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MIDDLE EAST COMMERCIAL LAW DEVELOPMENTS

-- YEAR IN REVIEW (1998)

by

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Some Middle East governments, in the face of slumping oil revenues and stagnant economies in recent years, may have been tempted to retreat from the rough-and-tumble vagaries of world trade. Much to their credit, however, most Middle East governments have maintained a strategy directed towards integration into the global economy. On the legal front, the year 1998 appears to have been a time for consolidating previous gains, rather than spectacular new advances.

In that context, a former high-ranking U.S. State Department official was prompted to observe:

[E]conomic developments in the Middle East -- particularly in the area of macro-economic policy reform -- are producing a brighter and more positive picture. They are setting the stage for greater economic growth, greater private sector participation, greater regional integration, and greater interaction with the global economy in years ahead.¹

In the following brief review, we summarize some of the more significant commercial law developments which took place in the Middle East during 1998.

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1. Investment/Privatization

The Egyptian government continues to encourage foreign investment as an engine for local economic growth. In the past year, the Egyptian government enacted a series of laws designed to facilitate foreign investment. For example:

(a) Egyptian Law No. 155 (1998) permits foreign ownership of Egyptian banks, up to a 10 per cent cap on shares owned by any one party. (That law also provides for the privatization of one of the public sector banks.)

(b) Law No. 156 (1998) amended the Egyptian Insurance Law (Law No. 91 (1995)), removing the 49% ceiling on foreign ownership, permitting privatization of national insurance companies, and abolishing the ban on foreign nationals serving as corporate officers.

(c) Law No. 1 (1998) amended the General Egyptian Maritime Organization Law No. 12 (1964), permitting the private sector (including foreign investors) to conduct most maritime transport activities, including loading, supplying and repairing ships.

(d) Law No. 18 (1998) authorized the sale of minority shareholdings of electricity distribution companies to private shareholders.

(e) Law No. 19 (1998) changed the status of the telecommunication authority (Telecom Egypt) to a shareholding company, with the government as majority shareholder.²

Over the past year in Saudi Arabia, various government ministries and the Consultative Council (the Majlis Al-Shoura) have actively considered amendments to the Foreign Capital Investment Code, intending "to create an atmosphere more attractive to the foreign investor, through reduction of a great deal of bureaucratic measures, to review existing incentives and to develop new ones."³ Among the additional incentives under consideration: waiving the de facto 25% minimum Saudi ownership requirement for companies established to perform strategic or export-oriented projects; granting a supplemental 5-year holiday from Saudi income taxes for projects in qualified areas; and (albeit more controversial) a reduction in Saudi income tax rates (which currently rise to 45% of net taxable income).⁴ In a related development, Saudi Ministerial Resolution No. 17/K/D (9 November 1998) added advertising,

publications and publicity services to the list of "approved projects" subject to the Saudi Foreign Capital Investment Code and benefitting from the special investment incentives in that code.

Saudi Arabia made notable strides in 1998 toward privatization in the telecommunications and power sectors. Privatization of the telecommunications sector moved forward with the creation of the Saudi Telecommunications Company ("STC") -- as an incorporated commercial entity, the STC will facilitate privatization in this important sector. Later in 1998, the Saudi Council of Ministers announced plans to restructure the power sector as well. The proposal adopted by the Saudi government will create a single unified electricity company for the Kingdom, called the Saudi Electricity Company, absorbing the four current regional Saudi power companies.⁵

Abu Dhabi Law No. 2 (1998), Concerning the Regulation of the Water and Electricity Sector, is among the most recent initiatives of the Abu Dhabi government in pursuit of its privatization program. That law creates the Abu Dhabi Water and Electricity Authority, designed to replace the Abu Dhabi Water and Electricity Department.⁶ Pursuant to that law, the Authority will be responsible for organizing and developing government policy pertaining to the water and electricity sector, including matters relating to privatization.⁷

2. Companies Law

Early in 1998, the Egyptian Peoples Assembly approved Law No. 3 (1998), amending the Egyptian Companies Law. Under Law No. 3, the procedures for establishing an Egyptian company are streamlined, in a fresh effort to trim bureaucracy and stimulate investment⁸ -- permitting most companies to begin operating as soon as the requisite corporate documents are submitted to the Egyptian Ministry of Economy (Companies Department). Egyptian government authorities are given ten days in which to review the submitted documents and, if those government authorities do not object within that time, then the company is automatically registered without further proceedings. Law No. 3 also lowers the required subscription of paid-up capital from 25 per cent to 10 per cent for the first three months on incorporation (after which time such capital requirement is increased to 25 per cent); grants companies more flexibility in dividend distribution, repurchase of shares, and employee profit-sharing plans; and exempts some companies from the requirement of maintaining Egyptian nationals on their boards of directors.⁹

Also in 1998, UAE Federal Law No. 15 (1998) amended the UAE Commercial Companies Law ("CCL"), stating that -- with respect to companies established in UAE free zones (known as "Free Zone Establishments" or "FZEs") -- the UAE Free Zone Regulations will take precedence over conflicting provisions of the CCL. The CCL and the Free Zone Regulations contain conflicting provisions on several issues, one of the most prominent examples being reflected in Article 22 of the CCL, which provides that at least 51% of UAE companies must be owned by UAE nationals; however, FZEs are allowed to be 100% non-UAE owned. Thus, UAE Federal Law No. 15 further legitimizes certain provisions of the Free Zone Regulations.¹⁰

The UAE government appears to be nearing completion of a law establishing a Federal Securities and Commodities Market as well as the Securities and Commodities Committee ("SCC") responsible for regulating that Market.¹¹ Under the proposed law, the SCC would have authority to prepare regulations and supervise the Market. Although the draft UAE law focuses primarily on the establishment of the Market and the SCC, there are also a few important substantive requirements addressed in that law -- particularly directed toward disclosure, transparency and integrity of the Market and transactions thereunder. For example, Article 32 of the draft law requires companies with securities listed on the Market to notify the SCC of any information that may affect the price of such securities, as soon as that information is available.

Market integrity also appears to underlie Omani Decree 80/98, regarding that country's securities market. The main structural reform contained in Decree 80/98 is the creation of the Capital Market Public Authority ("CMPA"), authorized to oversee and regulate the Omani Securities Market (which was previously the responsibility of the Muscat Securities Market itself). Decree 80/98 also imposes a wide range of new disclosure and reporting obligations on companies quoted on the Muscat Securities Market and those seeking to be listed in the future. Under the new decree, the CMPA is granted broad power to supervise and regulate market brokers and others providing financial market services in Oman.¹²

3. Government Procurement

In May, the Egyptian government enacted a new Tender Law, Law No. 89 (1998), with implementing regulations following in September. The Egyptian Tender Law governs government procurement of goods and services by all Egyptian "ministries, departments, local government units, and public and general organizations", unless otherwise excepted. The Tender Law was enacted in an effort to improve transparency and predictability in the Egyptian

government tender process. For example, the Tender Law requires government purchasers to explain why a bid was accepted or rejected; gives consideration to the technical and qualitative aspects of a tender (not merely lowest bids); and seeks to reduce delays in the return of bid bonds (which cannot exceed 2% of the estimated contract value) to unsuccessful tenderers or upon expiry of the bid. The Egyptian Tender Law expressly permits arbitration of disputes, provided that the necessary prior government approval has been obtained (as required by the Egyptian Arbitration Law). According to some Egyptian attorneys, that Tender Law provision should end the long debate on whether contracts with the Egyptian government may be subject to arbitration.¹³

Meanwhile, the Contractors Committee of the Riyadh Chamber of Commerce and Industry prepared a study on problems arising under the Saudi Tender Law and its implementing regulations.¹⁴ (The study was prepared with the input of over two thousand businessmen in the Saudi contracting sector.) In many instances, problems that have arisen are attributed to conditions and circumstances which did not exist at the time the Tenders Law was initially drafted (over 20 years ago). The Saudi Ministry of Finance and National Economy has sought to solve these problems on a piecemeal basis, issuing numerous circulars and explanatory notes, gradually transforming the previously concise and accessible rules.

Recent amendments to the UAE Federal Tenders Regulations gave individual Federal ministries some (limited) authority to make direct purchases, rather than effecting all purchases through the Federal Ministry of Finance and Economy. (Contracts valued at UAE Dirhams 100,000 or less may be executed directly by the purchasing ministry, with the Federal Ministry of Finance and Industry retaining authority to supervise the documentation relating to such transactions.) These amendments to the UAE Federal Tenders Regulations also create a register of approved suppliers and contractors, to be kept at the Federal Ministry of Finance and Industry.¹⁵

4. Commercial Agency/Distributorship

(a) Bahraini Amendments

Early in 1998, Bahrain enacted some substantial amendments to its commercial agency law.¹⁶ These amendments liberalize a number of provisions of existing Bahraini law -- including abolition of the statutory requirement of exclusivity for local commercial agents. The amendments, which should have substantial effect on future Bahraini commercial agency arrangements, and on the

resolution of disputes arising from their termination or non-renewal, reflect the Bahraini Government's continuing efforts to allow for a more equitable relationship between principal and commercial agent,¹⁷ and to open the market for competition among local traders and thus expand the consumer's options.¹⁸

Despite these significant changes to the literal provisions of the Bahraini commercial agency law, in practice the effect of the 1998 amendments might be less dramatic, particularly in the short term. For example, elimination of statutory "deemed exclusivity" is a significant liberalization in Bahraini commercial agency law, allowing principals to appoint multiple non-exclusive local commercial agents for the same products. But that liberalization probably will not affect an existing commercial agency agreement, for example, one in which the parties may have already contractually agreed to exclusivity. Moreover, in future negotiations, one would expect the larger Bahraini merchants to press hard for contractual exclusivity, particularly given the relatively small size of the Bahraini domestic market for some products. Importantly, Bahraini law continues to provide statutory support to a qualified commercial agent's claims for compensation in the face of a principal's unjustified termination or non-renewal. However, such compensation claims will now be complicated by the fact that a principal may appoint more than one Bahraini commercial agent for the same products.¹⁹

(b) Saudi Circular

A few years ago, the Saudi Ministry of Commerce began seeking comment within the local business community on a draft commercial agency regulation.²⁰ The draft regulation, if enacted, would entitle a distributor to compensation, as determined by the competent Saudi court (the Board of Grievances), in the event the distribution agreement was terminated or not renewed, provided that the distributor had not breached the agreement or (in the event of a non-renewal) had been "highly successful" in creating demand for the products. Similarly, new commercial agency legislation has been under consideration by the Consultative Council (Majlis Al-Shoura) -- although it is difficult to speculate as to when (or whether) new regulations will be enacted, or what changes may be made to the text of the draft regulations previously developed by the Saudi Ministry of Commerce.

In the meantime, the Saudi Ministry of Commerce issued a circular (in October 1998) commenting on a number of issues relating to commercial agencies and distributorships, including registration requirements.²¹ The circular urges Saudi merchants

acting as commercial agents (and distributors) for foreign firms to register their agreements with that Ministry. The circular also states that commercial agency agreements will not be accepted for registration unless they include provisions:

(a) obligating the principal and commercial agent to comply with any applicable standards set by the Saudi Arabian Standards Organization ("SASO") and the supply of spare parts (with the additional requirement that the agent be obliged to provide spare parts and maintenance service in all regions of the Kingdom), throughout the term of the agency and for one year thereafter or until the appointment of a new agent;

(b) requiring the foreign supplier to provide a certificate of origin for the goods and products;

(c) requiring the parties to announce any defects in the products and to undertake to withdraw such defective products from the market for repair or replacement at the expense of the producer;

(d) calling for disputes involving the commercial agency relationship to be resolved by the competent authorities in Saudi Arabia (since 1988, the Ministry of Commerce had accepted agreements for registration which provide for foreign dispute resolution); and

(e) requiring the agent to provide technical and managerial training to Saudis.

It will take some time to determine how strictly the Saudi Ministry of Commerce will apply these new requirements in practice.

(c) Yemeni Law

In 1998, Yemeni businessmen and lawyers sought to address the implications of Yemen's new law on commercial agencies and branches of foreign companies, Law No. 23 (1997). Although Law No. 23 cancelled the prior Yemeni law regarding commercial agencies and branches, the applicable rules for branch offices were mostly unchanged. However, Law No. 23 did contain some changes to the substantive rules relating to commercial agencies.

Law No. 23 (like the predecessor law) applies to a wide range of agents, defined to include buy-sell distributors ("distribution

agent for its own account"). Law No. 23 adds a new category of agents not explicitly included in the prior law, "maritime agents" (defined as agents who seek to procure maritime contracts in the name and for the account of a foreign company in Yemen).

Law No. 23 also contains some "dealer protections" which were not expressly stated in the prior Yemeni legislation. For example, Article 20 of Law No. 23 gives exclusive jurisdiction to the Yemeni courts to resolve all Yemeni commercial agency disputes. In addition, Article 19 of the new law permits a terminated Yemeni commercial agent to block the registration of a foreign company's replacement commercial agent in Yemen, pending an amicable or judicial resolution of the terminated commercial agent's claims.

5. Licensing/Intellectual Property

Omani Decree 63/98 approved the accession of Oman to the Paris Convention for the Protection of Industrial Property and to the Berne Convention for Protection of Literary and Artistic Works.²² Oman's accession to the Paris and Berne Conventions may be seen as part of that country's efforts towards membership in the World Trade Organization ("WTO"), and as a further legislative measure intended to encourage inward foreign investment and technology transfer. Decree 63/98 might also serve to defuse some criticism expressed by the US Trade Representative ("USTR") as to current intellectual property protection in Oman.²³

Although many Middle East countries have enacted and/or supplemented their intellectual property laws in recent years, a number of Middle East countries seemed to stumble in 1998, according to the Special 301 annual review by the USTR.²⁴ For example, Kuwait joined Egypt on the USTR's 1998 "priority watch list". Middle East countries on the USTR's "watch list" in 1998 were Bahrain, Jordan, Oman, Qatar, Saudi Arabia and the UAE. The USTR also made special observations concerning inadequacies in intellectual property protection in Lebanon and Yemen.

In October, Jordan enacted Law No. 14 (1998) amending its Copyright Law. However, observers continue to debate whether these amendments will adequately address the inadequacies in the Jordanian regulations (and enforcement practices) highlighted by the USTR.²⁵

Under the auspices of the Gulf Cooperation Council ("GCC") patent office, which officially opened in Riyadh in late 1998, patent holders are able to register their patent at one location to cover the six GCC countries (Bahrain, Kuwait, Oman, Qatar, Saudi

Arabia and the United Arab Emirates). The unified GCC patent office is designed so that a patent owner, once registered with that office, is automatically afforded protection throughout the member GCC states.²⁶

6. Environmental Regulations

Many Middle East countries have only recently enacted and begun implementing general environmental legislation. In some cases, those laws do not contain the detailed or specialized rules found in similar laws in the United States -- for example, specific rules for solid waste, hazardous chemicals, marine pollution and the like. In other cases, however, local or municipal regulations will provide additional requirements to supplement a Middle East country's general environmental laws.

In addition, under general principles of law in the Middle East (whether Islamic law rules in countries like Saudi Arabia, or civil law rules adopted elsewhere in the region) a party causing environmental damage might be liable either under contract or tort for actions which cause injury to the physical or financial interests of another party. In extreme cases, general criminal law rules in a Middle East country might be relevant (as occurred a few years ago in Lebanon, where the import and dumping of toxic wastes was deemed a "violation of the domestic security of the country".)²⁷

The year 1998 was to represent a milestone under Egypt's Environmental Law, enacted by Law No. 4 (1994). That law provides for the establishment of an Agency for Environmental Affairs, empowered to draw up general environmental protection policy, prepare plans needed to preserve and develop the environment, and follow-up implementation in coordination with other competent government authorities. That law requires existing companies to comply with its provisions during a four-year grace period, expiring in February 1998. However, the Egyptian government informally extended the grace period until the end of 1998.²⁸

In accordance with Federal Law No. 7 (1993), the UAE created a Federal Environmental Authority ("FEA"). The FEA's functions are to: draft laws, carry out studies, propose policy, conduct research, monitor the sea, land and air environment, and protect against hazards that may harm human health, crops, wildlife, other natural resources and the atmosphere. The FEA is authorized to monitor both the public and private sectors, and to have a licensing role over economic activities that might affect the environment. The FEA has been helping to prepare a supplemental environmental protection law, reportedly awaiting approval by the

UAE President, and containing harsh sanctions on polluters.²⁹ In another recent initiative, UAE Council of Ministers Resolution No. 5 (1998) prohibits the use of marine tankers, barges and other vessels as floating warehouses for the storage or transport of oil or its derivatives. The storage and transport of contraband Iraqi oil became a serious environmental problem in the UAE in 1998, with oils spills (caused by improper storage) rendering coastal water desalination facilities temporarily inoperable.³⁰

7. Tax/Currency Regulation

In January, the Egyptian People's Assembly passed Income Tax Law No. 5 (1998), amending two articles of the Income Tax Code to eliminate the tax benefit accruing to banks which borrowed funds to acquire treasury bills -- thereby receiving both tax relief for the interest on the borrowings as well as a tax exemption for the income from the treasury bills. Under Law No. 5, the amount of a bank's financing and administrative costs of acquiring treasury bills from borrowed funds now reduces the amount allowed as exempt treasury bill income.³¹

The Omani government, facing a substantial budget deficit in recent years, decided to implement a range of revenue-raising measures in 1998-99, including customs duties on vehicles doubling to 10-15%, corporate tax rates rising to 12%, and increased tax on luxury goods.³²

8. Courts/Disputes

For many years, Omani law had not adequately addressed the legal status of foreign arbitral awards (recognition and enforcement) before the Omani courts.³³ However, Omani Decree No. 36/98 has now provided for Oman's accession to the 1958 United Nations Agreement on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Oman's accession to the New York Convention is consistent with that country's recent enactment of Decree 13/97, authorizing Oman's commercial courts to recognize and enforce qualifying foreign judgments and arbitration awards.³⁴

In coming years, Middle East commercial laws are likely to strengthen the "free trade" trends suggested in this summary -- as countries in the region meet their commitments to WTO requirements, and as the oil-exporting countries of the region continue to adjust to the reality of limited oil revenues.

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E N D N O T E S

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2. See, e.g., U.S. & Foreign Commercial Service and Department of State, Country Commercial Guide, Egypt, Fiscal Year 1999 (1998), Chapter VII, "Openness to Foreign Investment".
3. Saudi Economic Survey (30 December 1998), p. 7. Portions of this information were contributed by Maren Hanson, Law Offices of Dr. Mohamed H. Hoshan (Riyadh).
4. Johnson, "Foreign Investment", 3 [1998] Mideast Update no. 2, p. 1 (newsletter of Williams, Mullen, Christian & Dobbins).
5. See, e.g., "Saudi Privatization Begins with Telecom, Power", U.S.-Arab Tradeline (newsletter of the U.S./Arab Chamber of Commerce), 8 January 1999, pp. 3-4.
6. See generally, "Abu Dhabi lights a beacon for reforms", Middle East Economic Digest (25 December 1998), pp. 2-3.
7. "Abu Dhabi Water and Electricity Authority Established", Monthly Newsletter (newsletter of Afridi & Angell), July 1998. The Abu Dhabi law also (i) establishes the Abu Dhabi Power Corporation which will, among other things, be authorized to conclude agreements relating to the management of production, transmission, distribution and service companies owned fully by the government, and (ii) provides for the creation of the Bureau of Regulation and Supervision for the Abu Dhabi Water and Electricity Sector. Id.
8. Middle East Economic Digest, 6 February 1998, p. 16. Investors usually compare the relative procedural simplicity of establishing a company under the Egyptian Companies Law with the legislative incentives and guarantees offered to companies formed under the Egyptian Investment Law, Law No. 8 (1997). See generally, Talaat, "Egypt's New 1997 Investment Guarantees and Incentives Law", Middle East Executive Reports (January 1998), p. 9.
9. See, e.g., Matouk, "Egypt Amends Companies Law To Provide Expedited Approval Procedure for Incorporation", Middle East Executive Reports (May 1998), p. 8; U.S. & Foreign Commercial Service and Department of State, Country Commercial Guide, Egypt, Fiscal Year 1999 (1998), Chapter VII, "Right to Private Ownership and Establishment".

10. "UAE -- Amendments to the Commercial Companies Law No. (8) of 1984", Gulf Business Law Review (newsletter of Trowers & Hamblins), January 1999, p. 3. The 1998 amendment to the CCL is also relevant to the oil, gas and power sectors, as it states that the CCL shall not apply to a company engaged in oil (exploration, drilling, marketing and transportation), electricity and gas production, water desalination and/or a company granted a Council of Ministers' exemption, where said company's memorandum of association specifically provides otherwise. See generally "UAE: company law to pave way for energy utility ventures", Middle East Economic Digest (19 July 1998), p. 24.

11. See, e.g., Monsour, "Commentary on the Emirates Securities and Commodities Market and Committee", Law Update (newsletter of Al-Tamimi & Co.), December 1998, p. 4; and "First signs of a formal bourse", Middle East Economic Digest (4 December 1998), p. 34.

12. See, e.g., Hirst, "New Capital Market Law Makes Important Changes", Middle East Executive Reports (September 1998), p. 9; Middle East Economic Digest (11 December 1998), p. 16.

13. See, e.g., Azmi and Ibrahim, "Egypt's New Law on Public Tenders", Arab Region Newsletter (International Bar Association), December 1998, p. 4.

14. Portions of this information were contributed by Maren Hanson, Law Offices of Dr. Mohamed H. Hoshan (Riyadh).

15. "U.A.E.: Federal Tenders Regulations Amended ... ", Middle East Executive Reports (April 1998), p. 6.

16. See Stokes and Stovall, "Bahrain Liberalizes Commercial Agency Law", Middle East Executive Reports (April 1998), p. 9.

17. Minister of Commerce & Agriculture Habib Ahmed Kassim, "Innovative Marketing Policies Pay Dividends", Bahrain Country Report (1994), p. 2.

18. See comments of Bahraini Minister of Commerce Ali Saleh Abdullah Al-Saleh, Middle East Economic Digest (27 March 1998), p. 18.

19. Similar issues are raised by recent liberalization of the Omani commercial agency law, which now also permits multiple non-exclusive commercial agency appointments. See Adler, "Oman Commercial Agency Law Amendments: Effects on Future Agreements, Dispute Resolution", Middle East Executive Reports (January 1997), p. 8.

20. See Haberbeck and Ghazzawi, "Saudi Arabia's New Draft Agencies Regulation", Middle East Commercial Law Review (Nov./Dec. 1995), p. 114.

21. Portions of this information were contributed by George Sayen, Legal Advisors (Riyadh).

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23. Similarly, Omani Ministerial Decision 43/98 was issued in 1998, providing for a special register (at the Agencies and Trademark Department with the Directorate General of Commerce) in which will be recorded details of the literary, artistic or scientific work to be protected. "Copyright", Gulf business law review (newsletter of Trowers & Hamlins), August 1998, p. 1.

24. See Mann, "Intellectual Property Protection: 1998 USTR Special 301 Decisions", Middle East Executive Reports (May 1998), p. 17.

25. See, e.g., "Jordan's Amended Copyright Law: Major Changes & Commentary", TMP [Abu Ghazallah] Bulletin (January 1999), p. 5. An English translation of Law No. 14 (1998) is published in AGIP [Abu Ghazallah] Legal Angle (November 1998), at p. 4-5.

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27. Mallat, "Lebanon" [Country Survey], Yearbook of Islamic and Middle Eastern Law (1994), p. 222.

28. See, e.g., U.S. & Foreign Commercial Service and Department of State, Country Commercial Guide, Egypt, Fiscal Year 1999 (1998), Chapter V, "Environmental Equipment & Services".

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30. See, e.g., Majid, "Call to update laws on maritime pollution", Gulf News (18 February 1998), p. 3.

31. See, e.g., International Bureau of Fiscal Documentation, Taxes and Investment in the Middle East, "Egypt" (January 1999), p. iii; Mostafa, "Give me Shelter", Business Today (April 1998), p. 48.

32. See, e.g., "Budget deficit set to double in 1999", Middle East Economic Digest (15 January 1999), p. 21.

33. See, e.g., Hirst, "Court Decisions on Commercial Arbitration in the Sultanate of Oman", Middle East Commercial Law Review (March/April 1995), p. 77. But see Lane and Morton, "First Enforcement Of An ICC Arbitration Award In Oman", Middle East Executive Reports (October 1985), p. 9.

34. Elnafie, "Oman Reforms Its Judicial System: New Commercial Court Law", Middle East Executive Reports (March 1997), p. 8; Trowers & Hamblins, "New Commercial Court", Arab Region Newsletter (International Bar Association), November 1997, p. 7.