civil Procedure in the United States.<sup>1162</sup> The following articles are constructed according to Title V rules, Disclosures and Discovery, and Rule 45 of Title VI of the FRCP. Upon drafting these proposed discovery articles, several rules were revised to enhance the court's involvement in the parties' discovery process, and to eliminate any too broad discovery practice from being proposed for adoption in Saudi Arabia. This is to offer a preferable discovery regime for the Saudi legal system with limited disadvantages.

This dissertation strived to safeguard that this proposed discovery litigation complies entirely with the rules of Islamic Law and the Saudi Public Policy and primary laws. It is highly recommended though that the Islamic Law experts and other specialized experts in the Saudi legislature examine the compatibility of these proposed rules to ensure that they are appropriately applicable to the Saudi civil procedural system. The following are the proposed disclosures and discovery articles that this dissertation suggests being adopted in the Saudi Civil Procedure Law.

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<sup>1162</sup> 2019 Federal Rules of Civil Procedure, *available at*: <https://www.federalrulesofcivilprocedure.org/frcp/>.

## Appendix A.1 Article 1: General Provisions Governing Initial Disclosure and Discovery

### (a) Required Disclosures.

#### (1) *Initial Disclosure.*

(A) In General. Except as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party who must also make available for inspection and copying as under Article 9 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Article 9, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible

judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Article 1(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(C) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Article 1(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(D) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

**(2) *Pretrial Disclosures.***

(A) In General. In addition to the disclosures required by Article 1(a)(1) and (2), a party must provide to the other parties, and promptly file, the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use of a deposition designated by another party; and any objection, together with the grounds for it, that may be made to the admissibility of materials identified.

**(3) Form of Disclosures.** Unless the court orders otherwise, all disclosures under Article 1(a) must be in writing, signed, and served.

**(b) Discovery Scope and Limits.**

**(1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of

the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need to be admissible in evidence to be discoverable.

***(2) Limitations on Frequency and Extent.***

(A) When Permitted. By order or executive regulation, the court may alter the limits in these articles on the number of depositions and interrogatories or on the length of depositions under Article 5. By order or executive regulation, the court may also limit the number of requests under Article 11.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these articles if the court determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action;

(iii) the proposed discovery is outside the scope permitted by Article 1(b)(1); or

(iv) the proposed discovery contradicts a binding rule of Islamic Law, a rule of a Saudi primary law, or a concept of the country's Public Policy.

**(3) *Trial Preparation: Materials.***

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But those materials may be discovered if:

(i) they are otherwise discoverable under Article 1(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Article 12(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person’s oral statement.

**(4) *Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged<sup>1163</sup> or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved;

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<sup>1163</sup> As discussed earlier in Section 5.6 of Chapter Four, the principle of privileges in the current Saudi legal system needs to be reformed upon adopting discovery to empower the protection of privileged information.

must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

**(c) Protective Orders.**

**(1) *In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

**(2) *Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

**(3) *Awarding Expenses.*** Article 12(a)(5) applies to the award of expenses.

**(d) *Timing and Sequence of Discovery.***

**(1) *Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Article 1(f), except when authorized by these articles, by stipulation, or by court order.

**(2) *Early Article 9 Requests.***

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Article 9 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Article 1(f) conference.

**(3) *Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

**(e) Supplementing Disclosures and Responses.**

**(1) *In General.*** A party who has made a disclosure under Article 1(a), or who has responded to an interrogatory, request for production, or request for admission must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

**(2) *Expert Witness.*** For an expert whose report must be disclosed, the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Article 1(a)(3) are due.

**(f) Conference of the Parties; Planning for Discovery.**

**(1) *Conference Timing.*** Except when the court orders otherwise, the parties must confer as soon as practicable, and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due.

**(2) *Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or

resolving the case; make or arrange for the disclosures required by Article 1(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

**(3) *Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Article 1(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including, if the parties agree on a procedure to assert these claims after production, whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these articles or by executive regulation, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Article 1(c).

**(4) Expedited Schedule.** If necessary to comply with its expedited schedule for pretrial conferences, a court may by executive regulation:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due; and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the pretrial conference.

**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.**

**(1) Signature Required; Effect of Signature.** Every disclosure under Article 1(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name, or by the party personally, if unrepresented, and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made;

and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these discovery articles and warranted by Islamic Law and existing laws or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

**(2) *Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

**(3) *Sanction for Improper Certification.*** If a certification violates this article without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

## Appendix A.2 Article 2: Depositions to Perpetuate Testimony

### (a) Before an Action Is Filed.

(1) *Petition.* A person who wants to perpetuate testimony about any matter cognizable in Saudi court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) *Notice and Service.* At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the court territorial jurisdiction in the manner provided by Articles 12 to 22 of the Civil Procedure Law. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise.

**(3) Order and Examination.** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these articles, and the court may issue orders like those authorized by Articles 9 and 10 of these discovery articles. A reference in these rules to the court where an action is pending means, for purposes of this article, the court where the petition for the deposition was filed.

**(4) Using the Deposition.** A deposition to perpetuate testimony may be used under Article 7(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these discovery articles or, although not so taken, would be admissible in evidence in the court where it was taken.

**(b) Pending Appeal.**

**(1) In General.** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

**(2) Motion.** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent;

and

(B) the reasons for perpetuating the testimony.

**(3) Court Order.** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Articles 9 and 10 of these articles. The depositions may be taken and used as any other deposition taken in a pending court action.

**(c) Perpetuation by an Action.** This article does not limit a court's power to entertain an action to perpetuate testimony.

### **Appendix A.3 Article 3: Persons Before Whom Depositions May Be Taken**

#### **(a) Within Saudi Arabia.**

**(1) *In General.*** Within the Saudi Arabian territorial jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths by the law in the place of examination;

(B) a person appointed by the court where the action is pending to administer oaths and take testimony; or

(C) a judicial lieutenant assigned by law to serve as a discovery magistrate

**(2) *Definition of “Officer.”*** The term “officer” in Articles 5, 6, and 7 of these articles includes a person appointed by the court under this article or designated by the parties under Article 4(a).

#### **(b) In a Foreign Country.**

**(1) *In General.*** A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a “letter rogatory”;

(C) on notice, before a person authorized to administer oaths either by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

**(2) Issuing a Letter of Request or a Commission.** A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

**(3) Form of a Request, Notice, or Commission.** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed “To the Appropriate Authority in [name of country].” A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

**(4) Letter of Request—Admitting Evidence.** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the territory of Saudi Arabia.

**(c) Disqualification.** A deposition must not be taken before a person who is any party’s relative, employee, or attorney; who is related to or employed by any party’s attorney; or who is financially interested in the action.

#### **Appendix A.4 Article 4: Stipulations About Discovery Procedure**

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified, in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified, but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

## **Appendix A.5 Article 5: Depositions by Oral Examination**

### **(a) When a Deposition May Be Taken.**

(1) A party may, by oral questions, depose any person, including a party, with leave of court. The deponent's attendance may be compelled by subpoena under Article 13.

(2) A party must obtain leave of court, and the court must grant leave to the extent consistent with Article 1(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this article or Article 6 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Article 1(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave Saudi Arabia and be unavailable for examination in the country after that time; or

(B) if the deponent is confined in prison.

### **(b) Notice of the Deposition; Other Formal Requirements.**

(1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice

must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

**(2) *Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Article 9 to produce documents and tangible things at the deposition.

**(3) *Method of Recording.***

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

**(4) *By Remote Means.*** The parties may stipulate, or the court may on motion order, that a deposition be taken by telephone or other remote means. For the purpose of this article and Articles 3(a), 12(a)(2), and 12(b)(1), the deposition takes place where the deponent answers the questions.

**(5) *Officer's Duties.***

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Article 3. The officer must begin the deposition with an on-the-record statement that includes:

- (i) the officer's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the officer's administration of the oath or affirmation to the deponent;

and

- (v) the identity of all persons present.

(B) **Conducting the Deposition; Avoiding Distortion.** If the deposition is recorded nonstenographically, the officer must repeat the items in Article 5(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) **After the Deposition.** At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

**(6) Notice or Subpoena Directed to an Organization.** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about

information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these articles.

**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.**

**(1) Examination and Cross-Examination.** The examination and cross-examination of a deponent proceed as they would at trial. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Article 5(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

**(2) Objections.** An objection at the time of the examination, whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition, must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve privileged information, to enforce a limitation ordered by the court, or to present a motion under Article 5(d)(3).

**(3) Participating Through Written Questions.** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

**(d) Duration; Sanction; Motion to Terminate or Limit.**

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Article 1(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction, including the reasonable expenses and attorney's fees incurred by any party, on a person who impedes, delays, or frustrates the fair examination of the deponent.

**(3) Motion to Terminate or Limit.**

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Article 1(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Article 12(a)(5) applies to the award of expenses.

**(e) Review by the Witness; Changes.**

**(1) Review; Statement of Changes.** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

**(2) Changes Indicated in the Officer's Certificate.** The officer must note in the certificate prescribed by Article 5(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

**(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.**

**(1) Certification and Delivery.** The officer must certify in writing that the witness was duly sworn, and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

**(2) Documents and Tangible Things.**

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to

the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

**(3) Copies of the Transcript or Recording.** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

**(4) Notice of Filing.** A party who files the deposition must promptly notify all other parties of the filing.

**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.**

A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

## Appendix A.6 Article 6: Depositions by Written Questions

### (a) When a Deposition May Be Taken.

(1) A party may, by written questions, depose any person, including a party with a leave of court. The deponent's attendance may be compelled by subpoena under Article 13.

(2) A party must obtain leave of court, and the court must grant leave to the extent consistent with Article 1(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this article or Article 5 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Article 1(d); or

(B) if the deponent is confined in prison.

(3) **Service; Required Notice.** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

**(4) Questions Directed to an Organization.** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Article 5(b)(6).

**(5) Questions from Other Parties.** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

**(b) Delivery to the Officer; Officer's Duties.**

The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Article 5(c), (e), and (f) to:

- (1) take the deponent's testimony in response to the questions;
- (2) prepare and certify the deposition; and
- (3) send it to the party, attaching a copy of the questions and of the notice.

**(c) Notice of Completion or Filing.**

**(1) Completion.** The party who noticed the deposition must notify all other parties when it is completed.

**(2) Filing.** A party who files the deposition must promptly notify all other parties of the filing.

## Appendix A.7 Article 7: Using Depositions in Court Proceedings

### (a) Using Depositions.

(1) *In General.* At a trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible if the deponent were present and testifying; and

(C) the use is allowed by Article 7(a)(2) through (8).

(2) *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the law.

(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Article 5(b)(6) or Article 6(a)(4).

(4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 kilometer from the place of trial or is outside Saudi Arabia, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

**(5) *Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Article 1(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken under the unavailability provision of Article 5(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

**(6) *Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

**(7) *Substituting a Party.*** Substituting a party does not affect the right to use a deposition previously taken.

**(8) Deposition Taken in an Earlier Action.** A deposition lawfully taken and, if required, filed in court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the law.

**(b) Objections to Admissibility.**

Subject to Article 3(b) and Article 7(d)(3), an objection may be made at a trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

**(c) Form of Presentation.**

Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

**(d) Waiver of Objections.**

**(1) To the Notice.** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

**(2) To the Officer's Qualification.** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

**(3) *To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Article 6 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

**(4) *To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony, or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition, is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

## Appendix A.8 Article 8: Interrogatories to Parties

### (a) In General.

(1) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than (25) written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Article 1(b)(1) and (2).

(2) **Scope.** An interrogatory may relate to any matter that may be inquired into under Article 1(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

### (b) Answers and Objections.

(1) **Responding Party.** The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) **Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Article 4 or be ordered by the court.

**(3) Answering Each Interrogatory.** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

**(4) Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

**(5) Signature.** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

**(c) Use.**

An answer to an interrogatory may be used to the extent allowed by the law.

**(d) Option to Produce Business Records.**

If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

**(1)** specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

**(2)** giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

**Appendix A.9 Article 9: Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes**

**(a) In General.**

With a leave of court, a party may serve on any other party a request within the scope of Article 1(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

**(b) Procedure.**

(1) *Contents of the Request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

**(2) Responses and Objections.**

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served or, if the request was delivered under Article 1(d)(2), within 30 days after the parties' first Article 1(f) conference. A shorter or longer time may be stipulated to under Article 4 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored

information. If the responding party objects to a requested form, or if no form was specified in the request, the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

**(c) Nonparties.**

As provided in Article 13, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

## Appendix A.10 Article 10: Physical and Mental Examinations

### (a) Order for an Examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Motion and Notice; Contents of the Order.* The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

### (b) Examiner's Report.

(1) *Request by the Party or Person Examined.* The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* After delivering the reports, the party who moved for the examination may request, and is entitled to receive, from the party against whom the

examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

**(4) Waiver of Privilege.**<sup>1164</sup> By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have, in that action or any other action involving the same controversy, concerning testimony about all examinations of the same condition.

**(5) Failure to Deliver a Report.** The court on motion may order, on just terms, that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

**(6) Scope.** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other articles.

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<sup>1164</sup> As discussed earlier in Section 5.6 of Chapter Four, the principle of privileges in the current Saudi legal system needs to be reformed upon adopting discovery to empower the protection of privileged information.

## Appendix A.11 Article 11: Requests for Admission

### (a) Scope and Procedure.

(1) *Scope.* With a leave of court, a party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Article 1(b)(1) relating to:

- (A) facts, the application of law to fact, or opinions about either; and
- (B) the genuineness of any described documents.

(2) *Form; Copy of a Document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Article 4 or be ordered by the court.

(4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or

deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

**(5) *Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

**(6) *Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this article, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Article 12(a)(5) applies to an award of expenses.

**(b) Effect of an Admission; Withdrawing or Amending It.**

A matter admitted under this article is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. The court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this article is not an admission for any other purpose and cannot be used against the party in any other proceeding.

**Appendix A.12 Article 12: Failure to Make Disclosures or to Cooperate in Discovery;  
Sanctions**

**(a) Motion for an Order Compelling Disclosure or Discovery.**

**(1) *In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

**(2) *Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

**(3) *Specific Motions.***

**(A) To Compel Disclosure.** If a party fails to make a disclosure required by Article 1(a), any other party may move to compel disclosure and for appropriate sanctions.

**(B) To Compel a Discovery Response.** A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

- (i) a deponent fails to answer a question asked under Article 5 or Article 6;
- (ii) a corporation or other entity fails to make a designation under Article 5(b)(6) or Article 6 (a)(4);
- (iii) a party fails to answer an interrogatory submitted under Article 8; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted, or fails to permit inspection, as requested under Article 9.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

**(4) *Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

**(5) *Payment of Expenses; Protective Orders.***

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Article 1(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or

deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Article 1(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

**(b) Failure to Comply with a Court Order.**

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

**(2) *Sanctions Sought in the District Where the Action Is Pending.***

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent, or a witness designated under Article 5(b)(6) or Article 6(a)(4), fails to obey an order to provide or permit discovery, including an order under Article 1(f), Article 10, or Article 12(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Article 10(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Article 12(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

**(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.**

**(1) *Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Article 1(a) or (e), the party is not allowed to use that information or witness

to supply evidence on a motion, at a hearing, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; and

(B) may impose other appropriate sanctions, including any of the orders listed in Article 12(b)(2)(A)(i)—(vi).

**(2) *Failure to Admit.*** If a party fails to admit what is requested under Article 11 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Article 11(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.**

**(1) *In General.***

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent, or a person designated under Article 5(b)(6) or Article 6(a)(4), fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Article 8 or a request for inspection under Article 9, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

**(2) *Unacceptable Excuse for Failing to Act.*** A failure described in Article 12(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Article 1(c).

**(3) *Types of Sanctions.*** Sanctions may include any of the orders listed in Article 12(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

**(e) Failure to Preserve Electronically Stored Information.**

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party; or

(B) dismiss the action or enter a default judgment.

**(f) Failure to Participate in Framing a Discovery Plan.**

If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Article 1(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

## Appendix A.13 Article 13: Subpoena

### (a) In General.

#### (1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Article 13(d) and (e).

(B) *Command to Attend a Deposition—Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition or a hearing or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) *Issued by Whom.* The discovery magistrate must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) *Notice to Other Parties Before Service.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

**(b) Service.**

(1) *By Whom and How; Tendering Fees.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the kilometers allowed by the law. Fees and kilometers need not be tendered when the subpoena issues on behalf of Saudi Arabia or any of its officers or agencies.

(2) *Service in Saudi Arabia.* A subpoena may be served at any place within the Saudi Arabia territory.

**(3) Service in a Foreign Country.** Articles 19, 20, and 21 of the Civil Procedure Law governs issuing and serving a subpoena directed to a Saudi Arabian national, resident, or visitor who is in a foreign country.

**(4) Proof of Service.** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

**(c) Place of Compliance.**

**(1) For a Trial or Deposition.** A subpoena may command a person to attend a trial or deposition only as follows:

(A) within 100 kilometers of where the person resides, is employed, or regularly transacts business in person; or

(B) within the administrative region where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party of a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 kilometers of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) *Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction, which may include reasonable attorney's fees, on a party or attorney who fails to comply.

**(2) *Command to Produce Materials or Permit Inspection.***

**(A) *Appearance Not Required.*** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition or trial.

**(B) *Objections.*** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises, or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) *Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Article 13(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Article 13(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) *Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person

identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Article 1(b)(2)(C). The court may specify conditions for the discovery.

**(2) *Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The

person who produced the information must preserve the information until the claim is resolved.

**(f) Transferring a Subpoena-Related Motion.**

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this article to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

**(g) Contempt.**

The court for the district where compliance is required, and also, after a motion is transferred, the issuing court, may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

## Appendix B The Rules of Discovery in The Hague Conference

The Hague Conference is "an international, intergovernmental organization that works to develop and service multilateral legal instruments in the areas of civil and commercial law."<sup>1165</sup> The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is one of the well-known treaties that deals with finding facts and obtaining evidence needed in civil and commercial litigation when the materials are found outside of the court's jurisdiction.<sup>1166</sup> The Hague Convention is "a multilateral treaty detailing procedures for the taking of evidence among signatory countries" in civil and commercial judicial proceedings only.<sup>1167</sup>

Since the rules of discovery vary considerably from one jurisdiction to another, The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters sets general standards for practicing international discovery that litigants in the member countries must follow in their international litigation to obtain pieces of evidence located abroad and out of their courts' jurisdiction.<sup>1168</sup>

One of the reasons for establishing formal standards for finding facts and obtaining evidence from abroad under The Hague Convention is to establish a formal process "to improve

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<sup>1165</sup> AM. SOC'Y INT'L L., *supra* note 69, at II.C-1.

<sup>1166</sup> Harkness, *supra* note 67, at 1; see also Harrison, *supra* note 47, at 8.

<sup>1167</sup> Harkness, *supra* note 67, at 1; See also Ogden & Rapawy, *supra* note 68, at 12-13.

<sup>1168</sup> AM. SOC'Y INT'L L., *supra* note 69, at II.C-1; See also Harrison, *supra* note 47, at 8. These codified standards were prepared by The Hague Conference on Private International Law.

judicial cooperation between common law and civil law countries on issues of foreign discovery."<sup>1169</sup> The United States was one of the countries that had encouraged the establishment of this formal process as a treaty among the member countries in the Hague Conference.<sup>1170</sup> This is due to existing practical problems with requesting discovery of evidence from another signatory country. This is especially true with civil law countries, such as Saudi Arabia, that do not adopt a formal discovery process in civil and commercial cases similar to the United States discovery process.<sup>1171</sup> One of the main purposes of the negotiation to establish the Hague Conference was "to provide methods to reconcile the differing legal philosophies of the Civil Law, Common Law, and other systems, as well as methods to satisfy doctrines of judicial sovereignty."<sup>1172</sup>

The main advantage of adopting this Treaty in the United States was to streamline "procedures for seeking evidence abroad by allowing United States courts to request evidence directly from the designated central authority of a foreign state and bypass diplomatic channels."<sup>1173</sup> Using this Treaty has become the most common legal method in the United States to find facts and obtain evidence located abroad and in the possession, control or custody of a foreign non-party to United States civil or commercial proceedings in order to present these

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<sup>1169</sup> Harkness, *supra* note 67, at 9; See also Ogden & Rapawy, *supra* note 68, at 11.

<sup>1170</sup> Ogden & Rapawy, *supra* note 68, at 11.

<sup>1171</sup> Harkness, *supra* note 67, at 9-10.

<sup>1172</sup> Ogden & Rapawy, *supra* note 68, at, 11.

<sup>1173</sup> Harkness, *supra* note 67, at 11.

materials in the United States proceedings.<sup>1174</sup> If a party has possession, custody, or control of the evidence, a United States court may also order discovery under the Federal Rules of Civil Procedure without using The Hague Convention.<sup>1175</sup>

Relying on The Hague Convention is optional for litigants in civil and commercial cases in the United States.<sup>1176</sup> Litigants in United States proceedings are not obliged to use the Hague Convention as the sole legal method to obtain materials from another member country; they may obtain materials from a member country by any other available legal methods.<sup>1177</sup> This is based on the decision of the Supreme Court<sup>1178</sup>, which states that using this Hague Convention is not the mandatory or exclusive method to obtain any document and information from another signatory country to this Treaty.<sup>1179</sup> According to this ruling of the Supreme Court, "if foreign discovery is sought in a U.S. proceeding, a requesting party may simultaneously seek evidence under the Hague Convention and under an alternative discovery mechanism."<sup>1180</sup>

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<sup>1174</sup> *Id.*; see also Ogden & Rapawy, *supra* note 68, at 11.

<sup>1175</sup> The United States Supreme Court decision in *Aerospatiale*, 482 U.S. 522 (1987).

<sup>1176</sup> Harkness, *supra* note 67, at 1.

<sup>1177</sup> Harkness, *supra* note 67, at 1&14.

<sup>1178</sup> The United States Supreme Court decision in *Aerospatiale*, 482 U.S. 522 (1987)

<sup>1179</sup> *Id.*

<sup>1180</sup> *Id.*

The Hague Convention identifies two formal mechanisms that litigants may use to obtain materials from a foreign country member in The Hague Convention.<sup>1181</sup> The first mechanism involves the judiciary authority in the member country that seeks the information to contact the competent authority in the other country by submitting a Letter of Request, seeking the materials requested. The other formal mechanism permitted under the Convention is to obtain the materials through a diplomatic officer, consular agent, or commissioner of a member country who works in the requested member country.<sup>1182</sup>

Even though these two mechanisms are stated as the formal mechanisms to obtain evidence from abroad under the Hague Convention, the Convention allows the member countries to set reservations and adopt restrictions on the use of these mechanisms in their territories.<sup>1183</sup> Member countries may exclude any provision of the Convention from being applied in their countries. They may also adopt additional restrictions, beside the Convention provisions, as requirements to use certain mechanism under the Convention to obtain evidence in their jurisdictions.<sup>1184</sup> Upon joining any of the Hague conventions, a member country may make declarations and reservations on any article of the convention. The same conventions may accordingly be different from one country to

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<sup>1181</sup> Harkness, *supra* note 67, at 15; see also Ogden & Rapawy, *supra* note 68, at 15.; see also The Hague Convention, *supra* note 49.

<sup>1182</sup> Harkness, *supra* note 67, at 16; See also Ogden & Rapawy, *supra* note 68, at 15.

<sup>1183</sup> Harkness, *supra* note 67, at 18.

<sup>1184</sup> Harkness, *supra* note 67, at 18.

another, based on the terms on to which a country agreed. The applicability of the same convention varies from one jurisdiction to another, therefore.<sup>1185</sup>

In 2016, Saudi Arabia became the (82<sup>nd</sup>) member of the Hague Conference when it signed and deposited Saudi Arabia's instrument of acceptance of the Statute of the Hague Conference.<sup>1186</sup> Saudi Arabia is not yet a party of any Hague Convention, which means that the authorities in Saudi Arabia are not committed by the Hague Convention to help in providing evidentiary materials located in Saudi Arabia to be used in foreign legal jurisdiction.<sup>1187</sup>

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<sup>1185</sup> Harrison, *supra* note 47, at 8; See also Ogden & Rapawy, *supra* note 68, at 11.

<sup>1186</sup> *The Kingdom of Saudi Arabia becomes the 82nd Member of the Hague Conference*, HCCH (Oct. 19, 2016), <https://www.hcch.net/en/news-archive/details/?varevent=525>.

<sup>1187</sup> *Id.*

## Appendix C Guide to the Saudi Law of Civil Procedures

Royal Decree No. (M / 1) 22 Moharram 1435 H. [26 November 2013]

### Introduction:

This is a guide to the Saudi Civil Procedure Law. The purpose of this guide is to provide a translated version of the law that is the subject of the main discussions in this dissertation. This is to allow the English readers of this dissertation to have comprehensive understanding of the current Saudi Civil Procedure Law. This guide provides the official translation of the formal articles of the law. This translation is provided by the Bureau of Experts at The Council of Ministers (BETCM) of the Kingdom of Saudi Arabia.<sup>1188</sup>

The translation of the articles of the Saudi Civil Procedure Law is as follows:

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<sup>1188</sup> BETCM website, *The Saudi Civil Procedure Law*, available at: <https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/f0eaae46-9f84-40ee-815e-a9a700f268b3/2>; see also the English translation of the law at <https://www.moj.gov.sa/Documents/Regulations/pdf/En/50.pdf>.

## **Appendix C.1 General Provisions**

### **Article 1**

Courts shall apply the provisions of Sharia to cases brought before them, as derived from the Quran and Sunnah, and State laws not conflicting therewith. Proceedings before such courts shall comply with the provisions of this Law.

### **Article 2**

Any procedure deemed valid under laws in force shall remain valid unless otherwise provided for in this Law.

### **Article 3**

1- No claim or defense shall be accepted unless submitted by a person with a legitimate interest. Potential interest shall be sufficient if the claim is intended as a precaution to avoid imminent damage or to establish a right the evidence for which may not be available at the time it is contested.

2- The court shall reject any lawsuit proven to be frivolous or malicious, and it may punish the person filing such lawsuit.

#### **Article 4**

No public interest lawsuit may be filed except by the public prosecutor upon approval by the King. Such lawsuit may not be heard upon the lapse of 60 days from the date on which the claim arises.

#### **Article 5**

A proceeding shall be invalid if so, declared by the law or if it suffers from a defect causing it to fail its purpose. It shall not be ruled invalid, notwithstanding a provision stating so, if it is established that the purpose of the proceeding is served.

#### **Article 6**

A clerk shall attend all hearings and all case proceedings along with the judge and shall keep a record and cosign it with the judge. If the clerk fails to attend, the judge may take charge of the proceeding and draft the record.

#### **Article 7**

Process servers, clerks, and other judicial clerks may not perform any official task in cases involving them or their spouses, relatives or in-laws up to the fourth degree, including declarations involving dispute. Otherwise, such action shall be deemed null and void.

## **Article 8**

Periods and dates stipulated in this Law shall be calculated according to Umm al-Qura calendar, and sunset shall be deemed the end of the day.

## **Article 9**

In the application of the provisions of this Law, the term place of residence shall mean the place where a person normally resides. For nomads, place of residence shall be deemed the place where a person resides at the time of filing the lawsuit. For detainees and prisoners, place of residence shall be deemed the place where a person is detained or imprisoned.

A person may designate a place of residence for receiving the notices addressed to him, in addition to his permanent place of residence, and shall notify the court of any change in his designated or permanent place of residence.

## **Article 10**

A case properly filed with a competent court may not be transferred to another court or authority nor withdrawn before judgment is rendered. A case shall be deemed filed from the date of its entry into the court registry.

## **Article 11**

1- Processes shall be served by process servers at the order of the judge or the request of the litigant or court administration. Litigants or their agents shall continue the proceedings and submit papers to process servers for service. Service may be carried out

by the plaintiff if he so petitions.

2- Processes may be served by process servers from the private sector in accordance with controls specified in the regulations of this Law. Private process servers shall be subject to rules and procedures governing process servers.

### **Article 12**

A process may not be served at a place of residence before sunrise or after sunset or during official holidays, except in compelling circumstances and with the written permission of the judge.

### **Article 13**

A service of process must be in duplicate, an original and a copy. If several persons are served, a copy shall be served to each person.

The process shall include the following:

- a) subject of the process, and date of service specifying day, month, year and time;
- b) full name, identification number, occupation or job, place of residence and place of work of the person requesting the process as well as full name, identification number, occupation or job, place of residence and place of work of his representative;
- c) full name of the defendant and any available information relating to his occupation or job, place of residence and place of work. If his place of residence is unknown, the process shall be served at his last known place of residence;
- d) name of the process server and the court where he works;
- e) name and capacity of the person receiving the copy of the notification and his signature on the

original, or a proof of his refusal and reason therefor; and  
f) the server's signature on both the copy and the original.

In case of government agencies, the name and location of the agency shall be deemed sufficient for the purposes of paragraphs (b and c) of this Article.

The Supreme Judicial Council may, if necessary, add other means and details.

#### **Article 14**

The server shall deliver a copy of the notification and attachments thereto to the person to be served at his place of residence or work if available; otherwise, he shall deliver the same to whomever he deems to be his agent or a person working for him or to any of his family members, relatives or in-laws residing with him. If none of them are present or if the one present refuses receipt of said notification or is a minor, the copy and attachments shall be delivered, as the case may be, to the Umdah (chief of the quarter), the police station, the administrator of the township or the chieftain of the tribe within whose jurisdiction lies the place of residence of the person to be served, in that order, and obtain their signature on the original acknowledging receipt.

The server shall, within 24 hours of the delivery of a copy to any of the parties provided for in this Article, send a letter – via registered mail – to the person to be served at his place of residence or work notifying him that a copy has been delivered to said party, and shall indicate the same in detail on the original notice. The process shall be deemed effective from the time of delivery of the copy as per the above conditions.

### **Article 15**

Administrators of townships, police stations, Umdas and chieftains of tribes shall, within their jurisdictions, assist the court process server in performing his task.

### **Article 16**

A process shall be valid if served on the person to be served, even if at other than his place of residence or work.

### **Article 17**

A copy of the notice shall be delivered as follows:

- a) with respect to government agencies: to their heads, or designees;
- b) with respect to public corporate persons: to their managers, or designees;
- c) with respect to companies, associations and private establishments: to their managers, or designees;
- d) with respect to foreign companies and establishments with branches or agents in the Kingdom: to the branch manager, or designee, or to the agent, or designee;
- e) with respect to armed forces personnel and those of similar status: to the immediate superior of the person to be served;
- f) with respect to ship crew: to the captain;
- g) with respect to interdicted persons: to their trustees or guardians as the case may be;
- h) with respect to prisoners or detainees: to the warden of the prison or detention center, or designee; and

i) with respect to persons without known or designated place of residence in the Kingdom: to the Ministry of Interior to notify him in an appropriate manner.

### **Article 18**

In all the cases set forth in Article 17 of this Law, if the person to be served, or designee, refuses to receive a copy of the service notice or sign the original acknowledging receipt, the server shall so indicate on the original and the copy, and deliver the copy to the governorate within whose jurisdiction lies the place of residence of the person to be served, or to the entity designated by the governorate. The process server shall indicate the same in detail on the original of the notice and the process shall be deemed valid as of the date of delivery of the copy to the relevant recipient.

### **Article 19**

If the place of residence of the person to be served is outside the Kingdom, a copy of the notice shall be sent to the Ministry of Foreign Affairs for delivery through diplomatic channels. A statement indicating that the copy has been delivered to the person to be served shall be deemed sufficient.

### **Article 20**

If the place of service in the Kingdom lies outside the court's jurisdiction, the papers to be served shall be sent by such court to the court within whose jurisdiction the service takes place.

### **Article 21**

A period of 60 days shall be added to the statutory time limits for persons residing outside the Kingdom, and the court may, if necessary, extend the same for a similar period.

### **Article 22**

If the time limit is set in days, months or years, it shall not include the notice day or the day of the event initiating the time limit, as recognized by law. The time limit shall expire at the end of the last day if the proceeding takes place on such day. If the time limit must expire prior to the proceeding, the proceeding shall not take place except upon the lapse of the last day of the time limit. If the time limit is set in hours, its starting hour and its hour of expiry shall be calculated as above.

If the time limit expires on an official holiday, it shall extend into the first working day thereafter.

### **Article 23**

Arabic shall be the official language of courts. The court shall hear non-Arabic speaking litigants, witnesses and others through an interpreter. A certified Arabic translation prepared by a licensed office shall be presented for documents in a foreign language.

## **Appendix C.2 Jurisdiction**

### **Chapter 1**

#### **International Jurisdiction**

##### **Article 24**

The Kingdom's courts shall have jurisdiction over cases filed against a Saudi citizen even if he has no known general or designated place of residence in the Kingdom, except for cases in rem involving real property outside the Kingdom.

##### **Article 25**

The Kingdom's courts shall have jurisdiction over cases filed against non-Saudis who have a general or a designated place of residence in the Kingdom, except for cases in rem involving real property outside the Kingdom.

##### **Article 26**

The Kingdom's courts shall have jurisdiction over cases filed against non-Saudis who have no general or designated place of residence in the Kingdom in the following cases:

- a) if the lawsuit involves property located in the Kingdom or obligation considered to have originated or is enforceable in the Kingdom;
- b) if the lawsuit involves bankruptcy declared in the Kingdom; or

c) if the lawsuit is filed against more than one person and one of them has a place of residence in the Kingdom.

### **Article 27**

The Kingdom's courts shall have jurisdiction over cases filed against a non-Saudi Muslim who has no general or designated place of residence in the Kingdom in the following cases:

- a) if the case is against a marriage contract to be executed in the Kingdom;
- b) if the case is for divorce or annulment of a marriage contract and is filed by a Saudi wife or a wife who has lost her Saudi citizenship by reason of marriage if either one is residing in the Kingdom, or a non-Saudi wife residing in the Kingdom, against her husband who has a place of residence in the Kingdom if the husband abandoned her and took residence abroad or if he was deported from the Kingdom;
- c) if the lawsuit is for support and the person for whom support is claimed resides in the Kingdom;
- d) if the lawsuit involves paternity of a child in the Kingdom or relates to an issue of custody over a person or property when the minor or the person to be interdicted has a place of residence in the Kingdom; or
- e) if the lawsuit involves some other family matters and the plaintiff is a Saudi or a non-Saudi residing in the Kingdom, provided the defendant has no known place of residence abroad.

### **Article 28**

Except for cases in rem involving real estate outside the Kingdom, the Kingdom's courts shall have jurisdiction over cases when the litigants accept these courts' jurisdiction, even if the case does not fall within their jurisdiction.

### **Article 29**

The Kingdom's courts shall have jurisdiction over precautionary and provisional measures enforced in the Kingdom, even if such courts have no jurisdiction over the original case.

### **Article 30**

The jurisdiction of the Kingdom's courts shall entail having jurisdiction over preliminary and incidental petitions relating to the original case as well as consideration of any petition relating to such case if the proper conduct of justice requires that they are considered together.

## **Chapter 2**

### **Subject Matter Jurisdiction**

### **Article 31**

General courts shall have jurisdiction to consider all lawsuits, cases, presentations, and the like, which are beyond the jurisdiction of other courts, notaries public and the Board of Grievances. They may, in particular, consider the following:

a) lawsuits relating to real property, including disputes over ownership or any associated right;

harm inflicted by the real property or users thereof; or lawsuits relating to values of utilities, eviction, payment or contribution to rent; or lawsuits relating to restraining interference with possession or recovery of possession and the like, unless the law provides otherwise;

b) issuing title deeds for real property ownership or endowment; and

c) lawsuits resulting from traffic accidents and offences provided for in the Traffic Law and its Implementing Regulations.

### **Article 32**

General courts in a county or township where there is no specialized court shall have jurisdiction over lawsuits, cases, presentations, and the like, which fall within the jurisdiction of such specialized court, unless the Supreme Judicial Council decides otherwise.

### **Article 33**

Family courts shall have jurisdiction to consider the following:

a) all family matters, including:

1- recording marriage, divorce, khul' (divorce at the insistence of the wife), dissolution of marriage, revocation of divorce, child custody, alimony and visitation;

2- registration of endowment, will, paternity, absence, death and determination of heirs;

3- inheritance and distribution thereof, including real estate if disputed or it involves a share of endowment or will, or a minor or an absentee;

4- recording the designation of trustees, guardians and administrators; permitting them to perform actions that require the court's permission and dismissing them if necessary, as

well as imposing interdiction against spendthrifts or removal thereof, subject to procedures set forth in the Regulations of this Law;

5- recording a power of attorney by illiterate deaf persons; and

6- marrying off women who have no guardians or are deprived of marriage by their guardians.

b) lawsuits arising from family matters; and

c) lawsuits filed for imposing penalties provided for in the Law of the General Commission for Guardianship over Property of Minors and those of Similar Status.

#### **Article 34**

Labor courts shall have jurisdiction to consider the following:

a) disputes relating to work contracts, wages, rights, work injuries and compensation therefor;

b) disputes relating to disciplinary measures imposed on employees by their employers or requesting exemption therefrom;

c) lawsuits filed for imposing penalties provided for in the Labor Law;

d) disputes arising from termination of employment;

e) complaints made by employers and employees whose objections to any decision issued by any competent department of the General Organization for Social Insurance, relating to mandatory registration; contributions or compensation, have been refused;

f) disputes relating to employees governed by the provisions of the Labor Law, including workers employed by the government; and

g) disputes arising from the application of the Labor Law and Social Insurance Law, without prejudice to the jurisdictions of other courts and the Board of Grievances.

**Article 35<sup>1189</sup>**

Commercial courts shall have jurisdiction to consider the following:

- a) all original and corollary commercial disputes between merchants;
- b) lawsuits filed against a merchant due to his original commercial activities or an activity related thereto;
- c) disputes between partners in partnerships;
- d) all lawsuits and violations relating to commercial laws, without prejudice to the jurisdiction of the Board of Grievances;
- e) lawsuits of bankruptcy and imposition of interdiction on bankrupt persons and removal thereof; and
- f) other commercial disputes.

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<sup>1189</sup> This article was repealed by Royal Decree (M/93) dated 15/8/1441H [9 April 2020], issued regarding the approval of the Commercial Courts Law and Procedures.

## **Chapter 3**

### **Territorial Jurisdiction**

#### **Article 36**

1- Jurisdiction shall belong to the court within whose jurisdiction the defendant's place of residence falls. If the defendant does not have a place of residence in the Kingdom, the jurisdiction shall belong to the court within whose jurisdiction the plaintiff's place of residence falls.

2- If neither the plaintiff nor the defendant has a place of residence in the Kingdom, the plaintiff may file the case with any court in any city in the Kingdom.

3- In case of multiple defendants, jurisdiction shall belong to the court with jurisdiction over the place of residence of the majority. In case of equal numbers, the plaintiff shall have the right to file the case with any court having jurisdiction over the place of residence of any of them.

#### **Article 37**

Cases against government agencies shall be filed with the court having jurisdiction over its head office. A lawsuit may be filed with the court having jurisdiction over the branch of a government agency in matters relating to that branch.

### **Article 38**

Lawsuits relating to existing companies and societies or those under liquidation, or to private establishments, shall be filed with the court having jurisdiction over its head office irrespective of whether the case is filed against the company, society or establishment, or by the company, society or establishment against a partner or a member, or by a partner or a member against another partner or member. A lawsuit may be filed with the court having jurisdiction over the branch of a company, society or establishment in matters relating to that branch.

### **Article 39**

The following shall be excluded from the application of Article 36 of this Law:

- 1- A claimant of alimony shall have the right to file a lawsuit with the court having jurisdiction over the place of residence of either the claimant or defendant.
- 2- A woman, in marital matters or matters relating to custody, visitation or deprivation of marriage by a guardian, shall have the right to file the lawsuit in either her town or that of the defendant. If the court hears the lawsuit in the plaintiff's town, it shall succeed the defendant's town court to consider her lawsuit. If the lawsuit is transferred, the defendant shall be summoned to appear before the court with which the lawsuit is filed in order to proceed therewith. If the defendant abstains, the lawsuit shall be heard in absentia and if the lawsuit is not transferred, the court shall dismiss it without summoning the defendant.
- 3- A plaintiff in lawsuits arising from traffic accidents occurring in a town other than that of the defendant shall have the right to file the lawsuit with the court within whose jurisdiction the place of the accident or defendant's place of residence falls.

#### **Article 40**

A city, county or township shall be considered the territorial jurisdiction of the court located therein. If there are multiple courts, the Supreme Judicial Council shall designate the territorial jurisdiction of each. A township with no court shall fall within the jurisdiction of the court of the nearest town within the province, unless the Supreme Judicial Council determines that they fall within the jurisdiction of another court in the same province. In case of conflict of territorial jurisdiction, the case shall be referred to the Supreme Court to decide thereon.

## **Appendix C.3 Filing and Recording Lawsuits**

### **Article 41**

1- A lawsuit shall be filed with the court by the plaintiff, by means of a statement of claim signed by the plaintiff or his representative, in an original and as many copies as there are defendants.

The statement of claim must include the following:

- a) plaintiff's full name, identification number, profession or occupation, place of residence and place of work, as well as his representative's full name, identification number, profession or occupation, place of residence and place of work;
- b) defendant's full name, available information about his profession or occupation, place of residence and place of work, or his last place of residence if he has no known place of residence;
- c) date of submission of the statement of claim;
- d) the court before which the lawsuit is filed;
- e) plaintiff's designated place of residence in the town where the court is located if he has no place of residence therein; and
- f) subject matter of the suit and plaintiff's claim and evidence.

As to government agencies referred to in paragraphs (a, b and e) of this Article, the name and location of said government agencies shall be deemed sufficient.

The Supreme Judicial Council may, if necessary, add other means and details.

2- A single statement of claim may not combine several unrelated claims.

#### **Article 42**

The clerk shall enter the case in the court docket on the day the statement of claim is filed, upon recording the date of the hearing on the original and copies thereof in the presence of the plaintiff or his representative. The clerk shall, not later than the following day, deliver the original statement of claim and copies thereof to the process server or plaintiff, as the case may be, for serving and returning the original to the court administration.

#### **Article 43**

Taking into consideration the date set for appearance, the process server or plaintiff, as the case may be, shall serve a copy of the statement of claim to the defendant not later than 15 days from the date of receipt, unless a hearing is set within such period. In such case, the statement of claim shall be served prior to the hearing.

#### **Article 44**

The date of appearance before a general court shall not be less than (8) days from the date of service of the statement of claim. The date of appearance before labor, commercial and family courts shall not be less than four days from the date of service of the statement of claim. The four-day period shall apply to labor, commercial and family cases brought before the general court in a county or township. Such period may be reduced to 24 hours in lawsuits arising from traffic accidents, or when necessary, provided that the litigant is served in person and is able to reach the

court in time. Reduction of such period shall be with the permission of the court before which the lawsuit is filed.

#### **Article 45**

With the exception of summary cases and cases where the period of court date is shortened, the defendant shall deposit with the court his statement of defense at least (3) days prior to the hearing set for consideration of the case before the general court and at least (1) day prior to the hearing before other courts and before labor, commercial and family circuits, if the case is considered by the general court in a county or township.

#### **Article 46**

Failure to observe the period set forth in Article 43 of this Law or the court date shall not invalidate the statement of claim, without prejudice to the right of the person served to postponement for completion of the period.

#### **Article 47**

If the plaintiff and defendant voluntarily appear before a court and request a hearing of their dispute, the court shall promptly hear the case, if possible, or set another hearing, even if the case is beyond its territorial jurisdiction.

**Article 48**

If a court sets a hearing for two litigants but they appear at other than the set date and they petition the court to consider their dispute, the court shall, if possible, grant such petition.

## **Appendix C.4 Appearance and Absence of Litigants and Representation in Litigation**

### **Chapter 1**

#### **Appearance and Representation in Litigation**

##### **Article 49**

On the day set for consideration of the case, the litigants shall appear in person or through representation. If the representative is an agent, he shall be eligible to act as a legal representative according to the law.

##### **Article 50**

An agent shall declare his appearance on behalf of his client and shall deposit a certified copy of the document of his power of attorney with the competent clerk. The court may, at its discretion, allow the deposit of the copy of the document by the agent within a period prescribed by the court, provided that it is not later than the first hearing. The power of attorney may be established by a declaration to be entered in the hearing record and signed or thumb-printed by the principal.

The aforementioned mandatory deposit shall also apply to trustees, guardians and administrators.

##### **Article 51**

Whatever the agent declares in the presence of the principal shall in effect be considered a declaration by the principal himself unless the principal denies it in the same hearing.

If the principal fails to appear, the agent may not concede the right claimed; make a waiver or accept a settlement; accept, direct, or reject an oath; drop the litigation; waive judgment in whole or in part or through any method of appeal; lift an interdiction; release a mortgage while leaving the debt unpaid; claim forgery; request dismissal of the judge; or select or reject an expert, unless he is specifically authorized to do so in the power of attorney.

#### **Article 52**

Resignation or dismissal of an agent without the court's approval shall not preclude continuation of the proceedings unless the principal notifies his adversary of the appointment of another agent, or of his intention to pursue the case pro se.

#### **Article 53**

If the court establishes that an agent has been dilatory under the pretext of the need to consult his client with the intent to procrastinate, the court may instruct the principal himself to complete the proceeding or assign another agent.

#### **Article 54**

A judge, a member of the Bureau of Investigation and Public Prosecution, or a court employee may not serve as an agent for a litigant in a case, even if filed before a different court. They are, however, permitted to represent their spouses, ascendants and descendants as well as persons legally under their guardianship.

## **Chapter 2**

### **Absence of Litigants**

#### **Article 55**

If the plaintiff is absent from a hearing without an excuse acceptable to the court, the case shall be dismissed. The plaintiff may, however, petition continuation of the case. In such case, the court shall schedule a hearing for consideration and shall notify the defendant. If the plaintiff is absent again without an excuse acceptable to the court, the case shall be dismissed and may only be heard pursuant to a decision by the Supreme Court.

#### **Article 56**

In the cases provided for in Article 55 of this Law, if the defendant attends the hearing from which the plaintiff is absent, he may petition the court not to dismiss the case and to render a decision on its merits; in which case, the court shall rule on such case and the judgment shall be considered in absentia with respect to the plaintiff.

#### **Article 57**

1- If the defendant is absent from the first hearing without being notified in person or through his agent, consideration of the case shall be postponed to a subsequent hearing of which the defendant shall be notified. If he is absent from said hearing without an excuse acceptable to the court and without being notified in person or through his agent, the court shall rule on the case and its judgment shall be considered in absentia with

respect to the defendant.

2- If the defendant or his agent in the same case is notified of the date of hearing in person, or a memorandum of defense is deposited with the court by the defendant or his agent prior to the scheduled hearing of the case, or if the defendant appears at any of the hearings then fails to appear again, the court shall rule on the case and the judgment shall not be deemed in absentia with respect to the defendant.

3 - If the defendant, who has no known or designated place of residence in the Kingdom, fails to appear after being served pursuant to Article 17 (i) of this Law, the court shall rule on the case and the judgment shall be deemed in absentia with respect to the defendant.

4 - If the defendant is absent in cases relating to marital matters or matters of custody, alimony, visitation or prevention of a woman from marriage by her guardian, the court may order the defendant to be brought by force in accordance with controls stipulated in the regulations of this Law.

### **Article 58**

In case of multiple defendants, where some are served in person while the others are not, and all of them or only those not served in person are absent, the court shall, in other than summary cases, postpone consideration of the case to a subsequent hearing and the plaintiff shall serve notice of that hearing to those absent who are not served in person. The decision in the case shall not be deemed in absentia with respect to served defendants.

## **Article 59**

In application of the preceding provisions, a person shall not be considered absent if he arrives 30 minutes prior to the end of a hearing's scheduled time if such hearing has not started. If he arrives while the hearing is in progress, he shall be considered present.

## **Article 60**

1- A person against whom a judgment in absentia has been rendered may, within the appeal period specified in this Law, challenge the judgment before the court which rendered it, as of the date of notifying him or his agent of the judgment.

2- The appeal shall be filed by a memorandum pursuant to established procedures for filing cases. Said memorandum shall state the number and date of appealed judgment and grounds for such appeal.

3- If the appellant or his agent fails to attend the first hearing of the appeal, the court shall, upon its own motion, rule that the right to appeal is deemed forfeited and such judgment shall be deemed final.

4- The court may order provisional stay of execution of an appealed judgment if it is petitioned to do so in the memorandum of appeal and the execution of said judgment would result in a grave and irreparable harm.

5- Execution of a judgment in absentia shall be stayed if reversed by a judgment.

## **Appendix C.5 Hearing Procedures and Order**

### **Chapter 1**

#### **Hearing Procedures**

##### **Article 61**

Hearings shall be attended by the legally required number of judges. If the required number is not satisfied, the chief judge shall assign a judge to complete the quorum. If this is unattainable, the Chairman of the Supreme Judicial Council shall assign a judge to complete the quorum.

##### **Article 62**

The clerk shall each day draft a list of cases arranged according to time scheduled for their consideration. Upon presentation to the judge, the list shall be posted on the docket prior to the hearing date.

##### **Article 63**

Litigants shall be called at the time scheduled for considering their case.

##### **Article 64**

Hearings shall be held in open court unless the judge, upon his own motion or the motion of one of the parties, holds the hearing in a closed session in order to maintain order, observe public morality or protect the privacy of the family.

### **Article 65**

Arguments shall be oral. This, however, shall not preclude the presentation of statements or defenses in written memoranda, copies of which may be exchanged between litigants. The original shall be kept in the case file and referenced in the record. The court shall grant litigants sufficient time to review and respond to the documents when necessary.

### **Article 66**

The judge shall ask the plaintiff with regard to necessary aspects of his claim prior to questioning the defendant and may not otherwise proceed with the case. If the plaintiff is unable or unwilling to do so, the judge shall dismiss the case.

### **Article 67**

If the defendant categorically refuses to answer or gives answers not relevant to the case, the judge shall repeat the request for a correct answer three times in the same hearing. If the defendant persists, the judge shall caution him and then consider him to have declined and shall proceed with the case in accordance with Sharia.

### **Article 68**

If either party presents a valid defense and requests a response from the other party who asks for postponement, the judge may postpone the case if he deems it necessary, but postponement may not be granted again for responding to the same request except for a reason acceptable to the judge.

### **Article 69**

Arguments shall close once litigants conclude their arguments. The court may, prior to pronouncement of judgment, and for justifiable reasons, reopen arguments on its own motion or the motion of one of the litigants and re-enter the case in the docket.

### **Article 70**

Litigants may, at any stage of the case, ask the court to enter agreed-upon acknowledgement, settlement, or the like in the case record, and the court shall issue a deed to that effect.

### **Article 71**

The clerk shall, under the supervision of the judge, enter the minutes of the arguments in the record, stating the date and time of the beginning and end of each argument, grounds for reviewing the case, name of the judge and names of litigants and agents. The judge, clerk and persons whose names are mentioned therein shall sign the record. If any declines to sign, the judge shall indicate the same in the record of the hearing.

### **Article 72**

Particulars provided in statements of claim, processes, case records, representations and the like, may be entered electronically and shall have the same legal effect as written documents in accordance with the Electronic Transactions Law.

## **Chapter 2**

### **Hearing Order**

#### **Article 73**

1- The presiding judge shall be in charge of order and management of the hearing and may, for this purpose, remove from the courtroom any person who disturbs order. If such person does not comply, the court may immediately imprison him for a period not exceeding 24 hours. Its decision shall be final. The court may reverse such decision.

2- In the event of a crime committed while the court is in session, the presiding judge shall order the recording of the crime and refer the same to the Bureau of Investigation and Public Prosecution for necessary legal action. He may also order the arrest of the offender.

3- The court rendering the judgment shall review claims for damages resulting from repeated default in fulfillment of liabilities subject of the case.

#### **Article 74**

The presiding judge shall be in charge of directing questions to litigants, witnesses and other persons related to the suit. Other circuit judges participating in the hearing as well as litigants may petition him to direct questions relating to the suit. The presiding judge may delegate the questioning of litigants, witnesses and others to any member of the panel.

## **Appendix C.6 Motions, Joinder, Intervention, and Incidental Petitions**

### **Chapter 1**

#### **Motions**

##### **Article 75**

Motions for the invalidity of the statement of claim, improper venue, or for transferring the case to another court because the same dispute or another related case is filed with said court, shall be presented before any request or defense is made in the case; otherwise, any right not so presented shall be forfeited.

##### **Article 76**

1- A motion for lack of jurisdiction; type or value of the suit; dismissal of the suit for lack of capacity, interest or any other ground; or if the suit has been previously decided, shall be admissible at any stage of the hearing and shall be decided by the court on its own motion.

2- If the court determines that a motion for dismissal of the case for lack of defendant's capacity is justifiable, it shall postpone the case in order to notify the person with proper capacity.

### **Article 77**

The court shall rule independently on motions provided for in Articles 75 and 76 of this Law unless it decides to include them with the subject matter of the suit; in which case, it shall indicate its ruling on both the motions and subject matter.

### **Article 78**

Subject to Article 178 of this Law, if a court rules that it lacks jurisdiction and said ruling becomes final, it shall refer the suit to the competent court and notify the litigants accordingly.

## **Chapter 2**

### **Joinder and Intervention**

### **Article 79**

A litigant may petition the court to join in the suit whoever would validly have been a litigant when the case was filed, following normal summons procedures. The court shall, if possible, rule on the petition for joinder and on the original suit in the same judgment; otherwise, it shall rule on the petition for joinder after ruling on the original suit.

### **Article 80**

The court may, on its own motion or the motion of a litigant, order the joinder of a person if it would serve the interest of justice.

The court shall set a date within a period not exceeding 15 days for the appearance of the person

ordered to be joined by the court or at the petition of litigants, in accordance with applicable case-filing procedures.

### **Article 81**

Any person with interest may intervene in the case by joining one of the litigants or by petitioning a judgment for himself on a matter related to the case. Intervention shall be pursuant to a memorandum served to the litigants before the day of the hearing in accordance with applicable case-filing procedures, or pursuant to an oral petition made during the hearing in the presence of the litigants. Said petition shall be recorded in the hearing transcript. No intervention may be permitted after the closing of proceedings.

## **Chapter 3**

### **Incidental Petitions**

### **Article 82**

Incidental petitions shall be filed by the plaintiff or defendant by means of a memorandum served to the litigants before the day of the hearing in accordance with applicable case-filing procedures, or pursuant to an oral petition made during the hearing in the presence of the litigant. Said petition shall be recorded in the hearing transcript. No incidental petitions may be permitted after the closing of proceedings.

### **Article 83**

The plaintiff may make the following incidental petitions:

- a) matters that involve correcting the original petition or amending its subject matter to meet exigencies that arose or became known after the lawsuit was filed;
- b) matters complementing, arising from, or indivisibly linked to the original petition;
- c) matters involving an addition or a change to the grounds of the case, leaving the original subject matter of the case unchanged;
- d) petitioning an order for preventive or temporary action; or
- e) whatever the court permits in connection with the original petition.

### **Article 84**

The defendant may make the following incidental petitions:

- a) petition for judicial offset;
- b) petition for a judgment for compensation for damages sustained as a result of the original case or a proceeding therein;
- c) any petition which, if granted, results in not rendering judgment on all or some of the petitions of the plaintiff, or rendering a judgment with limitations for the benefit of the defendant;
- d) any petition indivisibly linked to the original case; or
- e) whatever the court permits in connection with the original case.

**Article 85**

The court shall, if possible, rule on an incidental petition along with the original case; otherwise, it shall retain the incidental petition for ruling upon ascertaining its validity.

## **Appendix C.7 Suspension, Discontinuance and Abandonment of Litigation**

### **Chapter 1**

#### **Suspension of Litigation**

##### **Article 86**

Court proceedings may be suspended by agreement of the litigants for a period not exceeding (6) months following approval of such agreement by the court. Said suspension shall have no effect on any time limitation set by the law for a particular proceeding.

A litigant may, subject to the approval of the adverse party, petition proceeding with the case prior to expiration of the agreed-upon period.

If the litigants do not resume the case proceedings within the 10 days following the end of the specified period, the plaintiff shall be deemed to have abandoned his case.

##### **Article 87**

If a court determines that its judgment on the merit of a case should be contingent on deciding another matter on which the judgment depends, it shall order suspension of the case. Once the ground for such suspension no longer exists, the litigants may petition resumption of the case.

## **Chapter 2**

### **Discontinuance of Litigation**

#### **Article 88**

1- Unless the case is ripe for judgment on its merits, litigation shall discontinue upon the death of a litigant, loss of capacity to litigate, or loss of capacity to represent any of the litigants. Litigation, however, shall not discontinue upon the expiry of a power of attorney. The court may grant ample time to the principal if he appoints a new agent within 15 days of the expiry of the first power of attorney. If, however, the case is ripe for judgment, the litigation shall not be discontinued and the court shall render a judgment thereon.

2- In case of multiple litigants and ground for discontinuance applies against one of them, the case shall proceed with respect to the remaining litigants, unless the subject matter of the case is indivisible; in which case, litigation with respect to all litigants shall discontinue.

#### **Article 89**

A case shall be considered ripe for judgment on its merits if the litigants make their statements and closing arguments during the litigation hearing before the existence of a ground for discontinuance.

### **Article 90**

Discontinuance of litigation shall entail the suspension of all procedural dates effective against litigants and invalidation of all proceedings occurring during the discontinuance.

### **Article 91**

Proceedings of the case shall resume at the request of a litigant by summons duly served to the successor of the person against whom ground for discontinuance applies or to the other litigant. Proceeding with the case shall also resume if the hearing scheduled for consideration of the case is attended by the successor or the person against whom ground for discontinuance applies.

## **Chapter 3**

### **Abandonment of Litigation**

### **Article 92**

The plaintiff may abandon litigation by notifying his adversary by a statement made before the competent court clerk; an explicit statement in a memorandum signed by him or his agent and made available to the adverse party; or an oral petition during a hearing and its entry into the record. After the defendant submits his defense, abandonment is permitted only with the defendant's approval.

**Article 93**

Abandonment shall entail nullification of all litigation proceedings, including the statement of claim. Such abandonment, however, shall not affect the right claimed.

## **Appendix C.8 Recusal and Disqualification of Judges**

### **Article 94**

A judge shall be barred from considering and hearing a case in the following cases, even without a petition by any of the litigants:

- a) if he is the husband, relative or in-law up to the fourth degree of a litigant;
- b) if he or his wife has an existing dispute with a litigant in the case or with the wife of a litigant;
- c) if he is an agent, guardian, trustee, or a potential heir of a litigant or if he is the husband of the guardian or trustee of a litigant or if he is a relative or an in-law up to the fourth degree of such guardian or trustee;
- d) if he, his wife, a relative thereof, an in-law in the ancestral line or a person for whom he is an agent or guardian, has an interest in the case; or
- e) if he had provided a fatwa (religious legal opinion) or published his opinion on the subject of the case, or litigated on behalf of one of the litigants in the case, even if it were before he joined the judiciary, or if he had earlier considered the case as a judge, expert or arbitrator or had been a witness in the case or had engaged in any investigative action therein.

### **Article 95**

An action or decision by a judge in any of the cases set forth in Article 94 of this Law shall be null and void even with the agreement of the litigants. If such nullification occurs with respect to an affirmed judgment, a litigant may petition the Supreme Court to nullify the judgment and assign another court to reconsider the case.

## **Article 96**

1- A judge may be disqualified for any of the following reasons:

- a) if he, or his wife, has a case similar to the case before him;
- b) if he, or his wife, has a dispute with a litigant or the wife of the litigant after the case under consideration was filed before the judge, unless such case was filed with the intention of disqualifying the judge from considering the case pending before him;
- c) if his divorcee with whom he has a child or one of his relatives or in-laws up to the fourth degree has a dispute before the court with a litigant in the case or with the wife of the litigant, unless the case was brought with the intention of disqualifying him;
- d) if a litigant is his servant or the judge had regularly dined or resided with him, or if he had received a gift from him shortly before the lawsuit was filed or thereafter; or
- e) if enmity or friendship exists between him and a litigant which would likely compromise his ability to judge impartially.

2- A petition for disqualification shall result in a stay of the case until said petition is decided on.

## **Article 97**

A judge may not refrain from considering a case before him unless he is barred from considering such case or if ground for disqualification exists. He shall contact his immediate superior for permission to recuse himself. The same shall be entered into a special record kept at the court.

## **Article 98**

If there is ground for the judge to be disqualified and he fails to recuse himself, a litigant may request his disqualification. If the ground for disqualification is not stated in Article 96 of this Law, a motion for disqualification shall be filed before any defense or plea is presented in the case; otherwise such right is forfeited. Nevertheless, such motion may be filed if the grounds therefor occurred afterwards or if the petitioner proves that he had no knowledge thereof. In any case, no motion for disqualification may be granted after closing of arguments.

## **Article 99**

A motion for disqualification shall be filed with the court administration. It shall be signed by the petitioner, include grounds for disqualification and be accompanied with any supporting documents.

## **Article 100**

1- The court administration shall immediately notify the judge of the motion for disqualification, and the judge shall within four days following the notification respond to the chief judge of the court in writing regarding disqualification and grounds thereof. If he fails to respond within the prescribed period, or if he responds in support of the grounds for disqualification and such grounds are valid, or if he refutes such grounds but are proven against him, the chief judge of the court shall declare him disqualified from considering the case.

2- If the judge sought to be disqualified is a chief judge of a court of first instance, the

motion for disqualification shall be decided by the chief judge of the competent court of appeals. If the judge to be disqualified is a chief judge of a court of appeals or a judge of the Supreme Court, the motion for disqualification shall be decided by the Chief Judge of the Supreme Court.

3- If the chief judge – as the case may be – denies the motion for disqualification, he shall issue an order to this effect and such order shall be final.

## **Appendix C.9 Evidentiary Procedures**

### **Chapter 1**

#### **General Provisions**

##### **Article 101**

Facts intended to be proven during arguments must be relevant, material to the case and admissible.

##### **Article 102**

If the evidence of a litigant is in a place beyond the court's jurisdiction, said court shall deputize the judge with jurisdiction over that place to hear and verify such evidence.

##### **Article 103**

A court may abandon the evidentiary procedures it ordered provided that it includes grounds therefor in the record. It may also disregard the result of the procedure provided that it explains the grounds therefor in its judgment.

## **Chapter 2**

### **Questioning Litigants and Admissions**

#### **Article 104**

A court may question a litigant who is present, and each litigant may request the questioning of his adverse party who is present. Responses shall be given during the same hearing, unless the court decides to grant time for a response. The response shall be in the presence of the person requesting the questioning.

#### **Article 105**

A court may, upon its own motion or the motion of a litigant, summon the adverse party for questioning if deemed necessary. A person whom the court decides to question shall attend the hearing specified in the court order.

#### **Article 106**

If a litigant has an acceptable excuse for not appearing in person for questioning, the judge shall move to his place of residence or delegate a trusted person to question him. If the person sought for questioning resides outside the area of the court's jurisdiction, the judge shall delegate the court of said place of residence to question him.

### **Article 107**

If a litigant fails to appear for questioning without an acceptable excuse, or refuses to answer for no reason, the court may hear the evidence and draw whatever conclusion it deems proper from such failure to appear or refusal to answer. If the litigant who fails to appear or refuses to answer without justification has no evidence, he shall be deemed to have declined and the court shall take any necessary action in accordance with Sharia.

### **Article 108**

The effect of a litigant's admission, during questioning or without questioning, shall be limited to him. The admission shall be made before the court during consideration of the case relating to the admission.

### **Article 109**

A litigant's admission shall be valid if the litigant is legally competent and acts on his own volition. The admission of a person interdicted for imprudence shall be deemed valid in all matters not subject of interdiction according to Sharia.

### **Article 110**

A litigant's admission shall not be divisible, whereby parts against him are admitted and parts in his favor are disregarded. Admission shall be taken as a whole except if it pertains to multiple facts the existence of one of which does not entail the existence of others.

## **Chapter 3**

### **Oath**

#### **Article 111**

A person requesting the adverse party to take an oath shall specify the facts regarding which the oath is to be taken. The court shall prepare the wording of the oath as prescribed by Sharia. An illiterate deaf person shall take oath by means of an understandable sign.

#### **Article 112**

Taking or refusing to take oath shall be made only before the presiding judge during the hearing and shall have no effect outside such hearing unless there is a provision to the contrary.

#### **Article 113**

- 1- A person summoned to court to take oath must appear.
- 2- If the person requested to take oath appears and declines without contesting the admissibility or relevance of the oath to the case, he must take the oath immediately or require that the adverse party take the oath. If he refuses without contesting or fails to appear without excuse, he shall be deemed to have declined.
- 3- If the person requested to take oath appears but contests the admissibility or relevance of the oath to the case, he shall provide reasons therefor. If the court is not satisfied, he shall take oath; otherwise he shall be deemed to have declined.

#### **Article 114**

If the person requested to take oath has a reason that prevents him from appearing, the court shall administer the oath at his place or assign one of its judges for such purpose. If he resides beyond the jurisdiction of the court, the court may delegate the court at his place of residence to administer the oath. In either case, a transcript of the oath shall be drafted and signed by the oath taker, the delegated or assigned judge, the clerk and the litigants present.

#### **Article 115**

An oath shall be taken in the presence of the person requesting it, unless he waives his right to appear or fails to appear without an acceptable excuse despite his knowledge of the hearing.

### **Chapter 4**

#### **Inspection**

#### **Article 116**

The court may, on its own motion or the motion of a litigant, decide to inspect a disputed item either by presenting it to the court, if possible, or proceeding to its location or assigning the task to one of its judges, provided that such decision states the time of inspection. The court may assign the court with jurisdiction over the disputed item to undertake the inspection; in such case, the assigned judge shall be notified of the assignment decision. Said decision shall contain all particulars pertaining to litigants, inspection place and other particulars necessary for clarification of the case.

### **Article 117**

The court or the assigned or delegated judge shall invite the litigants at least 24 hours prior to the scheduled time, not including travel time, by means of a memorandum sent through the court administration stating the venue, day and hour of the meeting.

The court may, if necessary, place the item subject of inspection under custody until a judgment is issued or to any other time it deems proper.

### **Article 118**

The court and the judge assigned or delegated for inspection may appoint one or more experts to assist in the inspection. The court, the assigned or delegated judge may hear the testimony of any witness at the place of dispute.

### **Article 119**

A transcript of inspection result shall be drafted and signed by the inspector, clerk, attending experts, witnesses and litigants. Said transcript shall be entered into the case file.

### **Article 120**

Any person with interest in establishing facts that may become subject of a dispute before the court in the future may file a summary case before the competent court with venue jurisdiction for inspection of such facts – in the presence of persons with interest – and establishing their conditions. Request for inspection shall be made by means of a statement in accordance with

standard case-filing procedures. Inspection and establishment of the condition shall be in accordance with the provisions of this Law.

## **Chapter 5**

### **Testimony**

#### **Article 121**

A litigant who, during proceedings, requests proof by testimony of witnesses shall state in writing or orally during the hearing the facts he seeks to prove. If the court determines that such facts are admissible under the provisions of Article 101 of this Law, it shall decide to hear the witnesses, schedule a hearing for such purpose and ask the litigant to bring said witnesses.

#### **Article 122**

If a witness has an excuse for not appearing to testify, the judge shall proceed to his place to hear his testimony or the court may assign one of its judges for such purpose. If the witness resides outside the jurisdiction of the court, it shall delegate the court of his place of residence to hear his testimony.

#### **Article 123**

The testimony of each witness shall be heard individually in the presence of the litigants but not in the presence of other witnesses whose testimony had not been heard. Failure of the litigant testified against to attend a testimony shall not preclude hearing it, and the same shall be

read to him when he attends. Upon verification of his identity, a witness shall state his full name, age, occupation, place of residence and his relationship to the litigants whether by kinship, employment or any other form of relationship, if applicable.

#### **Article 124**

Testimony shall be given orally. The use of written notes during testimony is permitted only with the approval of the judge provided it is justified by the nature of the case. A litigant against whom testimony is made may indicate to the court matters that may prejudice the witness or his testimony.

#### **Article 125**

The judge may, at his own motion or at the motion of a litigant, direct to the witness questions he deems conducive to revealing the truth. The judge shall accede to the request of the litigant in this regard unless the question is immaterial.

#### **Article 126**

If an adverse party requests time to bring witnesses absent from the hearing, he shall be granted the shortest period of time that is necessary in the opinion of the court. If he fails to bring them to the scheduled hearing or brought persons whose testimony was not conducive, he shall be allowed another period and warned that he would be deemed unable if he fails to present his witnesses. If he fails to present them in the third hearing or presents some of the witnesses whose testimony is not conducive, the court may decide the dispute. If he does not present his witnesses,

due to their absence or his lack of knowledge of their place of residence, he shall have the right to file a case when they are available.

### **Article 127**

The testimony of a witness and his answers to questions directed at him shall be entered into the record and stated in the first person without change. It shall then be read to him and he may enter any amendment thereto. The amendment shall be entered after the text of the testimony and signed by the witness and the judge.

## **Chapter 6**

### **Expertise**

#### **Article 128**

1- The court may, when necessary, decide to assign one expert or more. The court's decision shall specify his task, time for submitting his report, hearing date and, when necessary, an advance payment for the expert's fees and expenses, the litigant to deposit such payment and the deadline for making such deposit. The court may appoint an expert to provide an oral opinion in a hearing; in which case, the opinion shall be entered into the record.

2- Regulations of this Law shall determine rules for expert fees and expenses.

3- Courts may seek the expertise of employees of government agencies.

4- Regulations of this Law shall define the power of the Expertise Department at the

Ministry of Justice which shall prepare a list of experts from other than government employees to assist the courts. Experts included in said list shall satisfy the following conditions:

a) be of good conduct; and

b) hold a valid license issued by the competent authority to practice his profession.

5- A department named Department of Experts shall be established in each court, as needed, and shall comprise members of the review committee, engineers, surveyors, interpreters and the like and shall be supervised by the chief judge.

#### **Article 129**

If a litigant fails to deposit the required amount by the date set by the court, the other litigant may deposit said amount without prejudice to his right to recourse against the adverse party if a judgment is made in his favor. If the amount is not deposited by either party and deciding the case is dependent on determination of the experts, the court may suspend the case until the amount is deposited.

#### **Article 130**

If the litigants agree on a particular expert, the court may approve their agreement; otherwise, it may select an expert in its own discretion and shall provide grounds thereof.

### **Article 131**

Within the three days following depositing the amount, the court shall call the expert and explain to him his task in accordance with the assignment decision and shall provide him with a copy thereof. The expert shall have access to documents deposited in the case file, but he may not take any of said documents without the court's permission.

### **Article 132**

If the expert is not a court employee, he may, within three days of receiving his assignment decision, ask the court to relieve him of the assigned task. In this case, the court shall appoint another expert. It may, in accordance with Sharia, make an expert, who fails to perform his task, pay the costs spent in vain.

### **Article 133**

Experts may be disqualified for the same reasons that disqualify judges. The court appointing the expert shall decide on disqualification motion in an unappealable decision. A motion to disqualify an expert made by the litigant who selected him shall be denied unless the reason for disqualification occurred after selection. No motion for disqualification may be granted once proceedings are closed.

### **Article 134**

The expert shall set a date for commencing his work no later than 10 days following the date of receipt of the assignment decision and shall notify the litigants of the place and time of the

meeting in a timely manner. The expert shall commence his work even in the absence of the litigants provided that they are duly notified.

#### **Article 135**

The expert shall prepare a statement detailing his tasks, attendance, statements and comments of the litigants as well as statements of persons concerned, and have it signed by them. The expert shall enclose with his statement a signed report providing the results of his work as well as his opinion and grounds thereof. If there are more than one expert, and they disagree, they shall present a single report in which they mention their individual opinions and grounds thereof.

#### **Article 136**

The expert shall deposit with the court his report and related statements and documents received. He shall inform the litigants of such deposit by registered mail within 24 hours following such a deposit.

#### **Article 137**

The court may, if it finds it necessary, summon the expert to a hearing to discuss his report. The court may return the report to the expert to rectify any errors or deficiencies, or it may assign such task to another expert or experts.

#### **Article 138**

The expert's opinion is for guidance and may not be binding on the court.

## **Chapter 7**

### **Writing**

#### **Article 139**

A document used for evidence shall be either on official paper or ordinary paper. An official paper is a paper on which a public servant or a person assigned to public service records actions taken by him or instructions received from concerned parties, pursuant to the law and within his powers and jurisdiction.

An ordinary paper is a paper signed, sealed, or fingerprinted by the person issuing it.

#### **Article 140**

The court shall determine the effects of any alteration, deletion, insertion or other material defects in a document on its validity as evidence.

If the court finds the validity of a document questionable, it may ask the public servant who issued it or the person who drafted it for clarification.

#### **Article 141**

Challenge to official documents may not be allowed except by claiming forgery, unless the content is in violation of Sharia.

### **Article 142**

If the person to whom the contents of a document is ascribed denies that the handwriting, signature, fingerprint or seal belongs to him or to his successor or deputy while the document is material to the dispute and the facts and documents of the case are not sufficient to convince the court of the validity of the handwriting, signature, fingerprint or seal, the court may order a questioned document examination (QDE) to be made under its supervision by one or more experts to be named in the QDE decision.

### **Article 143**

The denied handwriting, signature, fingerprint or seal shall be compared with the established handwriting, signature, fingerprint or seal of the person to whom the document is ascribed.

### **Article 144**

The disputed document shall be signed by the judge and the clerk indicating that they have examined it. Transcript shall be entered into the record showing adequately the condition and description of the document. Such transcript shall be signed by the judge, the clerk and the litigants.

### **Article 145**

Litigants shall appear on the date set by the judge to present documents in order for the court to select from among them the documents suitable for QDE. If the litigant upon whom the burden of proof falls fails to appear for no excuse, a decision forfeiting his right to use the disputed

document as evidence may be made. If his adverse party fails to appear, the documents presented for comparison may be deemed valid.

#### **Article 146**

The judge and the clerk shall affix their signatures on the QDE documents prior to examination, and the transcript shall so indicate.

#### **Article 147**

If the original official document exists, a copy thereof issued by a public servant within his competence and attested as a true copy of the original shall have the force of the original official document to the extent that he determines it to be true as the original. An attested copy shall be considered a true copy of the original unless disputed by a litigant; in such case, the copy shall be compared against the original. No copy shall be admissible in court if it is not attested to be a true copy of the original.

#### **Article 148**

A person holding an ordinary document may sue the person whom the document establishes a right against to make him acknowledge such right, even if the obligation set forth therein is not due at the time of the litigation. This shall be by means of a petition filed in accordance with standard case-filing procedures. If the defendant appears and admits the authenticity of the document, the court shall record his admission. In case of denial, the court shall order verification under the aforementioned procedures.

### **Article 149**

When necessary, the court may, on its own motion or the motion of a litigant, order as follows:

1- Obtain documents or papers from government agencies in the Kingdom if the litigants are unable to do so. The litigant may indicate the content of such documents and their bearing on the case.

2- Include any third party in order to compel him to produce documents or papers in his possession. The court may also refuse so if the holder has a legitimate interest in refusing to present the same.

### **Article 150**

A claim of forgery may be made at any stage of the case by means of a petition to the court setting forth all places of forgery claimed and verification procedures required for proof. A person charged with forgery may request verification process be suspended at any stage by waiving his right to use the disputed document; in such case, the court may, if the claimant of forgery so requests for a legitimate interest, order entry of the document into the record or keeping it on file.

### **Article 151**

A claimant of forgery shall deliver to the court the disputed document if in his possession or the copy served to him. If the document is in the possession of the adverse party, the judge, upon reviewing the petition, shall order him to deliver such document to the court. If the adverse party declines to deliver the document and the court is unable to find it, it shall be deemed non-existent. This shall not preclude taking any future action with respect to said document.

### **Article 152**

If the claim of forgery is material to the dispute while the facts and documents of the case are insufficient to convince the court whether the document is genuine or forged, and the court determines that the investigation requested is material to the case, the court shall order such investigation.

### **Article 153**

If a document is established to be forged, the court shall send said document and a copy of the relevant transcripts to the competent authority to take necessary penal action.

### **Article 154**

The court may, even if no claim of forgery is made before it, exclude any document if it appears from its condition or from the circumstances of the case to be forged or suspected to be forged. The court may also exclude any document of questionable validity. In such cases, the court shall provide in its judgment the circumstances and presumptions upon which it based its judgment.

### **Article 155**

A person who fears that a forged document may be used against him may sue the person holding or benefiting from such document. This shall be by means of a petition filed in accordance with regular case-filing procedures. In investigating this case, the court shall observe the aforementioned rules and procedures.

**Chapter 8**  
**Presumptions**

**Article 156**

A judge may draw one or more presumptions from the facts of the case or from questioning litigants or witnesses as grounds for his judgment, or complement incomplete established evidence, so that he becomes satisfied with the evidence to render judgment.

**Article 157**

Each litigant may rebut the presumption inferred by the judge; in such case, the presumption loses its value as proof.

**Article 158**

In a dispute over ownership, possession of movable property shall be a rebuttable presumption of ownership by the possessor. The adverse party may prove otherwise.

## **Appendix C.10 Judgments**

### **Chapter 1**

#### **Rendering Judgments**

##### **Article 159**

Upon completion of arguments, the court shall decide the case forthwith or postpone rendering judgment to another hearing and inform the litigants of the closing of arguments and of the date for pronouncing the judgment.

##### **Article 160**

In case of multiple judges, deliberations shall be in a closed session. Notwithstanding Article 162 of this Law, only judges who heard the arguments may participate in the deliberations.

##### **Article 161**

During deliberations, the court may not hear clarifications from a litigant except in the presence of the other litigant.

##### **Article 162**

If several judges consider the case, judgment shall be rendered unanimously or by majority opinion. The minority shall be the first to enter its opinion in the record. The majority shall explain in the record its point of view in response to the view of the minority. If no majority is reached or

if opinions diverge into more than two, the chief judge shall assign a judge to support one of the opinions so that a majority is reached for judgment. If this proves unattainable, the Chairman of the Supreme Judicial Council shall assign a judge for such purpose.

### **Article 163**

Upon closing of arguments and rendering of judgment in the case, the judgment shall be entered into the record preceded by the grounds on which it was based, and signed by the judge or judges who participated in consideration of the case.

### **Article 164**

The judgment shall be pronounced by reading its wording, or its wording and grounds in an open hearing. The judges who participated in the deliberations shall be present when the judgment is pronounced. If one of the judges is unable to attend, his absence shall not affect the judgment if he has signed the judgment entered into the record.

### **Article 165**

Upon pronouncement of the judgment, the court shall inform the litigants of the prescribed manner and deadlines for appeal. Guardians, trustees, administrators, representatives of government agencies and the like shall also be informed – if the judgment is not in favor of their principals or less than what they asked for – that the judgment must be appealed or reviewed and that the case will be referred to the court of appeals.

## **Article 166**

1- Within a period not exceeding 20 days from the date of pronouncement of the judgment, the court shall issue a decree containing a summary of the case, responses, valid defenses, verbatim testimony of witnesses along with attestation of their characters, oaths, names of judges who participated in the judgment, names of litigants, agents and witnesses, name of the court which considered the case, number and date of the case record, grounds and wording of the judgment, date of pronouncement, omitting redundant and repetitious sentences that have no bearing on the judgment. Said decree shall be signed by the judge or judges who participated in the judgment.

2- Each judgment shall be entered in the judgments record, unless otherwise decided by the Supreme Judicial Council.

3- A copy of the judgment decree shall be delivered within a period not exceeding the period provided for in paragraph 1 of this Article.

## **Article 167**

If a judge's jurisdiction over a case lapses before a judgment is rendered, his successor may continue with the case from the point where the proceedings of his predecessor ended. He shall read to the litigants what is in the record, which he shall honor if signed by the previous judge along with the signatures of litigants and witnesses. If proceedings entered into the record are not signed by one or more of the litigants or the judge and the litigants have not acknowledged the same, the arguments shall be heard anew.

### **Article 168**

1- The judgment decree which governs execution shall be sealed with the seal of the court after adding the following text: All ministries and government agencies shall enforce this judgment by all applicable legal means, even if it requires the use of force by the police.

2- The judgment decree shall be delivered only to the litigant with interest in its execution. Copies of the judgment without the execution statement may be given to any party with interest.

### **Article 169**

The judgment shall be subject to expeditious execution, with or without bail as the judge may deem fit, in the following circumstances:

- a) judgments in urgent matters;
- b) if the judgment involves alimony, breastfeeding cost, accommodation, child visitation, surrender of a child to his custodian, returning a woman to her mahrahm or dissolution of marriage; or
- c) if the judgment involves payment of wages of a servant, craftsman, laborer, breastfeeding woman or custodian.

### **Article 170**

A court before which an appeal is filed may, if it determines that the grounds for such appeal would result in reversal of the judgment, order stay of execution if it fears that it could lead to grave harm.

## **Chapter 2**

### **Correction and Interpretation of Judgments**

#### **Article 171**

The court shall, by a decision it issues pursuant to a petition by a litigant or upon its own motion, correct any material errors whether written or mathematical in the judgment decree. Such correction shall, upon entry of the decision into the case record, be made on the original decree and signed by the judge or judges of the issuing court.

#### **Article 172**

If the court rejects the correction, the objection thereto shall be in conjunction with the objection to the judgment itself. A decision to make corrections may be independently objected to through regular procedures of objection.

#### **Article 173**

If the wording of the judgment is vague or confusing, the litigants may file a petition for an interpretation from the court rendering such judgment, in accordance with applicable case-filing procedures.

**Article 174**

The interpretation of judgment shall be added to the original decree and signed and sealed by the judge or judges of the issuing court. The interpretation shall be deemed complementary to the original decree and shall be subject to applicable rules of appeal.

**Article 175**

If a court neglects to decide on motions related to subject matter, the party with interest may petition the court to order the adverse party to appear before it, in accordance with applicable procedures, and rule thereon.

## **Appendix C.11 Methods of Objecting to Judgments**

### **Chapter 1**

#### **General Provisions**

##### **Article 176**

Methods of objection to judgments are appeal, cassation and petition for reconsideration.

##### **Article 177**

Only the party against whom judgment is rendered or whose petitions are not fully awarded may object to the judgment, unless the law provides otherwise.

##### **Article 178**

1- No objection may be made to judgments issued before the case is decided and with which the litigation does not end wholly or partly except in conjunction with the objection to the judgment on the merits. Filing an objection before rendering a decision on the merits may be permitted against a decision to stay the case and against provisional and summary rulings and judgments subject to execution by force as well as judgments of lack of jurisdiction.

2- Objection to temporary and expeditious judgments and judgments subject to execution by force shall not entail stay of execution.

### **Article 179**

1- The objection period to a judgment shall commence from the date a copy of the judgment decree is delivered to the person against whom the judgment was rendered and his signature was entered into the record or from the date set for receiving such copy if he is not present. If he fails to attend to receive a copy of the judgment decree, said copy shall be deposited in the case file on the same date, marking such date in the record. Such deposit shall be deemed the commencement of the period for objection. The objection period to a judgment in absentia or a revised judgment before the Supreme Court shall commence from the date it is communicated to the person against whom it was rendered or his agent.

2- If the person against whom the judgment was rendered is imprisoned or detained, the authority in charge of him shall bring him to court to receive a copy of the judgment decree within the specified period. Said authority shall also bring him to file his objection within the specified period.

### **Article 180**

The period for objection shall be stayed upon the death or loss of competence of the person filing the objection or loss of capacity of his agent. Such stay shall continue until the judgment is communicated to the heirs or their representative, or the contingency ends.

### **Article 181**

If a judgment is objected to on grounds of lack of jurisdiction, the court considering such objection shall limit its consideration to jurisdiction.

### **Article 182**

Reversal of judgments shall entail nullification of all subsequent decisions and proceedings based on the reversed judgment.

### **Article 183**

If part of a judgment is reversed, other parts shall remain enforceable, unless the judgment is indivisible.

### **Article 184**

Courts of appeal and the Supreme Court shall be governed by the rules and procedures established before courts of first instance, unless otherwise provided for in this Law.

## **Chapter 2**

### **Appeal**

### **Article 185**

1- All judgments rendered by courts of first instance shall be appealable except for judgments in petty cases as determined by the Supreme Judicial Council.

2- The Supreme Judicial Council shall define the judgments for which revision by the court of appeals shall suffice.

3- Any person against whom an appealable judgment is rendered may, within the statutory objection period, file for revision by the court of appeals without a hearing, unless the

adverse party petitions for an appeal. In all cases, the court of appeals may, on its own motion, consider the case by means of a hearing.

4- If the person against whom a judgment is rendered is an endowment administrator, trustee, guardian or representative of a government agency or the like and fails to file an appeal within the statutory period, or if said person is absent and cannot be notified of the judgment, the court shall refer the judgment to the court of appeals for revision, regardless of the subject of the judgment. This shall not include the following:

a) a judgment issued by the competent court against the General Commission for Guardianship over Property of Minors and those of Similar Status to enforce a prior final judgment; or

b) a judgment regarding a sum of money which a person deposited for the benefit of another person or his heirs, unless the depositor or his representative objects thereto.

#### **Article 186**

New petitions shall not be accepted in an appeal and the court shall dismiss them on its own motion.

#### **Article 187**

The period for filing an appeal or a petition for revision shall be 30 days, with the exception of judgments rendered in summary cases which shall be 10 days. If an appellant fails to submit his appeal within said periods, his right to appeal or to file a petition for revision shall be forfeited and the competent court shall record the same upon the expiry of the objection period in the case record.

A note on the judgment decree and record shall be made, indicating that the judgment is final, without prejudice to the provision of Article 185 (4) of this Law.

### **Article 188**

1- An appeal or a petition for revision shall be made by means of a brief deposited with the court rendering the judgment. Such brief shall contain the appealed judgment, its number, date, grounds for objection, claims of the appellant and his signature as well as the date of depositing the brief.

2- The court shall enter the brief in the relevant record on the date of deposit and refer the same immediately to the court rendering the judgment.

### **Article 189**

Upon reviewing the brief, the court which rendered the appealed judgment may reconsider such judgment in terms of grounds for appeal without a hearing, unless necessary. The court shall, at its discretion, affirm or amend its judgment. If the court affirms the judgment, it shall refer it along with a copy of the case record and all papers to the court of appeals. If the court amends the judgment, the amended judgment shall be notified to the litigants and be governed by applicable procedures.

### **Article 190**

1- The court of appeals shall schedule a hearing to consider the appeal or petition for revision if it determines to consider the same by means of a hearing. If the appellant or

the person filing the petition for revision fails to appear before the court after being notified of the date of the hearing, and 60 days have lapsed without making a request to proceed with the case or failing to appear in court after commencement of proceedings, the court shall, on its own motion, rule that his right to appeal or to file a petition for revision is deemed forfeited, without prejudice to the provision of Article 185 (4) of this Law.

2- The court of appeals shall consider the appeal or petition for revision based on the documents provided in the case file and new defense or evidence presented by litigants in support of their grounds for appeal as stated in the brief. Upon hearing the testimony of litigants with respect to the appeal or petition for revision, the court shall, if it decides to consider the case by means of a hearing, affirm or reverse the judgment either wholly or partly and rule on the reversed part.

### **Article 191**

If the court of appeals, in cases reviewed without hearings, determines that the consequences of the text of the judgment are consistent with Sharia, it shall affirm the judgment and provide comments not requiring the reversal of judgment. If it reverses the judgment wholly or partly, it shall rule on the reversed part after hearing the litigants.

### **Article 192**

If the court of appeals nullifies the judgment of lack of jurisdiction rendered by the court of first instance, or admits a partial defense resulting in a stay of action, it shall refer the case to the court rendering the judgment for consideration of the merits.

## **Chapter 3**

### **Cassation**

#### **Article 193**

A party may apply to the Supreme Court for reversal of judgments and decisions rendered or affirmed by the courts of appeal if the objection is based on any of the following grounds:

- 1- violation of provisions of Sharia or laws not conflicting therewith.
- 2- issuance of a judgment by a court not properly formed in accordance with the law.
- 3- issuance of a judgment by an incompetent court or circuit.
- 4- error in characterization or description of a case.

#### **Article 194**

The period for filing a petition for reversal of judgment shall be 30 days, excluding judgments rendered in summary cases, the period for which shall be 15 days. If an appellant fails to file his objection within said periods, his right to such petition shall be deemed forfeited.

#### **Article 195**

1- A petition for reversal of judgment shall be made through a brief filed with the court of appeals which rendered or affirmed the judgment. Such appeal shall include the name and address of each litigant, the judgment objected to, its number, date, grounds for objection, requests, signature of the appellant and date of filing.

2- The court of appeals shall enter the brief in the relevant record on the date of filing and refer the same along with a copy of the case record and all documents to the Supreme Court within a period not exceeding three days from the end of the objection period.

### **Article 196**

An objection before the Supreme Court shall not stay execution of judgment unless otherwise provided by law. The court may order provisional stay of execution of judgment if petitioned to do so in the brief and if execution of said judgment would result in grave and irreparable harm. If the court orders stay of execution, it may require a security or a solvent guarantor, or whatever it deems appropriate, to protect the rights of the respondent.

### **Article 197**

The Supreme Court shall consider the formalities of the appeal with respect to the information provided for in Article 195 (1) of this Law, and whether said appeal is made by an eligible person. The court shall decide whether to grant the objection or dismiss it in form. If the appeal is dismissed in form, the court shall render a separate decision to this effect.

### **Article 198**

If the Supreme Court grants the objection in form, it shall determine its subject matter based on available documents, without discussing the facts of the case. If the court is not satisfied with the grounds of the objection, it shall affirm the judgment or reverse it in whole or in part – as the case may be – stating grounds therefor, and return the case to the rendering court to rule thereon

anew by a different judge. If the judgment is appealed for the second time and the case is ready for judgment, the court shall rule thereon, and its judgment shall be deemed final.

### **Article 199**

Grounds not stated in the memorandum of appeal may not be invoked before the Supreme Court, unless such grounds pertain to mandatory aspects of the Law. In such case, the court shall, upon its own motion, rule accordingly.

## **Chapter 4**

### **Petition for Reconsideration**

#### **Article 200**

1- Any litigant may petition for reconsideration of final judgments in the following circumstances:

- a) if the judgment was based on documents that were subsequently found to be forged or based on a testimony that was subsequently ruled perjurious by the competent authority;
- b) if the petitioner, after the judgment was rendered, obtained conclusive documents for the case that he was unable to produce before the rendering of the judgment;
- c) if an act of fraud was committed by the adverse party which would have a bearing on the judgment;
- d) if the judgment awards what the litigants did not ask for or more than what they asked for;

- e) if the wording of the judgment was contradictory;
- f) if the judgment was in absentia; or
- g) if the judgment was rendered against a person not properly represented in the case.

2- Anyone who was bound by the judgment and was neither joined nor did he intervene in the case may petition for reconsideration of final judgments.

### **Article 201**

The period for a petition for reconsideration shall be 30 days commencing from the day on which the petitioner is established to have known of the forgery of the documents, the testimony was ruled to be perjurious, the document provided for in Article 200 (1) (b) of this Law appeared, or fraud was discovered. The period for cases provided for in Article 200 (1) (d, e, f and g) of this Law shall commence from the time the judgment was communicated. The period for the case provided for in Article 200 (2) of this Law shall commence on the date the petitioner becomes aware of the judgment.

### **Article 202**

1- A petition for reconsideration shall be made through a brief filed with the court which rendered the judgment. Such brief shall indicate the judgment sought to be reconsidered, its number, date and grounds for reconsideration. The court administration shall, on the date of deposit, enter the brief in the relevant record. If the judgment is affirmed by the Supreme Court or court of appeals, the court which rendered the judgment shall refer the petition for reconsideration to the court which has affirmed the judgment to

consider the petition. The court shall, as the case may be, issue a decision granting or denying the petition for reconsideration. If the petition is granted, the case shall be considered by the court which rendered the judgment and shall notify the parties thereof. If the petition is denied, the petitioner may object to such denial in accordance with applicable procedures, unless the decision was rendered by the Supreme Court.

2- Filing a petition for reconsideration shall not stay execution of judgment. Nonetheless, the court considering said petition may order stay of execution of judgment if petitioned to do so and if execution of said judgment would result in grave and irreparable harm. If the court orders stay of execution, it may require a security or a solvent guarantor, or whatever it deems appropriate, to protect the rights of the respondent.

### **Article 203**

Judgments rendered on the merits of the case by a court other than the Supreme Court, upon a petition for reconsideration, may be objected to by means of appeal or request for reversal, as the case may be.

### **Article 204**

1- A decision denying the petition and a judgment issued on the merits of the case upon granting such petition may not be objected to by means of a petition for reconsideration.

2- Any litigant may file another petition for reconsideration on grounds not previously considered, as provided for in Article 200 of this Law.

## **Appendix C.12 Summary Proceedings**

### **Article 205**

The court with jurisdiction over consideration of the subject shall provisionally consider the case on the merits in urgent matters related to the same case that the lapse of time may affect. Such decision shall not affect the merits of the case, regardless of whether the motion for a provisional action was made independently or as part of the original case.

### **Article 206**

Summary cases shall include the following:

- a) cases of inspection to establish a condition;
- b) cases of an injunction banning travel;
- c) cases of an injunction banning interference with possession and recovery of possession;
- d) cases of suspension of new actions;
- e) cases requesting receivership;
- f) cases relating to daily wages; and
- g) other cases deemed urgent by law.

### **Article 207**

The period for appearance in summary cases shall be 24 hours. Such period may, in compelling circumstances, be reduced by court order.

## **Article 208**

A claimant may, during consideration of the case or immediately before it, file a summary case before the competent court to ban his adverse party from travel. The judge shall issue an injunction banning travel in case of a flight risk. In such case, the claimant shall provide security, as determined by the judge, to indemnify the defendant if the case is found to have no merit. A judgment indemnifying the defendant for damages resulting from the banning of his travel shall be appended to the judgment on the merit.

## **Article 209**

1- A person having a prima facie claim may file a summary case before the court having jurisdiction over the merits of the case for injunction against interference with possession or recovery of possession. The judge shall issue an injunction against interference with possession or recovery of possession if deemed justifiable. Such an injunction shall have no effect on the merits of the claim, nor be deemed as evidence therefor. A person disputing the basis of such claim may resort to court as provided for in this Law.

2- A possessory action may not be combined with a claim of ownership; otherwise, the possessory action shall be deemed forfeited. A defendant in a possessory action may not base his defense on a claim of ownership and his claim of ownership may not be granted prior to determination of the possessory action and execution of judgment; unless he actually relinquishes his possession to the adverse party.

### **Article 210**

A person harmed by an unlawful action may file before the competent court a summary suit to halt said action. The judge shall issue an injunction if he is convinced of the justifications. Such an injunction shall have no effect on the original right, nor may it serve as evidence therefor. A person disputing the same may resort to court as provided for in this Law.

### **Article 211**

A receivership suit involving disputed movable or immovable property where the right thereto is not established shall be filed with the court having jurisdiction over the subject matter. The judge may order placement under receivership if the party having an interest in the movable or immovable property presents reasonable cause that an imminent danger is feared if the property remains in the hands of its possessor. The receiver shall undertake to hold and manage the property and return it along with the proceeds derived therefrom to the person whose right thereto is established.

### **Article 212**

The appointment of a receiver shall be by agreement of all concerned parties. The judge shall make the appointment if no agreement is reached. The judgment for receivership shall specify the obligations, rights, and powers of the receiver. If the judgment is silent on the matter, the provisions of this Law shall apply.

### **Article 213**

The receiver shall safeguard the property under his custody and manage it as necessary. He shall exercise due diligence and may not directly or indirectly delegate in the performance of his duties, wholly or partly, a concerned party without the consent of the remaining parties.

### **Article 214**

In other than management matters, the receiver may only act with the consent of all parties concerned or upon permission from the judge.

### **Article 215**

A receiver may receive the remuneration specified in the judgment unless he waives the same.

### **Article 216**

The receiver shall maintain orderly books and records. The judge shall require him, when necessary, to use books carrying the court stamp. He shall, at intervals specified by the judge, or annually at least, give the concerned parties a financial statement along with supporting documents. If the receiver is appointed by court, he shall deposit a copy of such statement with the court.

**Article 217**

Receivership shall end by agreement of all the parties concerned or by a court judgment. The receiver shall then return the property under his custody to the person chosen by the concerned parties or appointed by the judge.

## **Appendix C.13 Declarations**

### **Chapter 1**

#### **General Provisions**

##### **Article 218**

1- Provisions relating to recusal of judges shall apply to establishment of title and other declarations if the same are disputed or the relevant judge has direct interest therein.

2- Provisions relating to cancellation, suspension, discontinuation and abandonment of a lawsuit shall apply to disputed declarations.

3- Provisions relating to correction and interpretation of judgments shall apply to declarations.

4- The regulations of this Law shall define the controls and procedures relating to the division of common property within the jurisdiction of the court, including distribution of inheritance, procedures for appointing liquidators, service of notices, summoning, announcement and eviction from real property.

## **Chapter 2**

### **Endowments and Minors**

#### **Article 219**

A judge may not register the establishment of an endowment unless ownership of said endowment by the endower is established and upon verification that his record is free from any encumbrances to such registration.

#### **Article 220**

An applicant for endowment registration shall submit an application to the competent court supported by official documents that establish ownership of the property to be endowed.

#### **Article 221**

Endowments without registered title deeds shall be established in accordance with applicable rules and procedures for establishment of titles.

#### **Article 222**

Subject to the provisions of ownership of real property by non-Saudis, endowment of real property owned by non-Saudis – within the Kingdom – may not be registered unless the following conditions are satisfied:

- a) the endowment is in compliance with Sharia;
- b) the endowment is for a continuing charity cause;

- c) the endowment is for Saudi individuals or Saudi charities;
- d) the endowment administrator is a Saudi citizen;
- e) the endowment deed provides for the right of the General Endowment Council to oversee the endowment; and
- f) the endowment is subject to the regulations governing endowments in the Kingdom.

### **Article 223**

1- If public interest requires a public endowment to be sold, substituted or transferred, the administrator may do so upon permission by the court where said endowment is located, and shall establish legitimate grounds for selling, substituting or transferring said endowment, provided that the proceeds are used, without delay, to acquire a similar property.

2- If interest dictates disposal of a private endowment by means of sale, exchange, transfer, pledge, borrowing, construction, purchase of a substitute, parceling, merger, lease for more than 10 years or trading in the proceeds thereof – if the price is insufficient to buy a substitute – the administrator may do so upon the competent court permission.

### **Article 224**

If the guardian is other than the father and there is a need to act on behalf of a minor or an absentee in the purchase, sale, division, pledge or merger of a real property, or borrowing for him or disposal, for any reason, of his money that is deposited by the court with the Saudi Arabian Monetary Agency or a branch thereof or with a local bank, or if the person placed under

guardianship is a partner in the companies whose articles of incorporation are to be registered or their capitals to be increased, the guardian or trustee may not undertake such actions without the competent court permission.

### **Article 225**

1- All judgments permitting the actions of guardians, trustees and administrators shall be revised by the court of appeals, with the exception of judgments for pledging, borrowing, registration of articles of incorporation, increase of corporate capitals and purchase of real property for minors, unless otherwise determined by the Supreme Judicial Council.

2- The judgment of the court of appeals on revision of judgments referred to in paragraph 1 of this Article shall be deemed final.

3- If the court of appeals reverses the judgments referred to in paragraph 1 of this Article, it shall rule on the same after hearing the declaration and request for disposal.

### **Article 226**

1- If an endowed real property or one belonging to a minor or an absentee is expropriated for public interest, or if any of said parties has a common share therein, the same shall be executed by a notary public, unless the substitute is a real property; in which case, it shall be permitted and executed by the competent court.

2- The competent court shall deposit the sale proceeds of the real property with the Saudi

Arabian Monetary Agency or a branch thereof or with a local bank until disbursement thereof is permitted by the competent court.

### **Chapter 3**

#### **Establishment of Title**

##### **Article 227**

Establishment of title is a request for a deed establishing ownership of real property not prompted by a contention from an adverse party, though it does not preclude hearing the case concerning the right, if any.

##### **Article 228**

Subject to the provisions of ownership of real property by non-Saudis, any person claiming ownership of real property, whether a land or a building, shall be entitled to request a deed establishing title from the court where the real property is located.

##### **Article 229**

An application for establishment of title deed shall be made pursuant to a petition detailing the type, location, boundaries, sides and area of the real property – pursuant to a certified survey report – along with the ownership document, if any.

### **Article 230**

The court shall verify the location, boundaries, sides, and area of the real property. The judge, or his designee, shall inspect the property with an engineer, if necessary. He shall prepare a report thereon and enter the same in the title establishment record.

### **Article 231**

Prior to recording the declaration and initiating the relevant evidentiary procedures thereof, the court shall communicate in writing – with the objective of identifying any objection to the declarations – to the Ministry of Municipal and Rural Affairs, Ministry of Islamic Affairs, Endowments, Da’wah and Guidance, and the Ministry of Finance; and with respect to property outside cities and villages, to the National Guard, Ministry of Defense, Saudi Commission for Tourism and Antiquities, Ministry of Agriculture, Ministry of Petroleum and Mineral Resources, Ministry of Transport, Ministry of Water and Electricity and the Saudi Wildlife Authority or branches thereof or entities acting on their behalf as well as other agencies defined by the Prime Minister. The court shall also order the publication of the title establishment application in a newspaper published in the area where the real property is located. If no such newspaper exists, the court shall order publication in the newspaper having the largest circulation in the area.

### **Article 232**

In addition to the provisions of Article 231 of this Law, the court shall seek the approval of the Prime Minister if petitioned to establish title to a land that has never been cultivated.

### **Article 233**

1- If 60 days lapse after notifying the government agencies concerned or after publication, as prescribed in Article 231 of this Law, without objection, the court shall proceed with establishing the title unless there is a Sharia or legal impediment.

2- Responses from agencies addressed along with their reference numbers and dates as well as name of the newspaper where the title establishment application was published, its issue number, date and page number shall be entered into the title establishment record.

3- Upon completion of title establishment procedures, the title establishment deed shall be executed and shall include essential details provided in the title establishment record. Said deed shall be signed and stamped by the judge establishing the title and shall be entered in the relevant record.

### **Article 234**

1- If a dispute arises over a real property with no registered deed, the court shall, if said property falls within its jurisdiction, proceed with the establishment of the title while considering the case in accordance with procedures stipulated in this Law, unless urgent settlement of the dispute is required; in which case, the dispute shall be decided on without proceeding with establishment of title. The judgment shall state that it shall not have the same effect as the title establishment deeds. The judgment, upon becoming final, shall be kept in the case file and the winning party shall receive a copy thereof certified by the judge and chief judge.

2- If the disputed property is beyond the court's jurisdiction, the court shall rule on the

matter without proceeding with title establishment and shall refer the case file, along with the judgment deed, to the court having jurisdiction over the property in order to proceed with title establishment.

#### **Article 235**

No title deed may be issued for lands and buildings in Mina and other Hajj sites. If litigation arises regarding any such matter, whether over ownership or usufruct of real property, and a party produced a supporting document, the court shall forward a copy of the litigation record and the supporting document to the Supreme Court, without issuing a deed.

### **Chapter 4**

#### **Establishment of Death and Determination of Heirs**

#### **Article 236**

An applicant for establishment of death and determination of heirs shall submit a declaration to that effect to the competent court. The declaration shall include the name of the deceased, his last address, date, time and place of death and witnesses to the death or a medical report to this effect from a medical center in the area. As to determination of heirs, the deed shall include names of heirs, their competencies, their relationship to the deceased, and witnesses for deaths occurring after the effective date of the Law of Civil Procedures promulgated by Royal Decree No. (M/21) dated 20 / 5 / 1421 H.

### **Article 237**

The court, if necessary, may instruct the declarant to publish the application for establishment of death and determination of heirs in a newspaper published in the area of the deceased. If no such newspaper exists, the court may order publication in the newspaper having the largest circulation in the area. The court may also request the relevant administrative governor to investigate such request. Responses provided in the investigation shall be signed by the persons providing them and shall be certified by the administrative agency conducting the investigation.

### **Article 238**

The judge shall investigate the matter personally if he finds the results of the investigation insufficient. Upon completion of procedures, the judge shall issue a death deed if death is established. Such deed shall determine the heirs, their names, capacities and dates of birth, in accordance with Sharia.

### **Article 239**

The deed establishing death and determining heirs in the said form shall be authoritative unless a judgment to the contrary is rendered.

## **Appendix C.14 Concluding Provisions**

### **Article 240**

1- The Implementing Regulations of this Law shall be drafted by the Ministry of Justice and the Supreme Judicial Council, with the participation of the Ministry of Interior with respect to relevant provisions, and shall be issued pursuant to a decision by the Minister of Justice upon coordination with the Council, within a period not exceeding 90 days from the date of entry into force of this Law. Said Regulations may be amended only in the same manner of its promulgation.

2- Competent departments at courts, whether existing or to be established, shall assume their administrative duties in accordance with this Law and its Implementing Regulations.

### **Article 241**

This Law shall supersede the Law of Civil Procedures promulgated by Royal Decree No. (M/21) dated 20 / 5 / 1421 H and shall repeal any conflicting provisions.

### **Article 242**

This Law shall enter into force following the date of its publication in the Official Gazette.

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