

GIBSON, DUNN & CRUTCHER

EXHIBIT D

PROCESS AND DUE PROCESS IN CLAIMS  
AGAINST THE SAUDI ARABIAN GOVERNMENT

A Report Prepared By

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**I. Background**

The process by which a judicial determination is made is critical to the acceptance by the parties -- and outsiders -- of the results of that judicial decision. Ad hoc or arbitrary decisions, decisions predetermined by political considerations, or those delivered by a corrupt system are not respected, either by the parties or by the world community. A determination that is reached according to an established, open, and impartial judicial process must be respected, however, even by a party that is disappointed with the outcome it produces.

This Report examines the process of adjudicating claims made by private parties against a governmental agency in Saudi Arabia. Specifically, this Report reviews a case brought by Gibbs & Hill, Inc. ("the Company") against the Royal Commission for Jubail and Yanbu (the "Commission"), an agency of the Saudi Arabian government.

The case involves a Technical Services Agreement under which the Company provided architect/engineering services in connection with the construction of an industrial complex in Yanbu, Saudi Arabia. The Technical Services Agreement was originally entered into by the parties on July 30, 1978, but was later amended and re-executed on June 1, 1980. It is the amended version of the Technical Services Agreement that is at issue, and is referred to in this Report as the "Agreement."

The Agreement is a fairly typical contract for engineering, design, and technical support and follows a standard form used by the Commission for its many contracts. Significantly, at the time of its amendment in 1980, the parties agreed to change the Agreement from a "cost reimbursable" to a "fixed price" contract. It is the fixed price element of the Agreement that forms the kernel of the Company's complaint. It is important to bear in mind that the amendment of the Agreement was mutually accepted by both parties.

Following completion of the work specified in the Agreement, the Company was paid the full amount of the fixed price specified in the Agreement. The Company asserted, however, that due to the Commission's alleged delays and administrative failures, the Company incurred substantial increased costs beyond what was contemplated when it entered into the Agreement, and sought to recover additional amounts from the Commission over and above the fixed contract price.

The Agreement provided that any dispute between the parties would be resolved in the Saudi Arabian judicial system, and would be governed by Saudi law. The Company first filed a claim with the Commission, according to the procedure set forth in the Agreement. When, after review, this claim was denied, the Company filed suit against the Commission before the Board of Grievances in Saudi Arabia, which is the court with jurisdiction over such cases. After a series of hearings and written submissions by both parties over a period of several years, the Board of Grievances issued a lengthy opinion finding that the Company was not entitled to additional compensation under the Agreement, and entered judgment against the Company. Upon appeal, this judgment was affirmed.

After the Company lost the litigation that it initiated in Saudi Arabia, its successor in interest has now sought assistance from various Members of Congress and from the Departments of State and Commerce in an effort to reopen its claims with the Saudi government. At the request of these offices, the Royal Embassy of Saudi Arabia in Washington, D.C. (the "Embassy") ordered a comprehensive review of this case and reported back to the Members and the Executive Branch departments that this was a fairly typical contract dispute which had run its course through the proper judicial channels in Saudi Arabia, and had been resolved in the appropriate forum.

Despite this, issues continue to be raised regarding the Company's claim, and regarding the process under which its claim was resolved by the Saudi judicial system. At the request of the Saudi Ambassador, Gibson, Dunn & Crutcher has been asked to address whether or not the Company was accorded a full and fair hearing in the Saudi court system, consistent with generally accepted principles of due process. If the Company received due process in the Saudi courts, there is no legitimate basis for not respecting the final judgment of the Board of Grievances. This Report, then, focuses on the issue of whether the Company was accorded a full and fair hearing in the Saudi court system, as measured by generally accepted standards of due process.

## II. The Elements of Due Process

Although it is difficult to produce a universally accepted definition of what constitutes due process, certain fundamental elements are present in every system generally accepted as fair.

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Opportunity to Present a Case. At the center of any judicial process is the rather obvious element that there must have been a process at all. A complainant must be afforded an opportunity to present its case -- to have its story heard. Standards vary as to procedure, method, and detail of presentation, but the right to be heard is fundamental. This includes the right to present evidence and legal argument, the right to hear and present rebuttal to the other side's case, and the right to have a decision rendered on a defined record in accordance with known and regular procedures. The right to assistance of legal counsel is also an important feature of being accorded a fair "day in court."

Right to an Appeal. Another important element of due process is the right to appeal an adverse decision to a separate panel of independent decision makers. Recognized legal systems take cognizance of the fact that courts of first impression sometimes make mistakes, and that appellate review is critical to a fair judicial system.

Impartial Forum. The final central element of due process is the existence of a forum that is impartial and capable of understanding and judging the issues presented to it. Absent these factors, the right to be heard is rendered meaningless.

These fundamental elements -- the opportunity to present a case, in an impartial forum with proper rules of procedure and the assistance of counsel, and the right to have an adverse decision reviewed by a separate appellate panel -- form the core of what is generally recognized as due process. Legal scholars could argue endlessly about nuances and additional elements of judicial procedure, but there is a broad spectrum of agreement that if the elements listed above are present, then the system is sound.

This Report discusses below how the Saudi legal system, and in particular its procedure for claims brought against the Saudi government, measures up against these fundamental elements of due process. In addition, while recognizing that different nations have different approaches to dispute resolution, and that the approach adopted in the United States is but one of many possible acceptable systems, the Report briefly compares the process for bringing claims against the Saudi Arabian government with the process applicable for claims against the United States government. Finally, the Report canvasses judicial decisions in the United States that have addressed the fairness of the Saudi legal system.

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### III. Opportunity to Present a Case

#### A. Contract Procedure

As is typical of construction-related contracts, the Agreement contains an internal dispute resolution procedure designed to resolve disputes without litigation to the extent possible. The Agreement provides that any claims by the Company are first to be submitted to the Commission, which is required to respond formally to the claims. If the Company disagrees with the Commission's response, it is to file a written protest, and the parties are to attempt to resolve the dispute through conciliation and discussion. The Agreement provides that the parties can seek the assistance of technical experts during these discussions. Unresolved disputes are referred to the Board of Grievances.

The internal dispute resolution procedure is meaningful from at least two perspectives. First, it provides both sides with access to information, an important element of the right to be heard, because the procedure requires written submissions supported by argument and documentary evidence. Second, it provides the parties with a formal mechanism for trying to resolve any disputes. While an independent decision maker is not involved, incentives exist to resolve the parties' differences because, if no resolution is reached, the aggrieved party can take the next step and institute litigation.

The Company and the Commission availed themselves of this internal contractual procedure in the case at issue. Submissions and arguments were made by the Company to the Commission and to the Commission's technical consultant, Saudi Arabian Parsons Limited, the Saudi affiliate of a major U.S. engineering firm. This procedure is typical of construction-related contracts and, as will be seen later in the Report, matches the procedure in contract disputes with the United States government.

After consideration of the Company's submissions, the Commission rejected the claim asserted by the Company. In accordance with its rights under the Agreement and under Saudi law, the Company then brought suit before the Board of Grievances.

#### B. The Board of Grievances

Although its jurisdiction has expanded in recent years to cover certain commercial disputes between private parties, the core function of the Board of Grievances has always been to adjudicate disputes between private contractors (whether Saudi or foreign) and Saudi government agencies. The

Board of Grievances sits in three-judge panels at the first level, and a three-to-six-judge Audit Commission hears appeals. The Board of Grievances has been described as resembling the French Conseil d'Etat, which is also a specialized tribunal for administrative cases.<sup>1</sup>

As a result of Saudi Arabia's recent history of massive construction expansion and the inevitable disputes that resulted, the Board of Grievances has tremendous experience in hearing construction-related claims. Unlike decisions of most other Saudi courts (and unlike decisions in most civil law countries), opinions of the Board of Grievances are published, making it possible to review and analyze the court's decisions.

The day-to-day procedure of the Board of Grievances would not be unfamiliar to a Western jurist. Following the filing of a complaint, the defendant is given an opportunity to respond to the plaintiff's allegations. The case then proceeds with the filing of memoranda back and forth by the plaintiff and defendant, responding to each other's points, until the plaintiff indicates in writing that it has completed presentation of its case. The submission of memoranda is accompanied by hearings before the Board of Grievances, where the attorneys' legal arguments and the court's questions and commentary are recorded by the clerk of the court and are signed by the court, the clerk, and the attorneys, and which form the official record of the case. The judges are permitted to ask questions and seek clarification from the attorneys. This can be done officially, in which case the questions and responses become part of the official record of the case, or informally, in side-bar conversations with the judges, in which case the discussion is not recorded.

While the procedures of the Board of Grievances do not include the wide-ranging discovery unique to the American court system, the Board of Grievances, if requested by a party, will rule on whether a party should be required to produce a document or other evidence requested by the other side. In cases against the government, the court has interpreted the right of access to documents broadly, taking the position that government documents are essentially in the public domain and, except in sensitive circumstances, should be produced.

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<sup>1</sup>See Lerrick, A. and Mian, Q.J., Saudi Business and Labor Law (2d ed. 1987), at 238.

Like the American court system, the Board of Grievances relies on the clash of opposing arguments and evidence, presented by trained attorneys, to marshal the key facts and focus the dispositive legal issues. The parties are given wide latitude in presenting their cases, and during the initial stages of the litigation the court's primary role is to receive the evidence and opposing arguments. Where the parties cannot agree on a procedural matter (say, for example, whether a document should be produced), the Board of Grievances will rule on the issue. Otherwise, the court will permit the litigants to proceed until they indicate to the court that they have completed their cases. As a general matter, the Board of Grievances (and indeed other Saudi courts) apply very liberal evidentiary rules, and do not bar substantive evidence based upon procedural technicalities.

Once the litigants have closed, the Board of Grievances reviews the entire record and determines whether it has sufficient information upon which to base a ruling. Frequently, the Board of Grievances will request additional information or clarification from one or both of the litigants. Where this occurs, the other side is permitted to supplement its case in response to the additional information given by its opponent. Finally, the court considers all of the evidence and argument presented, and renders a written opinion deciding the case.

Here, the Company brought its claim before the Board of Grievances, as required by the terms of the Agreement. The opinion of the Board of Grievances states, and the record confirms, that numerous hearings were held and multiple submissions were made by both parties. The Company was represented by counsel throughout, and the detail of the published opinion indicates that the Company's case was carefully considered by the court. The case lasted for several years, during which the Company had ample opportunity to present its case, together with all supporting facts and documents.

In the consideration of the Company's suit against the Commission it appears that all of the Board of Grievance's normal procedures were followed. The case would not have been closed until the Company's attorney certified in writing that the presentation of the Company's case was complete. Based on this full record, the Board of Grievances considered the case, and issued a detailed and lengthy opinion addressing and deciding the claim presented. Although the court did not find the Company's arguments persuasive, it is clear that the company's position was fully understood and considered by the Board of Grievances, in accordance with its normal procedures and practice.

#### IV. Opportunity for Appeal

An important element in proper judicial procedure is a review of the lower tribunal's decision by an appellate body. The right of appeal is a recognized component of due process. The Saudi legal system, like the system of the United States, provides for an appeal as of right.

After the Board of Grievances publishes its written decision, either party has the right to appeal the decision within 30 days. The appellant is permitted to file additional argument in support of its appeal, addressing the claimed errors in the Board of Grievances' decision. The appellant can also submit new evidence on appeal. In this respect, the Board of Grievances' procedure is more liberal than the typical appellate process in the American court system.

The first step in the appellate process is to seek reconsideration of the initial decision. Just as American courts permit a losing litigant to petition the trial court to set aside the verdict or decision against it, the appellate process before the Board of Grievances begins with submissions to the same panel of the Board of Grievances that issued the judgment. If the panel agrees with the appellant's contention that the original decision was in error, based either on the conclusion that a mistake was made or that new evidence dictates a different result, the panel can vacate its prior judgment. If the panel is not convinced by the appeal, the appellant's brief is added to the entire case file, which is then passed to the Audit Commission, the appellate division of the Board of Grievances.

The Audit Commission has overriding authority on procedural matters and its rulings must be followed by the lower court. On substantive issues, the lower court judges are not technically bound by the decisions of the Audit Commission. If, on occasion, the lower court declines to go along with an Audit Commission ruling on a case, however, the Audit Commission must either refer the case to a new lower court panel of the Board of Grievances for a *de novo* hearing, or issue its own judgment, which supersedes that of the lower court panel.

In this case, the Company was afforded the opportunity to appeal the decision of the Board of Grievances, and took advantage of that opportunity. In accordance with its normal procedures, the Audit Committee of the Board of Grievances addressed, and ultimately rejected, the Company's appeal. Again, however, it is clear that the Company was given full opportunity to present its arguments, and simply failed to persuade the Audit Committee, as it had failed to

persuade the initial panel of the Board of Grievances that heard its case.

V. Impartiality of the Saudi Judicial System

The opportunity to present one's case is meaningless if the tribunal that hears the case is inadequate or other than impartial. For example, a court that is incapable of understanding a complex case might also be incapable of rendering a fair judgment -- a criticism frequently leveled at U.S. juries in complex civil litigation. Alternatively, a corrupt judiciary, or a judiciary entirely co-opted by political pre-determination of disputes, could not be regarded as fair.

By the terms of its enabling legislation,<sup>2</sup> the Board of Grievances is "an independent judicial body whose decisions are final."<sup>3</sup> The judges on the Board of Grievances are trained in law, with most of them holding advanced degrees. Typically, they are chosen for judicial careers based on the recommendations of scholars in law colleges in Saudi Arabia. Judges are formally appointed after a period of years working for and with senior judges. Judges are given tenure until retirement age, and may be removed only by a Royal Decree made upon the motion of the Administrative Affairs Committee of the Board of Grievances.

Reliance upon a trained, professional judiciary -- with essentially life tenure, much like federal judges in the United States -- is a strong indicator of the Saudi Arabian commitment to a competent and impartial judicial system. Other factors also demonstrate the impartiality of the judicial process in Saudi Arabia.

As was noted earlier, a formal record is maintained throughout the course of the case and is read aloud and signed by those in attendance (including attorneys) at the close of each hearing. Attorneys generally take notes during the readings of the record of the proceedings, although the official record is available to them. In addition, hearings of the Board of Grievances, while not public in the sense of having a visitors' gallery, are open. Attorneys waiting for

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<sup>2</sup>The Board of Grievances Law, Royal Decree No. M/51 of 17/7/1402 (10/5/1982).

<sup>3</sup>Lerrick, and Mian, supra, at 238.

later-scheduled hearings are often present, and interested persons, such as the parties themselves, are free to attend. Thus, the atmosphere in which the hearings are conducted and closely monitored by counsel for the litigants is one that is consistent with impartiality.

Of great significance, the opinions of the Board of Grievances are required to be published<sup>4</sup> and, in administrative cases, carry the weight of precedent. To overturn a decision in an administrative case requires a lengthy and complicated procedure.<sup>5</sup> While the concept of precedent is familiar to common law jurists, it is not generally followed in Islamic law, or for that matter, in civil law systems such as those in most Western European countries. In this respect, then, the procedure of the Board of Grievances more closely follows that of common law courts in the United States and the United Kingdom. Setting aside whether the lack of concern for precedent is a fair criticism of other legal systems, here at least the criticism does not stand.

Perhaps most compelling, examination of the results reached by the Board of Grievances makes clear that the extensive procedural safeguards, open court system, and independent judiciary that characterizes the Board of Grievances in fact results in due process and fair outcomes for litigants. Although statistics do not exist, it is widely recognized by attorneys in Saudi Arabia that the Saudi government frequently loses cases before the Board of Grievances. Indeed, many Saudi lawyers can cite to victories they have obtained before the Board of Grievances on behalf of both domestic and foreign contractors.

Moreover, it cannot be said that plaintiffs win only the insignificant Board of Grievances cases. In what was almost certainly one of the larger claims ever brought before that court, Hyundai Engineering & Construction Company, a South Korean contractor, was awarded nearly \$100 million by the Board of Grievances earlier this year against the Saudi Arabian Ministry of Public Works & Housing.<sup>6</sup>

While a losing litigant can always (and often does) claim that the wrong result was reached in a case, and that

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<sup>4</sup>The Board of Grievances Law, Article 31.

<sup>5</sup>The Board of Grievances Law, Article 40.

<sup>6</sup>Middle East Economic Digest, March 3, 1995, at 25.

had the court "properly" considered the evidence it would have come out differently -- a claim that is made by losing parties every day in the United States -- there is no basis for concluding that the Saudi court system in fact lacks either adequate procedures or impartial decision makers. The record in this case establishes that the Board of Grievances went to considerable lengths to hear both sides' views of the dispute, and to understand its complexities. The very presence of a record and of a detailed, published opinion is evidence itself of the openness and fairness of the tribunal. This, combined with evidence of proper procedure, an independent judiciary, and a history of decisions both in favor of and against the government, strongly demonstrates that the judgment of the Board of Grievances in this case was reached in a fair manner and deserves to be accorded respect.

#### VI. Comparison to U.S. Procedure

Although each country is obviously entitled to establish its own process for resolving disputes, and the dangers of trying to graft one nation's views of appropriate procedure onto the judicial system of another are apparent, it is nonetheless useful to compare Saudi and U.S. procedures for resolving disputes between a private party and a government agency. Contractors providing construction-related services to the United States government are, in fact, provided with a dispute resolution process not unlike the one in Saudi Arabia.

Disputes between contractors and the United States government are resolved under the procedures prescribed by the Contract Disputes Act of 1978 ("CDA") 41 U.S.C. § 601 et. seq. As in Saudi Arabia, the first step in the dispute process in the United States is the contractor's submission of a claim, in writing, to the government contracting officer. 41 U.S.C. § 605. The contractor's written claim must notify the contracting officer of the factual basis and amount of the claim. The contracting officer may then either negotiate a settlement with the contractor or render a final decision. 41 U.S.C. § 605(c). As we have seen, the Commission adopted very nearly the same initial procedure.

Similar to the process in Saudi Arabia, a contractor in the United States may appeal an adverse decision of the contracting officer (or the contracting officer's failure to issue a decision) to either the U.S. Court of Federal Claims ("COFC") or an agency board of contract appeals ("BCA"). The CDA provides for a full evidentiary trial on the claim at either a BCA or the COFC, with appeals from either forum to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). Review of decisions by the Federal Circuit may be

sought from the U.S. Supreme Court, although such review is very rarely granted.

The BCAs are independent administrative review bodies whose jurisdiction is determined by the CDA. They are comprised of administrative judges appointed by the appropriate agency head. The BCAs are not bound by the Federal Rules of Evidence and Civil Procedure. Usually, the hearing is conducted by a single administrative judge who then writes the decision. This decision is reviewed and adopted by a panel of three to five judges as the decision of the full board. The BCAs also encourage the resolution of disputes through alternative methods such as binding arbitration or mini-trials, and make their resources available to conduct such procedures. This rather informal system of adjudication appears to be even more relaxed than the Board of Grievances.

While the COFC is more formal than the BCAs, it too, bears the hallmark of a specialized system. Pursuant to 28 U.S.C. § 2503(b), the proceedings of the COFC are conducted according to the Federal Rules of Evidence. The court is not bound by the Federal Rules of Civil Procedure, but it has incorporated them "to the extent that they appropriately can be applied to the proceedings in this court," U.S.C.C. Rule 1(b). Cases before the COFC are heard and decided by one judge, 28 U.S.C. § 174(a). The independent COFC judges may refuse to follow each other's decisions, but are bound by the decisions of the Federal Circuit.

Both the Saudi and U.S. systems, therefore, have a separate judicial mechanism for dealing with claims against the government, distinct from the courts available to resolve private disputes. Both involve hearings before judges; there is no right to a jury trial for claims against the United States government. In both systems the parties are represented by counsel. And in both systems the same three basic steps are followed: (1) presentation of a claim to the government agency involved, (2) de novo review of the contractor's claim in an adversarial proceeding before impartial judges, on a full evidentiary record, and (3) an opportunity for appeal of an adverse judgment. Thus, while intricacies of procedure may differ, the two systems are quite comparable. This similarity of process strongly supports the conclusion that the Company was accorded due process in the Saudi court system.

**VII. The American Courts' View of the Saudi Legal System**

The conclusion that the Saudi legal system provides American litigants such as the Company with a fair opportunity to present their claims is reinforced by consideration of how the American courts view the Saudi system of justice.

Courts in the United States have consistently rejected contentions that the Saudi legal system is somehow unfair or inadequate. To the contrary, American courts have stated that "Saudi Arabia possesses a sophisticated legal system,"<sup>7</sup> and have expressly held that "Saudi Arabia is recognized as an adequate forum" for resolving legal disputes.<sup>8</sup> As a consequence, United States courts regularly enforce contractual provisions under which the parties agreed to litigate disputes in the Saudi legal system -- as the parties did here -- and also require American plaintiffs to pursue their cases in the Saudi courts where the events giving rise to the claim occurred in Saudi Arabia and the relevant witnesses and evidence are located there. This result has been reached with apparent uniformity both in cases involving private parties,<sup>9</sup> and in suits brought by American plaintiffs against Saudi government agencies or officials.<sup>10</sup> Indeed, it does not appear that there are any cases where a United States court has agreed with a contention that the Saudi court system is unfair or inadequate.

American courts have specifically rejected the contention that an American plaintiff will not be treated

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<sup>7</sup>Chadwick v. Arabian American Oil Co., 656 F. Supp. 857, 863 (D.Del. 1987); Shields v. Mi Ryung Construction Co., 508 F. Supp. 891, 894 (S.D.N.Y. 1981).

<sup>8</sup>Chadwick, 656 F. Supp. at 863.

<sup>9</sup>Jeha v. Arabian American Oil Co., 751 F. Supp. 122, 126 (S.D. Tex. 1990), aff'd, 936 F.2d 569 (5th Cir. 1991); Tisdale v. Shell Oil Co., 723 F. Supp. 653, 657 (M.D. Ala. 1987); Chadwick, 656 F. Supp. at 863. See also Spradlin v. Lear Siegler Management Services Company, Inc., 926 F.2d 865, 868-869 (9th Cir. 1991); In re Disaster at Riyadh Airport, 540 F. Supp. 1141, 1154 (D.D.C. 1982).

<sup>10</sup>Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 290 (5th Cir. 1989); Weidner Communications Inc. v. Al Faisal, 671 F. Supp. 531, 536 (N.D. Ill. 1987), rev'd on other grounds, 859 F.2d 1302 (7th Cir. 1988); Shields, 508 F. Supp. at 896-897.

fairly by the Saudi court system in suits against or involving the Saudi government or Saudi officials. One court, in rejecting the contention that the plaintiff would not be treated fairly because of the defendants' association with the Saudi royal family, noted that Saudi Arabia "purchase[s] a very large proportion of goods and services on the international market and has, as a result, a significant commercial incentive to provide fair adjudication in its courts to foreigners with whom it trades."<sup>11</sup> In another case involving claims against a Saudi government entity, the U.S. Court of Appeals for the Second Circuit held that "there is no indication that a Saudi Arabian forum would treat [an American plaintiff] unfairly."<sup>12</sup> A third American court, in addressing a suit alleging wrongdoing by a member of the Saudi royal family, emphasized that "Saudi Arabia has established a specific tribunal for litigation of claims against the government," in concluding that an adequate forum was available in Saudi Arabia.<sup>13</sup>

Likewise, American courts have also rejected attacks on the substantive law of Saudi Arabia. In applying Saudi law to cases involving events in that nation, courts have rejected claims that Saudi law is "uncivilized"<sup>14</sup> or is "anachronistic and unfair,"<sup>15</sup> characterizing such assertions as "chauvinistic and unfounded."<sup>16</sup> In these and other cases, American courts have shown no reluctance to apply Saudi law to disputes involving American parties.<sup>17</sup>

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<sup>11</sup>Weidner, 671 F. Supp. at 537.

<sup>12</sup>Forsythe, 885 F.2d at 290.

<sup>13</sup>Shields, 508 F. Supp. at 896.

<sup>14</sup>Walton v. Arabian American Oil Co., 233 F.2d 541, 545 (2d Cir.), cert. denied, 352 U.S. 872 (1956).

<sup>15</sup>Levine v. Arabian American Oil Co., 1985 WL 3945, \*7 (S.D.N.Y. 1985), aff'd, 800 F.2d 1128 (2d Cir. 1986).

<sup>16</sup>Id.

<sup>17</sup>Walton; Levine; Fogelman v. Aramco (Arabian American Oil Company), 920 F.2d 278, 284 (5th Cir. 1991); Triad Financial Establishment v. Tupane Co., 611 F. Supp. 157, 164 (N.D.N.Y. 1985); Godbey v. Frank E. Basil, Inc., 603 F. Supp. 775, 777 (D.D.C. 1985).

Of particular relevance to the present situation, in cases holding that litigation must be pursued in Saudi Arabia, and in cases applying Saudi law in United States actions, American courts have recognized the legitimate interest of the Saudi legal system in resolving disputes involving business and events that take place in Saudi Arabia. For example, in holding that the American courts should defer resolution of a dispute regarding an employment agreement executed in Saudi Arabia to the Saudi legal system, the Fifth Circuit stated that it "acknowledge[d] that our community has an interest in the hiring and firing of American citizens by foreign corporations; however, in this situation, Saudi Arabia appears to have a greater interest in resolving this dispute than does the United States."<sup>18</sup> This interest is, of course, particularly strong in cases such as the present one involving contracts with the Saudi government. As explained above, the United States government has the same interest, and requires similar procedures, with respect to claims by those who contract with the government.

Finally, the principles United States courts apply with respect to the recognition and enforcement of foreign judgments make clear that the Company has "had its day in court," and that the United States government should respect the finality of the determination reached by the Saudi legal system. "Under federal law, the recognition of foreign judgments and proceedings is governed by principles of comity."<sup>19</sup> The principle of "comity" dictates that the courts of one nation "will give effect to the laws and decisions of another, not as a matter of obligation, but out of deference and respect."<sup>20</sup>

In the United States courts, "a final judgment obtained through sound procedures in a foreign country is

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<sup>18</sup>Forsythe, 885 F.2d at 291. See also Jeha, 751 F. Supp. at 128 ("Saudi Arabia has a greater, and more direct interest [than the United States] in the issue of whether the medical care is rendered properly [in that country]"); In re Disaster at Riyadh Airport, 540 F. Supp. at 1153 (emphasizing Saudi interest in resolving claims regarding air crash in Saudi Arabia); Triad Financial Establishment, 611 F. Supp. at 163 ("Saudi Arabia has a compelling interest in having its law applied to this controversy").

<sup>19</sup>Victrex Steamship Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987).

<sup>20</sup>Black's Law Dictionary, at 242 (5th ed. 1979).

generally conclusive as to its merits unless (1) the foreign court lacked jurisdiction over the subject matter or the person of the defendant; (2) the judgment was fraudulently obtained; or (3) enforcement of the judgment would offend the public policy of the state in which enforcement is sought."<sup>21</sup> Here, there is no suggestion that any of the exceptions to the conclusiveness of the Saudi tribunal's judgment are present. Based on the principle of comity -- respect for another nation's laws and decisions -- the finality of the decision reached by the Board of Grievances would be recognized in the American court system. The same recognition and respect should be accorded that decision by the American political system.

#### VIII. Conclusion

Having established a measure of what constitutes due process, namely, the opportunity to be heard in accordance with appropriate procedures and with the assistance of counsel, in an impartial forum, followed by the right to appeal, one can only conclude that the Saudi legal system passes this test by a substantial margin. A comparison of the Saudi legal system to the United States system, and a look at how Saudi courts are viewed by United States courts, only underscores the view that the Saudi system is fundamentally fair.

Here, in a procedure not unlike one it would have encountered in a claim against a United States government agency, the Company first presented its claim to the cognizant governmental agency and then to a specialized tribunal, where the matter was considered in a lengthy series of hearings. Both sides were represented by counsel and made oral and written presentations to the Board of Grievances until both litigants indicated their respective cases had been presented. The Company appealed the adverse decision and the judgment was affirmed. The entire process bears a striking resemblance to the process in cases brought by private contractors against the United States government.

The openness of the Board of Grievances procedure is testimony to its fairness. Hearings may be attended by outsiders and the signatures of counsel serve as a verification of the record of the case. The decision and opinion are made public. The Saudi government often loses

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<sup>21</sup>Ackerman v. Levine, 788 F.2d 830, 837 (2d Cir. 1986).

cases brought against it, and plaintiffs have won substantial judgments against Saudi government agencies in the Board of Grievances. The expertise of the Board of Grievances in adjudicating construction-related cases cannot be questioned, and it has repeatedly demonstrated its independence. American courts have recognized the propriety and independence of the Saudi judicial system and have been unsympathetic to those who would disparage it.

From all perspectives then, whether a straightforward test of due process, or a comparison to a more familiar legal system, the Saudi Board of Grievances passes muster. It provides (and provided to the Company) a fair and open forum for the airing of grievances. The Company, having accepted and availed itself of this forum and lost, should respect and accept the results of this process.

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