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ISLAMIC LAW IN AMERICAN COURTS*

DAVID F. FORTÉ**

I. INTRODUCTION

As the nations of Islam become more active in world political and economic affairs, Islamic law will inevitably interact more frequently with other legal systems. There has already developed a long relationship between Islamic law and European legal systems. A vital amalgam of Anglo-Muhammadan law has long been in place in the Indian sub-continent.¹ The French attempted a similar melding in northwest Africa.² In the twentieth century, Islamic states themselves began absorbing the legal norms and legal codes of Europe. Today, most Islamic states possess a legal system which is mostly European.³

Contact and interaction with the American legal system has also begun. Uncounted numbers of contracts have been signed between Islamic states and American companies resulting in the employment of thousands of American workers.⁴ Some of the inevitable disputes which have arisen have found their way into American courts for adjudication. In many cases, American courts are asked to interpret Islamic norms, for Islamic components remain in the legal systems of many Middle

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1. J. Schacht, An Introduction to Islamic Law 94-96 (1964) [hereinafter cited as Schacht]
2. Id. at 97-99.
4. As long ago as 1953, 8,000 Americans were reported to be living and working in Saudi Arabia. Hart, Application of Hanbalite and Decree Law to Foreigners in Saudi Arabia, 22 Geo. Wash. L. Rev. 165 (1953).
Eastern and Asian states. At least one legal system, the Saudi Arabian, is primarily Islamic, and many other states are considering re-introducing the principles of classical Islamic law (the shari'a) into their legal systems.

When looking at the relationship between Islamic law and American law within the United States one must understand that, to the extent that it is recognized, Islamic law operates within the context of a fundamentally different legal system. The manner in which American courts are able to comprehend, articulate, and enforce Islamic norms in the milieu of American jurisprudence is a difficult but interesting issue.

Foreign law arises in American courts when one of the parties before it claims a legal right arising from either a foreign law or from a properly decided foreign judgement. Absent a treaty there is no obligation on the part of American courts to legitimate or enforce foreign law or judgments. Yet when


For a general survey of the legal systems in the Middle East which retain an Islamic content in varying degrees, see H. LIEBESNY, THE LAW OF THE NEAR & MIDDLE EAST 129-267 (1975) [hereinafter cited as LIEBESNY].


Of course, revolutionary Iran has trumpeted its return to Islamic values, but little is known of the actual legal structure there at the present time. For a criticism of Iran's justice system as violating Islamic legal principles, see Ottley, The Revolutionary Courts of Iran: Islamic Law or Revolutionary Justice? 4 NEWSLETTER OF INT'L L. 1 (1980).


American courts recognize foreign law, they have traditionally done so on grounds of comity. Although the term "comity" has been used for decades, it remains a remarkably vague concept. It is certain that a claimant cannot demand the recognition of foreign law as a matter of right. Rather, domestic courts apply principles of comity and recognize foreign law as a matter of custom.

The choice of law rules of the forum hearing the case will determine the application of comity. Whether the forum operates under the older lex loci delicti formula, or under the modern contacts or interest analysis, the forum will decline to recognize the foreign law if it comes from an "uncivilized" legal system, if it is contrary to domestic public policy or good morals, or if the foreign judgement was reached without re-


10. "Comity . . . is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an international imperative . . . ." Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). A number of considerations compel the application of comity: 1) mutual interest and convenience; 2) the necessity to do justice and 3) the traditional adherence to comity by other civilized nations. See Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960); McFarland v. McFarland, 179 Va. 418, 152 S.E.2d 77, 83 (1942).


12. One noted case held that comity is granted on the basis of reciprocity, such that if the foreign nation grants legitimacy to our court decisions, our courts in turn will grant legitimacy to foreign court decisions under the doctrine of res judicata. Hilton v. Guyot, 159 U.S. 113 (1894). The Court in Banco Nacional de Cuba v. Sabatino, 376 U.S. 398 (1964), limited the doctrine of reciprocity to the enforcement of certain foreign court judgments and refused to extend the principle to a foreign government’s capacity to sue in United States courts. 376 U.S. at 411-412. However, most authorities deny that the basis of comity is on reciprocity even in court judgments. See Bata v. Bata, 163 A.2d 493 (Del. 1960)(reciprocity rejected as basis for enforcing judgement rendered against party who was not U.S. citizen), cert. denied, 366 U.S. 964 (1961); Johnston v. Compagnie Generale Trans Atlantique, 242 N.Y. 381, 152 N.E. 121, 123 (1926) (foreign judgement applied, "not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgement."). See generally 2 BEALE CONFLICT OF LAWS 1381-89 (1936); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 comment e (1971); Reese, The Status in This Country of Judgments Rendered Abroad, 50 COLUM. L. REV. 783, 790-93 (1950). Most assert that the recognition of a foreign judgement depends on the need to give justice to the party before the court. Johnston v. Compagnie Generale Trans Atlantique, 242 N.Y. 381, 152 N.E. 121 (1926).
garding to fundamental notions of due process.13 Such arguments have been raised against recognizing the law of an Islamic nation.14


The concerns for protecting the rights of parties and the public policies of the forum state resulted in the universally accepted rule that penal statutes would not be forced outside the jurisdiction enacting them. James-Dickinson Farm Mortgage Co. v. Harry, 273 U.S. 119, 125 (1926); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1887).

14. See, e.g., Walton v. Arabian Oil Co., 233 F.2d 541 (2d Cir. 1955). In Cooley v. Weinberger, 398 F. Supp. 479 (E.D. Okla. 1974), aff'd, 518 F.2d 1151 (10th Cir. 1975), claimant had been denied insurance benefits under the Social Security Act because she had been convicted of the felonious homicide of her husband by an Iranian court. 398 F. Supp. at 482. Claimant and her husband were American citizens living in Iran in connection with her husband's employment there. The claimant asserted that fundamental norms of due process were not followed by the Iranian authorities during her imprisonment and during her trial. She claimed that she had waited eleven months in prison before trial, that Iranian authorities had interrogated her in all night sessions and subjected her to torture. Hearing Transcript at 189, 198, 202. At her trial in Iran, Mrs. Cooley made a claim of self-defense but the Iranian court did not accept her version of the facts. Letter from Dr. Ebrahim Paad (attorney for defendant in Iran) to attorney for claimant in United States, January 15, 1972. In her testimony before the hearing officer, Mrs. Cooley asserted that she had complained to American embassy officials about her husband's drunkenness and his threats to her but that both the embassy officials and Iranians who worked with her husband said that because of Islamic mores, the police would not take any action on behalf of a wife against her husband. Mrs. Cooley believed the Iranian court operated under the same prejudice.

In concluding that the laws of Iran afforded sufficient procedural guarantees to Mrs. Cooley, the administrative hearing judge stated that Iran's "criminal process [was] similar to that in the United States ... although procedurally and substantively different from the United States federal system." In re Cooley, Hearing Decision December 15, 1972 at 42. The District Court found that the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, 8 U.S.T. 901 (1955), established United States recognition that judicial procedure in Iran is according to the course of a civilized jurisprudence likely to secure an impartial administration of justice. Cooley, 398 F. Supp. at 485 (1974). The court of appeals opined that "Mrs. Cooley's testimony before the administrative law judge constitutes a rather severe indictment of the Iranian legal system," although the court deferred to the finding of the administrative judge presuming that he had not found claimant's testimony credible. Cooley, 518 F.2d 1151, 1155 (1975).

In Miltenberg & Santon, Inc. v. Mallor, 1 A.D. 2d 458, 151 N.Y.S.2d 748 (N.Y. App. Div. 1956), defendant had sold mislabeled canned herring to a knowing plaintiff who in turn sold it to an Egyptian distributor for resale in Egypt. Plaintiff had obtained a guarantee from the defendant insuring the plaintiff against all losses should the herring be discovered to be mislabeled. After delivery, the Egyptian customer refused payment to plaintiff asserting that Egyptian regulations forbade mislabelling. Plaintiff sought to recover on the guarantee by defendant. Id. at 749-50.

Both plaintiff and defendant briefed arguments on whether Egyptian law forbade the sale of mislabeled foodstuffs. Brief for Appellant, at 10-14; Brief for Respondent,
The proof of foreign law in American courts has changed over recent decades. Formerly domestic courts regarded foreign law as a question of fact for determination by the jury.\textsuperscript{16} Consequently, the courts applied multiple laws of evidence and the jury was responsible for determining the content of the law of the foreign jurisdiction. For many courts the jury's determination could not be overturned unless the decision was clearly erroneous.\textsuperscript{16} A confusing array of issues, concepts, evidentiary rules, and authorities faced a judge and jury in determining the law of any foreign jurisdiction.\textsuperscript{17} As we shall see, Islamic law presents peculiar difficulties even for judges, let alone the typical juror.

New rules of civil procedure replaced the older view that foreign law must be proven as a question of fact. Today, rules allow both state and federal courts to take judicial notice of foreign law and to treat such notice of foreign law as a legal ruling subject to full review by the appellate courts.\textsuperscript{16} New York's civil practice law (CPLR), Rule 4511, permits New York courts to take judicial notice of the law of foreign countries.\textsuperscript{16} In fact, the rule states that "judicial notice shall be

\footnotesize{at 18-19. The New York court, however, found the substantive law of Egypt irrelevant, for New York public policy could not countenance such an agreement. \textit{Mallor}, 151 N.Y.S.2d at 751 (1956). "[T]he practice contemplated by the parties' agreement is so grossly corrupt that it must carry universal condemnation," the court declared. \textit{Id.} at 752.\textsuperscript{15} Miller, \textit{Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine}, 65 Mich. L. Rev. 615, 617 (1967) [hereinafter cited as Miller]. See, e.g., \textit{Fitzpatrick v. International Ry. Co.}, 252 N.Y. 127, 169 N.E. 112 (1929) (law of Ontario established by jury, but construction of interpretation of law to be determined by court). See generally R. Schlesinger, \textit{Comparative Law} 47-49 (3d ed. 1970) [hereinafter cited as Schlesinger].\textsuperscript{15} Miller, \textit{supra} note 15, at 623. Prior to the adoption of Federal Rule 44.1, even some federal courts of appeals would reverse a factfinder's determination of foreign law only if "clearly erroneous" within the meaning of Federal Rule 52(a). Miller, \textit{supra} note 15, at 689-90; see \textit{Fed. R. Civ. P. 44.1, 52(a).}\textsuperscript{15} Miller, \textit{supra} note 15, at 620-23. The requirement that foreign law be proved as a question of fact, when combined with the \textit{lex loci} premise, could result in a dismissal of the suit. If the party relying on foreign law for the vindication of his rights was unable to present sufficient proof of the foreign law to the trier-of-fact, the party's case was dismissed for failure to prove a necessary, material fact. See, e.g., \textit{Cuba R.R. v. Crosby}, 222 U.S. 473 (1912) (employee's action against employer for injuries sustained in Cuba dismissed upon plaintiff's failure to establish applicable Cuban law).\textsuperscript{18} \textit{Fed. R. Civ. P. 44.1.}\textsuperscript{18} N.Y. Civ. Prac. R. 4511 (McKinney 1974). This rule, enacted in 1962, incorpo-
"taken" of foreign law if a party has given notice that it wishes to plead foreign law and has given the court sufficient information "to implement the request." In addition, under CPLR 3016(e), a party relying on foreign law for its cause of action or for its defense must plead the substance of the foreign law. The comment to CPLR 3016 suggests plausibly that a pleading to the court would necessarily satisfy the requisite criteria to compel judicial notice under CPLR 4511(b). The comment, however, is clearly wrong. Even though New York law seems to require a court to notice foreign law when a party submits sufficient evidence, the courts have always been permitted to determine whether or not the parties have indeed provided sufficient information. Thus, despite the compulsory wording of the rule, judicial notice of foreign law remains discretionary in New York courts. The practice of most New York judges is still to treat the proof of foreign law similar to that of a question of fact by requiring pleadings and testimony and by applying many of the rules of evidence.

The Federal Rules of Civil Procedure are far less ambivalent. Rule 44.1 allows courts to take judicial notice of foreign law and provides that any form of reasonable notice to the court will be sufficient to raise foreign law questions. In addition, Rule 44.1 permits courts to consider any relevant material or source of foreign law, whether or not submitted by a party, even if such materials are otherwise inadmissible under the Federal Rules of Evidence. The purposes of the rule were to remove all unreasonable limitations from the judicial quest to find the foreign law, and to treat the court's determinations §344-a of the 1943 N.Y. Civil Practice Act, but requires, rather than permits, the court to take judicial notice of the law of foreign states. N.Y. Civ. Prac. R. 4511 (Leg. Stud. & Rep's) (McKinney 1974).

20. Id.
23. Petition of Petrol Shipping Corp., 37 F.R.D. 437 (S.D.N.Y. 1965) (difficulties in language, insufficient assistance of counsel were sufficient to persuade the court not to take judicial notice of Greek law as matter of discretion), aff'd, 360 F.2d 103, cert. denied, 385 U.S. 931 (1966).
26. Id.
nation of foreign law as a question of law, not one of fact. 27

Prior to the adoption of Rule 44.1, federal courts followed the method, with certain exceptions, of proving foreign law which was present in the state where the particular federal court sat. 28 Courts ordinarily treated foreign law as an issue of fact unless state law provided for judicial notice of foreign law. 29 Federal Rule 44.1 has displaced all state procedural rules concerning proof of foreign law in federal actions leaving proof of foreign law free of the restraints of the Erie doctrine. 30

There is evidence that Federal Rule 44.1 was designed to allow federal court judges to act in the same manner as their civilian counterparts in Europe. 31 For the most part, however, federal judges have eschewed the opportunity to take upon themselves the responsibility of finding the relevant foreign law. 32 Federal courts have preferred to allow the litigants to prove the foreign law through the testimony of expert witnesses, although trial judges often take a vigorous role in examining the witnesses. Indeed, federal judges are necessarily dependent on expert testimony, so that if it seems inadequate, the judge may criticize a party for its lack of aid to the court. 33 In addition, federal judges feel much more confident of their decisions when the foreign law is expressed in the form of statutes, codes, or legal decisions, rather than upon

31. Miller, supra note 15, at 661. See generally Sommerich & Busch, The Expert Witness and the Proof of Foreign Law, 38 CORNELL L.Q. 125 (1953). The authors of this article review the European antecedents to Section 344-a of the New York Civil Practice Act (1942). Id. at 128, 133. That statute, which preceded Fed. R. Civ. P. 44.1, allowed trial courts to exercise discretionary powers and to take judicial notice of foreign law. Id. at 133.
32. Miller, supra note 15, at 660; see, e.g., Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 (2d Cir. 1968) (relying on Restatement (Second) of Conflicts of Laws § 136, comment h (1971)).
interpretive writings of jurists. 34

Although proof of foreign law is now more commonly treated as an issue of law and not one of fact, courts will usually agree to abide by the stipulation of the parties as to what the foreign law is, particularly in contract disputes. 35 In the absence of stipulation, however, courts must determine which party has the burden of proving foreign law. Some courts hold that the party whose cause of action or defense depends on the foreign law must shoulder the burden of proof. 36 Other courts hold that the party who contends that the applicable foreign law is different from domestic law must bring forward the proof. 37

34. See, e.g., First National City Bank v. Compania de Aguaceros, 398 F.2d 779 (5th Cir. 1968). In that case, based on testimony presented by Panamanian legal experts, the trial court refused to apply a harsh Panamanian banking statute on the ground that it was ambiguous. The appellate court reversed this decision and applied the harsh statutory language. Id. at 785.

The remaining problem is what to do when foreign law is insufficiently pleaded in court. When the proof of the foreign law was treated as a fact, the failure to plead it often led to dismissal of a plaintiff's case. Miller, supra note 15, at 633, noting Cuba R.R. v. Crosby, 222 U.S. 473 (1912) (suit for personal injury dismissed for failure to establish relevant Cuban law). However, alternative results can occur when proof of foreign law is an issue of law:

1. The court can presume in the absence of proof of foreign law that "the law to be applied is the same as that of the forum." Note, Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1, 10 Washburn L.J. 296, 298 (1971).

2. The court can presume that the parties have tacitly agreed to abide by the law of the forum. Miller, supra note 15, at 637.

3. The court can presume that the law is the same in the foreign jurisdiction as in the home forum. Id. at 635.


37. Miller, supra note 15, at 697. In the former situation, the case may logically be dismissed if proof is insufficient; in the latter, the forum's law may logically be applied if proof is sufficient. One New York case holds that if the cause of action on which the plaintiff bases his claim is one which would create an obligation under the law of any civilized country, the defendant must show that the foreign law is different from American law. On the other hand, if the plaintiff alleges a cause of action which is dissimilar to commonly accepted views, the plaintiff must show that this dissimilar cause of action is valid under foreign law. Arams v. Arams, 182 Misc. 328, 335, 45 N.Y.S.2d 251, 257 (N.Y. Sup. Ct. 1943).

Professor Schlesinger suggests a multi-factored analysis in determining whether to
II. ATTITUDES TO ISLAMIC LAW

With this as background, we may now examine the manner in which American courts have recently interpreted the contract and tort law of Islamic countries. One might presume that American courts would be hesitant to apply Islamic law because of an implicit viewpoint that Islamic law was somehow less civilized than Western law. In fact, early authoritative writings in this country tended to equate Islam with paganism. For example, during the ratification debate in the North Carolina convention, James Iredell, later to become a justice of the United States Supreme Court, objected to those who feared that representatives to the new Federal Congress might not be men of Christian temperament.38 Iredell said that a number of delegates were afraid that the people might "choose representatives who have no religion at all, and that pagans and Mahometans might be admitted into offices."39 To that objection, Iredell rejoined: "But how was it possible to exclude any set of men, without taking away the principle of religious freedom which we ourselves so warmly contend for?"40

Similarly, Professor Cooley's classic book on constitutional limitations notes that the Christian background to the United States Constitution has an allowable effect on the secular society, despite the constitutional protections of freedom of religion and separation of church and state.41 Cooley declares

dismiss the case or apply the forum's law where a party has not sufficiently pleaded the foreign law. SCHLESINGER, supra note 15, at 168-69. The factors he suggests are: a) the degree to which the dispute involves a strong public interest, such as matrimonial disputes; b) the nature of the issue, i.e., whether the issue is of a fundamental nature seemingly shared by all civilized nations; and c) the nature of the foreign legal system, i.e., if it is a common law system, one may more correctly assume that its law is similar to United States law on basic points; d) the party's access to foreign law materials; and e) the presence or absence of forum-shopping, i.e., the need to prevent the plaintiff from simply choosing a forum whose law is sympathetic to his case. SCHLESINGER, supra note 15, at 168-69.

39. Id.
40. Id.
that there are certain practices which our society may regard as offensive because of our moral background even though in "a Mahometan or pagan country [they] might be passed by without notice, or even regarded as meritorious."42

In addition, American judges have sometimes suffered under a simplistic notion of the nature of Islamic adjudication. In his dissent in *Terminiello v. Chicago*,43 Justice Frankfurter decried the majority's propensity to find a federal claim where none had been pleaded in the lower state courts. "This is a court of review," he declared, "not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."44 Similarly, the Second Circuit once fought against its conscience by stating: "[I]ndeed, if we were dispensing Cadi justice, we would be disposed to rule in defendant's favor. However, the limited scope of judicial review under the Federal Arbitration Act forbids our doing so."45 The Ninth Circuit also disparaged one plaintiff's argument finding it based only upon an "abstract theory of justice which might be entertained by an oriental cadi."46

In point of fact, however, American judges have never held that Islamic legal principles were "uncivilized" and therefore not amenable to enforcement in American courts.47 As will be shown below, what most prevents application of Islamic law in American jurisdictions is the fear the American judges have in confronting a different legal system of apparently baffling complexity.

Over the past few years, a pattern has developed in the way American courts handle issues of foreign law when dealing

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42. Id.
43. 377 U.S. 1 (1949).
44. Id. at 11 (Frankfurter, J., dissenting).
46. Colonial Trust Co. v. Goggin, 230 F.2d 634, 636 (9th Cir. 1955).
47. Walton v. Arabian American Oil Co., 233 F.2d 541 (2d Cir. 1956). In Walton, the plaintiff, asserting that Saudi Arabia had no law or legal system, argued against the application of the "laws" of Saudi Arabia on the basis that the country was uncivilized. The court stated that it was "loath to and [would] not believe" that the Saudi system was uncivilized, absent proof to the contrary. Id. at 545.
with an Islamic nation. Where the foreign country has absorbed large amounts of European or common law principles into its legal system, American courts have had little trouble in applying the foreign law. On the other hand if Islamic principles constitute a substantial portion of the law of the foreign jurisdiction, the American court will find itself in an unfamiliar and complex environment. In such circumstances, it will frequently seek to avoid the issue. Whether or not the foreign country has absorbed large amounts of European or common law principles within its law, American courts still rely on expert testimony to an extraordinary degree in deciding the substance of the foreign law.

III. APPLYING FOREIGN CONTRACT LAW

American courts seem to have the least difficulty in applying foreign contract law. Most Islamic countries have either adopted codes, both civil and commercial, which mirror continental principles, or they have been influenced by the common law tradition. Since American courts have had long experience with contract disputes involving European and English law, judges in the United States seem to display little hesitation in applying the foreign substantive law of contracts. Of course, it is possible that a European code adopted by an Islamic country may contain Islamic glosses, nuances, and elements which escape the ken of a judge sitting in a court in the United States. On the other hand, where it is evident that there is indeed a mix of Western and Islamic legal systems,


50. See, e.g., Ziadeh, Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 239, 245-46 (1978) (describing the mixed sources of Egypt's Civil Code). In the main, Syria, Iraq, and Libya have followed the Egyptian example. LIEBESNY, supra note 5, at 94. British common law principles influenced greatly modern Pakistan and India. LIEBESNY, supra note 5, at 118.
American courts are more reluctant to apply the substantive foreign law to the issues before them. The cases below illustrate these principles.

*Rupali Bank v. Provident National Bank,* 51 is an example of the manner in which one federal court interpreted the law of an Islamic nation according to common law principles. In *Rupali*, the Muslim Commercial Bank, headquartered in Karachi, West Pakistan, arranged with the Provident National Bank in the United States to collect the proceeds from certain export transactions between an American importer and an East Pakistani exporter. 52 During the course of these transactions, Bangladesh achieved its independence from Pakistan. Subsequently, Bangladesh nationalized the East Pakistani branch of the Muslim Commercial Bank and all of its assets became vested in the Rupali Bank of Bangladesh. 53 Rupali Bank claimed that, pursuant to a power of attorney issued to certain employees of the Muslim Commercial Bank, Provident was notified to dispose of Muslim Commercial’s dollar account for the benefit of Rupali Bank. 54

When Provident refused, Rupali brought suit in the District Court for the Eastern District of Pennsylvania. The court denied Rupali’s claim and held, *inter alia*, that “the law of Pakistan and Bangladesh is derived from the English common law.” 55 The court concluded that under Pakistani and Bangladeshi law, an agent cannot act contrary to the best interests of his principal. 56 The judge noted that the same common law rule of agency was equally valid in the State of

52. Provident National Bank was to deposit the proceeds in a dollar account in the name of the Muslim Commercial Bank. The East Pakistani exporter of jute financed his transactions through the Muslim Commercial Bank by borrowing a sum which would be covered by the proceeds collected from the American importer upon delivery. The exporter delivered the appropriate export bills of lading and documentary drafts to the East Pakistani branch of the Muslim Commercial Bank. These documents were forwarded to Provident National Bank which then credited the appropriate amounts to the Muslim Commercial Bank’s account. 403 F. Supp. at 1287-88.
53. Id. at 1288.
54. Id. at 1289.
55. Id. at 1290.
56. Id. at 1291. The judge stated that he had relied upon the testimony of the defendant’s legal expert to inform him of the rule in Pakistan and Bangladesh. Id.
Likewise, inasmuch as American judges have frequently had to apply European law, one should expect little difficulty in interpreting the law of Islamic countries whose statues are codified according to continental principles. Many countries, however, have codes which are influenced both by European law and Islamic law. Where the issue before an American court concerns only the European based part of the law, there are few problems in successfully pleading the foreign law, especially when an expert witness can give a clear exposition of its content.

In monarchical Iran, for example, the Civil Code was a mixture of rules derived from Islamic and European sources. The primary basis of the Commercial Code, on the other hand, was on the law of France and other Latin countries. In 1976 a federal district judge in New York City was called upon to decide whether the director of an Iranian company had the legal capacity to bring an action in the company’s name after the company had been dissolved by force of law. The district judge scrutinized the 1932 Commercial Code of Iran and confessed that his first inclination was to interpret the code as giving directors the right to carry out liquidation proceedings as well as the concomitant right to become liquidators with the capacity to defend actions against the company. Nonetheless, the court relied on the affidavits of an expert witness and decided that, under the 1932 Commercial Code, a director cannot initiate liquidation proceedings without shareholder approval. The director in question, therefore, could not become a liquidator with a right to represent the company.

57. Id.
61. Id. at 689.
62. Id.
63. Id. at 689. The court also found that, unlike the normal practice in the United States, the 1932 Commercial Code of Iran does not permit a director to remain in office beyond his term even if no replacement director has been elected. Id. at 690.
In *Hunt v. Coastal States Gas Producing Company*, a Texas Court of Appeals upheld the decision of the trial court that a Libyan petroleum concession to Nelson Baker Hunt did not, according to Libyan law, grant Hunt any title to unextracted oil. In a trial replete with experts, the defendants successfully argued that similarities existed between Libyan law and Italian, French, and general Civil Code principles on the nature of property interests. In addition, the appeals judge relied on the plain meaning of the Libyan statute in question to defeat the claim of the appellant. In reality, Libyan property law contains certain principles of Islamic law incorporated into the modern code. The fact that they were not discovered or brought to light insulated the court from having to contend with an unfamiliar body of law.

When an American court enters an area in which Islamic and European principles are definitely intertwined, its confidence in reaching a correct apprehension of the law rapidly evaporates. A federal district court recently dismissed a suit on grounds of *forum non conveniens* precisely on that basis. In that case, the plaintiff sued Gulf Oil Corporation for breach of contract. The plaintiff alleged that Gulf had induced its subsidiary in Iran to turn over its shares to the government-owned National Iranian Oil Company, thereby breaching Gulf's contract to the plaintiff. Under the contract the plaintiff had a prior right to repurchase the shares at cost.

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66. Brief for Appellees at 22, App. at 3.
67. *LIBYAN PETROLEUM LAW* No. 25 (1955). The law states in pertinent part that "[a]ll petroleum in Libya in its natural state in strata is the property of the Libyan State." *Id.*
68. In classical Islamic law, for example, the state held title to *mawat* or "dead lands," i.e. those lands, usually desert, outside of arable areas. Nearly all Middle Eastern states, including Libya, have retained the category of *mawat* lands in their modern codes with concomitant limitations on their ownership by private individuals. F. ZIADEH, *PROPERTY LAW IN THE ARAB WORLD*, 14-18, 21-24, 54-55 (1979).
70. *Id.* at 913.
71. *Id.*
though Gulf and its co-defendants were American and the plaintiff was an Iranian citizen, Gulf moved for dismissal on the grounds of *forum non coveniens.*

Gulf had attempted to unsettle the court with the esoteric complexity of Islamic law. Its brief argued that a federal court was not the place "to try out novel theories of Iranian law, a system of jurisprudence not only remote from our own, but heavily founded upon Islamic religious tradition and enshrined in a language which presents serious translation problems." The tactic succeeded. The federal district court granted the motion. The court noted that most of the witnesses would be found in Iran. In addition, the court observed:

[I]t must be recognized that the validity of plaintiff's claims must be determined under Iranian and not American law. Having already had occasion in this case to examine Iranian law at least preliminarily, I know from first-hand experience what a difficult task it is to reach any conclusion as to its substance.

The court had accepted the opinion of the plaintiff's expert that the Iranian Civil Code was the product not only of European law, but also was indebted to "centuries of development of the principles of Islamic law." The court concluded that comprehending the essence of Iranian law would take an "inordinate amount of time" as its foundation was totally different from American law.

Another federal judge nearly found himself enmeshed in Saudi Arabian contract law because of the manner in which he applied New York choice of law rules. The plaintiff in the case of *Nakhleh v. Chemical Construction Co.* alleged that he had made an oral contract with the defendant under which

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72. *Id.* at 914.
73. *Brief for Defendant at 8-9; Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910 (S.D.N.Y. 1977), aff'd, 588 F.2d 880 (2d Cir. 1978).*
75. *Id. at 923-24.*
76. *Id. at 924.*
77. *Id.*
78. *Id.*
79. 359 F. Supp. 357 (S.D.N.Y. 1973).*
he would intervene for the defendant in Saudi Arabian bureaucratic circles in order to procure a construction contract for the defendant. In return the plaintiff was to receive a fee for his services of five percent of the contract price. The defendant moved for summary judgment in the plaintiff's suit for breach of contract. The court denied the motion since there were material questions of fact which would determine whether New York or Saudi Arabian law would apply in testing the validity of the oral contract.

The judge found that the choice of law rules of New York required a "center of gravity" or "interest analysis" approach. Under such an analysis, New York substantive law should govern the agreement unless the parties indicated that they intended the law of some other jurisdiction to control the contract. Of course, even if the parties had intended Saudi law to govern, no judge sitting in New York could enforce any agreement which violated a fundamental policy of the state. Although noting that the New York Statue of Frauds requires a contract like the one in suit to be in writing, the judge found that the statute did not represent a policy so fundamental as to bar enforcement of an oral contract made under Saudi law. The court further declared that New York law permits parties to a contract to choose a foreign law to govern the interpretation of a contract as well as its validity. Thus, the court denied the motion for summary judgment because there was a factual issue as to whether the parties had

80. Id. at 358.
82. Id. at 358.
83. Id. at 359.
84. Id.
85. Id.
86. Id. at 360 (relying on RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §187(2)(a) (1971)) (parties' choice of law of state allowed except where it would contravene fundamental policy of forum state if forum state has significantly greater interest than chosen state).
87. N.Y. GEN. OBLIG. § 5-701(10) (McKinney 1974).
88. 359 F. Supp. at 360.
89. Id. at 359-60.
intended Saudi law to control their agreement.90

With the distinct possibility that the decision would rest on
Saudi contract law, the defendant’s attorneys sought expert
advice.91 The case was settled before trial. Yet, if there had
been a trial on the merits, the court would have had to face a
series of troublesome issues.

The validity of an oral contract under Saudi law would have
been one of the issues facing the court.92 Oral contracts are
generally valid in Islamic law, but in most instances the word-
ing of both the offer and acceptance must be framed in the
past tense; otherwise, the words are regarded only as an in-
quiry or a promise but not as an enforceable contract.93 This
requirement derives from the limited verb forms present in
the Arabic language.94 It is uncertain whether a Saudi court
would apply the same rule to a contract made in another lan-
guage in which other verb forms could signify a proper con-
tractual intent.

Another issue confronting the court would have been
whether a contract predicated on influencing Saudi officials
was valid under Saudi law. Defendant’s legal expert asserted
that it was illegal to pay an intermediary for assistance in ob-
taining a contract with the Saudi government.95 In addition, a

90. Id. at 360.
357 (S.D.N.Y. 1973) (73 Civ. 3618 (M.P.)) (affidavit of defendant’s expert witness).
357 (S.D.N.Y. 1973). The plaintiff alleged the following conversation constituted the
agreement:

[Defendant]: Assuming we get a contract, what would be our obligation to you?
[Plaintiff]: The usual fee is 5% of the value of the contract. This is the custom-
ary fee in Saudi Arabia and I have important associates there.
[Defendant’s associate]: That was a customary fee.

Id.

93. LIEBESNY, supra note 5, at 210.
94. Id. The rules may be simplified as follows. If both parties signify their assent to
a contract in the past tense, they have formed a contract. If one or both parties sig-
nify their assent in the present tense or in the imperative mood, an enforceable con-
tract results only if intent is shown. No contract results if one or both parties use the
future tense or an interrogative sentence. JOHN MAKDISI, COMPARATIVE LEGAL PRO-
CESS 332 (1982) (citing 3 Marghinani, Hidaya 21 (n.d.)) (Course Materials, Cleveland
State University College of Law).
95. Opinion of Expert at 5-6, Nakhleh v. Chemical Construction Corp., 359 F.
circular from the Saudi Ministry of Finance and National Economy required that all contracts had to include a declaration that no fee was due to any agent for his assistance in gaining the contract. 96 The penalty was deduction of the amount of the fee from the price paid by the government to the contractor. 97

Finally, it is not altogether clear whether a shari'a court applying Islamic principles would hear the case if the suit were brought in Saudi Arabia. It is possible that such a dispute would come before one of the Commercial Disputes Arbitration Boards which are not required to follow the shari'a. 98 It would indeed perplex an American court to deduce exactly what law would be applied when even the forum was questionable. 99

IV. APPLYING FOREIGN TORT LAW

The problems encountered by American judges discovering Middle Eastern contract law are minor when compared to the difficulties involved when they face issues of tort. Relatively few tort cases involving the law of Islamic countries reach courts in the United States. 100 As will be seen below, not only is the Islamic law of torts extremely complex and subject to various interpretations, but even when pleaded clearly, it generally provides a plaintiff with less opportunities for recovery than the laws of this country. Plaintiffs, therefore, will generally seek recovery under the law of an American jurisdiction.

The lessons were learned in the first and most famous such

97. Id.
98. LIBBESNY, supra note 5, at 107; ANDERSON, supra note 3, at 185.
99. The defendant's expert also emphasized the procedural requirements of the shari'a for proving the existence of a contract. The expert focused the importance of the competency of witnesses to an oral contract. Opinion of Expert at 4-5, Nakhleh v. Chemical Construction Corp., 359 F. Supp. 357 (S.D.N.Y. 1973). This procedural requirement would not have bound the federal court, however, since it is required to apply the evidentiary rules of the forum, not of the foreign state. Fed. R. Evid. 601; RESTATEMENT (SECOND) OF CONFLICT OF LAWS 137 (1971).
100. See infra text accompanying notes 101-90 (examination of tort cases involving Islamic law).
tort case, Walton v. Arabian American Oil Co. Walton, a citizen of Arkansas, was injured in Saudi Arabia when his automobile collided with a truck owned by Aramco, a Delaware corporation, licensed to do business in New York and heavily involved in business in Saudi Arabia. The court indicated that Walton would have recovered under the New York law of torts. Nevertheless, although the choice of law theory of contacts had already surfaced, the year was 1956 and the court found that New York still adhered to the lex loci rule. Thus, the court held that Saudi law should govern the case.

Despite opportunities afforded to the plaintiff by the trial judge, the plaintiff did not bring forward any evidence of the applicable rules of Saudi law. Although at the time of trial, foreign law had to be proven as a fact, the federal rules required a federal court to receive evidence admissible under the law of the state in which it sat, and under New York law, the courts could take judicial notice of foreign law. Thus, the trial judge had the opportunity to seek out Saudi law on his own in the same way the present federal rules permit him to do. Yet, in reviewing the trial court's decision, the circuit court did not think that the failure of the trial judge to take judicial notice of Saudi law was an abuse of discretion. The appellate court hinted that, without expert

101. 233 F.2d 541 (2d Cir. 1955).
102. Id. at 542.
103. Id.
104. Id.
105. Id. at 546.
106. Id. at 543. Today, of course, the substance of the foreign law is treated as an issue of law in federal courts. Fed. R. Civ. P. 44.1.
110. Walton, 233 F.2d at 544.
pleadings, a judge might easily make serious errors based on his own inbred American legal assumptions of what the foreign law truly requires, particularly when the foreign legal system is based on a different tradition. The practice of federal judges today still observes that prudential warning.

The circuit court held that where legal systems are so different that one cannot fairly assume common agreement on rudimentary legal principles of tort law, the burden is on the plaintiff to show why the foreign law allows him to recover. The court admitted that the burden would more fairly fall on the defendant who had better access to the Saudi law, but the court declared itself bound to follow the New York rule to the contrary. Plaintiff retreated to an assertion that Saudi Arabia was an “uncivilized” country, a claim the court rejected out of hand.

The Walton case was the object of severe criticism. Most commentators, however, concentrated on the issue of which party should have the burden of proving the foreign law and on the responsibility of the forum to apply its own law when the foreign law is neither available nor pleaded. A few sought to ascertain what the relevant Saudi law would have been, with confusing results.

111. Id.
112. M. Pollack, Proof of Foreign Law, 26 Am. J. Comp. L. 470 (1978) (asserting that despite Federal Rule 44.1, counsel and litigants retain responsibility for demonstrating content of foreign country’s law).
113. Id. at 545. If the legal systems were similar enough to allow a presumption of common legal rights, then the defendant should have the responsibility of proving that the foreign law precludes recovery. Id.
114. Id.
115. Id.
117. A. von Mehren & D. Trautman, The Law of Multistate Problems, 100-01 (1965). Professors von Mehren and Trautman suggested the following, somewhat conflicting, set of findings:
1. The Saudi-Arabian courts apply the Moslem law derived from the Koran known as the Shari'a. Under the Shari'a the concept of negligence is not known, but a person injuring another must pay the cost of the injured person’s medical care.
2. The person causing the injury may be prosecuted criminally, and his duty to compensate the injured person may be sanctioned by keeping the former in jail.
Apparently, Walton’s attorney had made some efforts to discover Saudi Arabian law but was stymied by the lack of available authoritative statutes, codes, or cases, and by indications that such cases were handled administratively seemingly until the latter recovers.

3. The court administering the Shari’a does not recognize corporations as legal entities. If a corporation wishes to appear in a shari’a case (for example, in an action brought by an employee), a representative (an executive or lawyer) will appear for the corporation. The court’s judgment will run against him.

4. There is a workmen’s compensation law in Saudi Arabia with a scale of payments for various injuries. This is administered by an executive department of the government.

5. Persons seriously injured other than by fellow servants may apply to the government for administrative relief. If the executive department feels that the case is a suitable one, it will order the person causing the injury not only to pay the cost of medical care but also amounts determined by reference to the workmen’s compensation scale. The amount to be paid may be increased or decreased by reference to the executive department’s view of the “defendant’s” fault. There are no rules or principles governing this award.

6. The executive department in a complex case (for example, a collision between two cars) may require that the party seeking relief prove the facts of the accident before the Shari’a court. If this is done, the court will apply the strict Shari’a rules governing proof. These require facts to be proved by the testimony of two witnesses. The court will report the facts found to the executive department, which will determine its action in the Koran (and other religious sources), it does not include the rules of the road in force in Saudi Arabia. Though ignored by the court, these can be taken into account by the executive department in passing on the facts found by the court.

7. If a foreigner appeared before a Shari’a court and asked that his national law be applied to the case, the court would refuse to entertain the case.

8. In controversies involving foreigners the aid of the Ministry of Foreign Affairs is sometimes sought. However, it would not attempt to handle a running-down case between foreigners.

Id.

Professor Currie confessed that his efforts to discover the relevant Saudi Arabian law “had little success.” Currie, supra note 116, at 1000. He incorrectly suggested that “if the Walton case had been brought before a Muslim qadi, he might have refused to assume jurisdiction over two non-believers, or would have attempted to apply the national law of the litigants.” Id. at 1000, n.101. It is a surprising statement, for even if it were true, it is a species of renvoi which would not likely have been applied by the federal court sitting in New York applying New York choice of law rules. Roger v. National Ass’n of Bedding Mfrs. Group Ins. Trust Fund, 372 N.Y.S.2d 97, 83 Misc.2d 527 (1975) (renvoi usually limited to land title and divorce cases).

Finally, Professor Joseph Schacht offered a creative opinion that “without recourse to anything resembling the common-law doctrine of respondeat superior, Saudi Arabian law would fix responsibility upon the corporate employer for injuries accidentally inflicted by the employee, by analogy to an established practice of fixing such responsibility upon the members of the culprit’s tribe.” Currie, supra note 116, at 1000 n.101.
on an *ad hoc* basis.\textsuperscript{118} He also believed the costs for a full investigation of Saudi law would be prohibitive. Finally, he suspected that the rules in that country were far less favorable to his client than those of the forum.\textsuperscript{119}

Walton's attorney was perceptive. Some years later another plaintiff actually attempted to have her claim adjudicated under Saudi Arabian law.\textsuperscript{120} She succeeded, but then saw her case evaporate.

Plaintiff brought her suit in the United States District Court for the Southern District of New York for the wrongful death of her husband.\textsuperscript{121} The decedent spouse had never been a resident of New York and had worked for thirteen years in Saudi Arabia.\textsuperscript{122} In 1963 he became ill at his job and allegedly received negligent treatment by a physician employed by the defendant.\textsuperscript{123} The plaintiff's spouse was taken to Lebanon where he died.\textsuperscript{124} The defendant, Trans Arabian Pipeline, was a Delaware corporation having its principal place of business in Beirut.\textsuperscript{125} Its contacts with New York were minimal. Although the decedent had agreed at the time of his employment that the New York Workmen's Compensation Law would apply in case of personal injury, the court found that the weight of contacts required the application of Saudi law, the contractual agreement notwithstanding.\textsuperscript{126}

 Plaintiff argued for the application of Saudi law because New York's statute of limitations would have barred her suit. The law of Saudi Arabia would not have recognized such a lapse in time as fatal.\textsuperscript{127} From the transcript, one can infer that the court held the limitation question an "important"

\textsuperscript{119} Id.
\textsuperscript{120} Terry v. Trans Arabia Pipeline, No. 66 Civ. 727 (S.D.N.Y. 1970), \textit{reported in} S. Hassan, \textit{Seminar in Islamic Law and Middle Eastern Legal Institutions} 34 (Part 1, 1975) (Course Materials, Columbia Law School) [hereinafter cited as Hassan].
\textsuperscript{121} Id. at 42.
\textsuperscript{122} Id. at 34.
\textsuperscript{123} Id. at 42.
\textsuperscript{124} Id. at 35.
\textsuperscript{125} Id. at 34-35, 42.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 37.
procedural issue more properly controlled by the foreign law, and argument proceeded on the substantive claim.128

The parties stipulated a number of legal points which would have had interesting implications in Islamic law. For example, they agreed that the decedent's wife had capacity to bring suit.129 Under Islamic law, all heirs of the deceased, either sharers or residuaries, have a right to make a claim.130 Thus this stipulation was correct. The parties also stipulated that recovery would be gauged according to the standard of comparative negligence and not barred by the doctrine of contributory negligence.131 Exemplified here are the peculiar difficulties in seeking "concepts" in a casuistical legal system. In Islamic law, there is no "concept" in the true sense of the term of either contributory or comparative negligence. If anything, a wrongful death action points to strict liability.132 In a literature replete with examples serving as archetypes, one can find instances which point to one idea or another.133

The parties did not stipulate whether the legal cause of death was willful homicide, quasi-willful homicide, or accidental homicide.134 Yet, one can infer from the facts that it was a

128. Id.
129. Id. at 36.
130. Liebesny, supra note 5, at 231. The Maliki school limits the capacity to sue to male heirs, but Saudi Arabia follows the Hanbali school. Id. at 231, 107.
131. Hassan, supra note 120, at 37.
132. Schacht, supra note 1, at 187. Much of the structure of the classical Islamic law of wrongful death was taken over from pre-Islamic Arabia. There a homicide was followed by retaliation against the perpetrator by the kinsmen of the victim, or a blood feud against the perpetrator's tribe, or by compensatory payment to the victim's kinsmen. P. Hitti, History of the Arabs 26 (10th ed. 1970).
133. See Liebesny, supra note 5, at 33 (citing Abu Yusuf, Kitab al-Kharaj 96-97 (1855)). Abu Yusuf gives an example seemingly from a species of contributory negligence. "If a man falls into the pit but remains safe and sound and then tries to climb out, reaches a certain height, and falls back and dies, the owner of the pit is not responsible because he was not there to push the person down." Liebesny, supra note 5, at 33 (citing Abu Yusuf, Kitab al-Kharaj 96-97 (1885)).
134. The elements for willful homicide are an action resulting in death undertaken with no legal excuse, and with the intention to wound or kill by means of an instrument that normally causes death. The elements for quasi-willful homicide are the same but with an instrument not normally known to be fatal. Accidental homicide occurs where the offender did not intend to kill a person, or where he did intend to kill a person but believed that he was acting legally. Forte, Comparative Criminal Law: Islam, reprinted in Encyclopedia of Crime and Justice (in press) (1983).
In addition, the court focused on the penalty of 100 camels of lesser value, the prescribed blood money for accidental homicide in classical Islamic law.\(^{136}\) Turning to the contested issues, the court heard testimony from expert witnesses on both sides.\(^{137}\) It held that the law of Saudi Arabia does not share the Anglo-American concept of \textit{respondeat superior}.\(^{138}\) While such conceptualizations are not in the vocabulary of the Islamic law of torts, there are examples in the writings of the jurists showing that a master is liable for the wrong committed by his servant.\(^{139}\) Nonetheless, the court decided that \textit{respondeat superior} did not exist in Islamic law and did not attempt to analogize such liability from available examples found in Islamic writings.\(^{140}\) Because of the absence of the doctrine of \textit{respondeat superior}, the court dismissed the case against Trans Arabian Pipeline.\(^{141}\) Only the negligent doctor could have been held liable, and under traditional Islamic law, not the perpetrator himself, but his kin. However, the court did not attempt to connect the modern corporation with the ancient social structure of the clan.\(^{142}\) Alternatively, the court dismissed the case because the obligatory payment for this form of wrongful death was the equivalent of 100 camels or $3,600, a sum below the jurisdictional amount required for a suit in federal court.\(^{143}\)

Plaintiff’s attorney argued that the court should ignore the monetary limit. “I cannot accept,” he said, “the basic proposition that what was adequate to compensate for the death of a

\begin{itemize}
  \item 135. See Hassan, \textit{supra} note 120, at 42.
  \item 136. \textit{Compare} Hassan, \textit{supra} note 120, at 40 (one hundred camels are valued at $3,600) \textit{with} Liebesny, \textit{supra} note 5, at 232 (intentional homicide calls for camels worth $3,900 while accidental homicide calls for camels worth $3,500).
  \item 137. Hassan, \textit{supra} note 120, at 40.
  \item 138. Hassan, \textit{supra} note 120, at 40.
  \item 139. Liebesny, \textit{supra} note 5, at 218.
  \item 140. Hassan, \textit{supra} note 120, at 43.
  \item 141. Hassan, \textit{supra} note 120, at 43.
  \item 142. Liebesny, \textit{supra} note 5, at 231 (citing \textit{AL-MAWARDI, AL-ANKAM AL SULTANIYYA} 231-33 (n.d.)).
  \item 143. Hassan, \textit{supra} note 120, at 43. Ten thousand dollars is the minimum amount sufficient to invoke federal court jurisdiction in cases involving diversity of citizenship. 28 U.S.C. \textsection 1332 (1982).
\end{itemize}
man in 1200 is the same thing that is adequate to compensate a man for his death in 1963. It is an unacceptable concept for a civilized nation." The court pointed out that wrongful death is a statutory reform of the common law and that monetary limitations are common in the law of many states.

Finally, the plaintiff attempted to assert the questionable proposition that Islamic law permitted moral damages for pain and suffering. The court rejected the claim, holding that the plaintiff had neither properly put into evidence nor properly argued the proposition that Saudi Arabian law permitted damages for pain and suffering.

In another case, a federal court reacted to the criticisms which had been leveled at the Walton decision by trying to avoid any reliance on the foreign law altogether. In 1971, the case of Couch v. Mobil Oil Corp. reached a United States District Court in Texas. The facts of Couch paralleled Walton to a remarkable degree, except that the foreign law at issue was Libyan. The Libyan substantive law in question arose from its civil code derived in large measure from European sources. The district judge reviewed the relevant provisions and commented that Libyan law allowed judicial discretion in the awarding of damages in a manner much like that accorded federal judges in the United States. Yet the judge steadfastly refused to apply Libyan law and he used all the arguments he could muster to avoid that choice. It is fair to say that some of his points were tenuous.

The court began by applying the choice of law rules of Texas, the state in which it sat. Texas apparently clung to the

144. Hassan, supra note 120, at 38.
145. Hassan, supra note 120, at 39.
146. Hassan, supra note 120, at 40.
147. Hassan, supra note 120, at 43-46. The Saudi Labor and Workmen Regulations of 1969, however, provide for moral damages in some cases, such as when an employer arbitrarily breaches a labor contract. Liebesny, supra note 5, at 108, 222.
149. Plaintiff, a resident of Texas, worked for a subcontractor of Mobil Oil Corp., a Delaware corporation, in Libya where he was injured by an oil tank explosion. Allegedly, a Mobil employee negligently turned on a valve emitting gases while welders were still working. Id. at 898.
150. Id. at 901.
151. Id.
lex loci delicti rule which would have compelled the application of Libyan law.\textsuperscript{152} To rid itself of this burden, the court noted that the Texas rule had been enunciated in a wrongful death action and that there was no requirement to extend the lex loci rule to a case involving personal injury.\textsuperscript{153}

Freeing itself from the Texas lex loci rule, the court turned to the law of California, asserted by plaintiff to be controlling.\textsuperscript{154} Mobil had accepted, as part of its subcontract with plaintiff's employer, an agreement between the plaintiff and the subcontractor stating that the California Workmen's Compensation Insurance Law would be the exclusive remedy for injuries received.\textsuperscript{155} Finding that Mobil was bound by the agreement, the federal judge asserted that this brought the case not only under the California Workmen's Compensation law, but under the California law of conflicts as well.\textsuperscript{156} Proceeding further, the judge declared that California used both interest analysis and the weighing of contacts to decide choice of law questions.\textsuperscript{157} This analysis permitted the judge to dispose of one rule of Libyan law relied upon by the plaintiffs. Since both California and Texas each had a greater interest in the application of their rule of contributory negligence than did Libya in its rule of comparative negligence, the defense of contributory negligence would be permitted.\textsuperscript{158}

The district judge, however, was determined to displace Libyan law altogether. He next found that Texas had more contacts with the parties than either California or Libya. By this expansive use of renvoi, the federal judge declared that Texas substantive law had to apply.\textsuperscript{159}

The court did not, however, end its argument there. It further decided that Libya embraced the "antiquated doctrine"

\textsuperscript{152} Id. at 900 (citing Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968)).
\textsuperscript{153} Couch, 327 F. Supp. at 900.
\textsuperscript{154} Id. at 901.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 901-02.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 902.
of *volente non fit injuria*, that is to say, the plaintiff, through its employer, had the legal duty of “supervision at its own risk” at the worksite of possible negligent action by third parties. Thus, Libyan law would bar a suit by the plaintiff against Mobil.\(^\text{160}\) Texas law contains the same doctrine but limits this assumption of risk to relations between the employee and employer only.\(^\text{161}\) The judge declared that since Texas does not extend the rule to negligent action by third parties, the Libyan rule is contrary to the fundamental public policy of Texas.\(^\text{162}\)

Finally, the court raised a last barrier against the Libyan legal system. “In the interest of effective justice,” it stated, “this court should not apply Libyan law, for the complexities of interpreting the laws of a country that is in political upheaval and unrest is tenuous at best.”\(^\text{163}\) It is not clear whether the judge was suggesting that political upheaval leads to arbitrariness in the administration of the law, and thus is contrary to American requirements of due process, or whether he meant that the substance of the rules is in indeterminate flux. In any event, he had suggested a new and interesting bar against applying the law of the volatile states in the Middle East.

The intractable problems which an American judge faces in attempting to contend with Islamic law are perhaps most apparent in *Bakhshandeh v. American Cyanamid Co.*\(^\text{164}\) Plaintiff Bakhshandeh, a citizen and resident of Iran, was an importer and distributor of drugs manufactured by defendant’s pharmaceutical division. Defendant was incorporated in Maine with its principal offices in New York City.\(^\text{165}\) Bakh-
shandeh alleged that, in 1951, defendant’s representative in Teheran maliciously defamed him by stating that he bribed Iranian doctors to purchase his drugs, and that “he sold bottles of Aureomycin which in fact did not contain Aureomycin but were filled with some other harmless drug.” 166 Bakhshandeh brought suit for $500,000 in damages in the federal district court in New York. 167 The judge, operating under the older New York rules then in force, declared that the law of Iran was to apply under the theory of lex loci delicti and that the law had to be proven as a fact. 168 Since the judge was sitting as fact-finder, however, the actual procedure used in relying upon expert witnesses was similar to the present federal practice.

Plaintiff’s expert claimed that Iranian law was merely a codification of Islamic law and that no law could be passed by the Iranian parliament which was contrary to Islamic law. 169 He also asserted that Iranian judges were not European trained. 170 Defendant’s expert admitted that the Civil Code of Iran was largely Islamic, but that the Penal Code and the Code of Criminal Procedure were based on the French model. 171 In addition, he asserted that many judges in Iran had been educated in France. 172 The judge had to decide, therefore, whether to interpret Iranian code provisions according to the norms of Islamic law, French law, or both.

The court was soon hopelessly tangled in a thicket of strained interpretations. For example, the court had to determine whether the corporation was liable for the acts of its employee. The defendant argued that an Iranian law passed in 1960 which established the doctrine of respondeat superior could not be applied retroactively to events occurring in 1951 and that Article 4 of the Iranian Civil Code prohibited the

166. Id. at 805.
167. Id. at 804.
168. Id. at 805-06.
169. Trial Transcript at 526, 638, Couch.
170. Id. at 1388.
171. Id. at 989-90.
retroactive application of the laws. In addition, the defendant argued that with few exceptions fixing tribal responsibility, Islamic law fastens liability on the individual.\textsuperscript{173} The plaintiff countered that the doctrine of \textit{respodeat superior} existed in Iranian law as early as 1951, despite the later passage of a law explicity establishing the principle. Furthermore, the plaintiff argued ingeniously that the Iranian Commercial Code made corporations juristic personalities, and that since the Civil Code made individual principals liable for the actions of their agents, the two codes together created corporate responsibility for the tortious acts of employees.\textsuperscript{174}

Another issue facing the court was whether an action for slander could be maintained under Iranian law. A 1959 Law of Civil Responsibility permitted recovery for slander.\textsuperscript{175} The plaintiff once again asserted that the law merely made explicit a pre-existing right to material and moral damages present in the Islamic precept that "there can be no loss without compensation."\textsuperscript{176} He also asserted that this precept was implicit in Sections 328 and 331 of the Iranian Civil Code which protects property against destruction by another.\textsuperscript{177} The defendant countered by saying that there were no moral damages in Islamic law and that the cited Iranian Civil Code provisions provided remedies only for negligent damages to real property. The defendant further rebuked plaintiff's argument by stating that Islamic law had no civil remedy for slander and that the precept relied upon by the plaintiff acted only to substitute money damages for talion in cases of actual harm.\textsuperscript{178}

The plaintiff put forward an alternative argument in favor of his position that slander was an offense under Iranian laws. He noted that Section 269 of the Iranian Penal Code, in force in 1951, made it a crime falsely to attribute in a public gathering a criminal act to another.\textsuperscript{179} The plaintiff asserted that a

\textsuperscript{173} Trial Transcript at 1014-17; Brief for Defendant at 12, Bakhshandeh.
\textsuperscript{174} Plaintiff's Reply Brief at 6; Trial Transcript at 533, Bakhshandeh.
\textsuperscript{175} Bakhshandeh, 211 F. Supp. at 811.
\textsuperscript{176} Reply Brief for Plaintiff at 5, Bakhshandeh.
\textsuperscript{177} Id.
\textsuperscript{178} Brief for Defendant at 9-11, Bakhshandeh.
\textsuperscript{179} Brief for Plaintiff at 34, Bakhshandeh.
corporation could be prosecuted under Section 269 and further, by operation of Sections 1-17 of the Iranian Code of Criminal Procedure, a civil tort action could be attached to a criminal prosecution. The suggested procedure was adopted from French criminal procedure, and from his silence on the matter, one can infer that the plaintiff's expert did not regard it as contrary to the requirements of Islamic law.

The defendant argued that only a criminal prosecution, and not a civil suit, could be used in cases of defamation. He asserted that in Islamic law, the only "payment" for the moral damage of slander was by discretionary penal punishment (ta'zir), not by compensation. Finally, the defendant's expert testified that Penal Code Section 269 required the slander be spoken at a public meeting and not merely at a private gathering. In any event, there was the evidence proffered that corporations were not liable under Section 269.

With shifting and uncertain references to Islamic and French law, the judge could not help but be confused. In addition, the judge became frustrated by the manner in which the opposing experts testified. Plaintiff's witness lost credibility when he asserted that all of Iranian code law was Islamic and when he offered simple maxims as dispositive of the legal issue. Defendant's witness launched into extended background lectures in response to the most narrow questions. He must also have confirmed a likely suspicion that it was impossible to ascertain the law when he stated, "Moslem law is very vast, your honor, and therefore I don't think anybody can pretend, living or dead, that he was able to have all the law or that he possessed it."

The court dismissed the action because the plaintiff had failed to offer any real proof that the slanderous statements

180. Id. at 35-36.
181. Reply Brief of Plaintiff at 2, citing Brief for Defendant at 58, Bakhshandeh.
182. Trial Transcript at 1009, Bakhshandeh.
183. Brief for Defendant at 11, Bakhshandeh.
184. Id. at 12.
185. Trial Transcript at 634, 636, Bakhshandeh.
186. Id. at 965-66, 978-80.
187. Id. at 1068.
ever took place. The judge found that Section 269 of the Penal Code was an insufficient basis for the action. Finally, the judge declared that in regard to any other possible actions “based in general Islamic principles . . . [t]he testimony of both plaintiff’s expert and defendant’s expert in this connection left much to be desired.”

V. Conclusion

This survey of contract and tort cases demonstrates the extraordinary difficulty in pleading Islamic law in American courts. There are, in fact, remarkably few such cases which have been reported. One might expect that with the continuing demise of the *lex loci* choice of law standard, there will be even more instances of a forum applying its own law rather than the foreign law, notwithstanding the increased contact of Americans with Islamic countries. Even within the limited number of reported cases, one finds that in none of them did the plaintiff recover on the basis of Islamic law, even when he sought to have his claim adjudicated on that ground.

Thus, if there are more opportunities to recover under American law, few plaintiffs will seek to have the court apply foreign law, particularly when the foreign law is significantly Islamic and not continental. In addition, even when a party pleads a foreign law with Islamic content, American judges will tend not to take judicial notice of the law, despite recent statutory permissions to do so. Judges continue to rely heavily on expert witnesses, even when, as in the *Bakhshandeh* case, it leads to frustration. The root cause of the frustration and the root cause of why Islamic law is so extraordinarily difficult to prove lies in the vastly different natures of the common law legal system and the Islamic legal system. In the former, the judge articulates, refines, applies, and projects the law beyond the instant case. In the latter, the judge primarily applies the law. In a common law jurisdiction, there are authoritative sources in statutes, high court opinions of a particular juris-

189. *Id.*
190. *Id.*
diction, and regulations. Under Islamic law, authoritative sources are found in a mass of juristic writings. In a common law system, and a civil law system as well, law is a series of hierarchical norms. In the Islamic system, law is a series of maxims, examples, and mandates developed through a sophisticated casuistical system. Like the legal system of ancient Rome, Islamic law does not possess the same kind of vocabulary of conceptualization as does Western law.

Consider a common law judge questioning an expert in Islamic law. The judge is told that Islamic law is unchanging. When he asks for a rule, he is told a maxim. When he asks for examples to help him concretize the maxim, he is told contrary examples. When he searches for an authoritative principle to order the separate items of law that are told to him, none is provided.

Expert witnesses could improve the chances of a judge accepting Islamic law. A good presentation of the law of an Islamic state will rely on statutes and codes where possible. Since cases do not normally have precedential authority, the expert should seek alternatives such as *fatwas* (authoritative legal opinions by jurists). Where possible, the expert should seek to describe Islamic law principles in a vocabulary comprehensible to a common law judge, e.g., by stating a comprehensive norm supported by illustrative examples.

Nonetheless, the common law judge remains constrained by his own system of adjudication. Not only does he apply the law, he also states it. Yet, he becomes hesitant when he is asked to apply an asserted principle of Islamic law unless he is certain that it truly represents the accepted view and is not some imaginative interpretation. Thus, in interpreting Islamic law, the American judge is more reluctant than a *qadi* would be in choosing between opposing casuistical arguments in the same kind of case. Ironically, the American judge is also far more restrained in a case involving Islamic law than he would be in articulating American law subject to differing interpretations. In considering these factors together, *viz.*, the new choice of law rules more favorable to the law of the forum, the less likelihood of recovery under Islamic law, the differing natures of the two legal systems, and the innate caution of the
American judge in articulating foreign law, it is fair to conclude that Islamic law will, for the most part, continue to be an entity inaccessible to American courts.