This article seeks to give a brief outline of the bases of jurisprudence in the States of the Gulf Co-operation Council: Bahrain: Kuwait: Oman: Qatar: Saudi Arabia: The United Arab Emirates.

The Shari'a runs like a golden thread through the jurisprudence of the Gulf States. In this article we shall consider the sources of that jurisprudence and one of our main tasks will be to assess the extent of the role played by the Shari'a in each Gulf jurisdiction. In confronting any legal problem, perhaps the first question to be asked is: to what extent, if at all, does the Shari'a affect the matter? The answer may vary from “not at all” in a problem falling within the Commercial Code of Kuwait to “basically” in a problem in Saudi Arabia, while in the other jurisdictions, the answer may be somewhere between these extremes. Overall, we must record and always bear in mind the uncertainty engendered by the looming presence of the Shari'a which should be one of the factors to be borne in mind in weighing the benefits and risks of any commercial contract in the Islamic countries.

A comparative approach is essential in this area. Not the least reason for this is the lacunae which exist in the codified law. It may be said that in this respect the need to resort to general principles increases in inverse proportion to the quantum of specific substantive law or specific conflict rules, as the case may be, which is available. We therefore have to consider the sources of law prescribed in the various codes, where we shall find, as might be anticipated, that the legislator has given to the judge in many cases the right, in fact the obligation, to supplement codified provisions or to introduce principles where such provisions do not exist. 2

The Constitutions form the backdrop to all legal considerations, and the role of the Shari'a as prescribed by these Constitutions as a source of law is important. 3 I would like to stress the essentiality of ascertaining at the outset the basic constitutional position: this is true both where a detailed constitution is laid down in writing, as in Kuwait, Bahrain, Qatar and the UAE; where it is prescribed also in writing but in broad principle as in Saudi Arabia; and where it is unwritten, as in Oman.

Saudi Arabia

We may deal briefly with Saudi Arabia where we find the Shari'a as the source of law.

1 The material in this article formed the basis of a lecture in the series “Comparative Commercial Law in the Middle East” delivered by the author to the LLM course at the School of Oriental and African Studies, University of London.

2 Quotations from the various codes in this article are my own translations from the original Arabic.

3 Kuwait, Bahrain, UAE: “a principal source of law”; Qatar: “the principal source of law”.
on an almost unalloyed basis. There is a parallel body of secular "Regulations" to which, due to the sensitivity of the 'ulama', the word "law" cannot be applied: these would in my view be void if contrary to express provisions of the Shari'a. In this connection, we recall the writings of Ibn Taymiya of the Hanbali School, (the School applying in Saudi Arabia) and his teachings that laws are valid unless expressly forbidden in the fiqh.

Oman

Touching also briefly on Oman here, because it, too, falls outside the pattern of our other jurisdictions and indeed outside the pattern in the Middle East generally, we find the Sultan at the head of the hierarchy, relying upon the Shari'a of the Ibadi School. However, reference to Oman must be qualified in this respect, because it certainly legislates sub nomine "laws" and in such codes as the Banking Law and the Commercial Companies Law for example we find that the Shari'a has for several years been by-passed to an extent which we do not find in Saudi Arabia.

The picture needs to be updated to take account of the promulgation of the new "Procedure for Hearing Cases and Applications for Arbitration before the Authority for Settlement of Commercial Disputes". The creation of the new Authority will be discussed more fully in future issues of the ALQ, but it will be noted here that it has wider powers than its predecessor, the Committee for the Settlement of Commercial Disputes. The sources of law to which it is referred in issuing its judgments are, however, little changed.

Article 44 of Sultani Decree 32 of 1984 prescribes:

... decrees and laws in effect in the Sultanate; contracts between the litigants provided that such do not conflict with the laws, public order or morals; established and observed customs in the field of commercial activity; and that which will achieve justice between the adversaries and lead to stability in commercial transactions.

Here we note the authority which the written law of Oman, in common with the other codes which we shall consider, ascribes to the contract between the parties: the principle of pacta sunt servanda, a principle which the Shari'a subscribes. It may be thought that the latter two dictates of Article 44 confer considerable latitude upon the Authority, although, again, the ever present backdrop of the Shari'a must be constantly adverted to.

Kuwait

Kuwait took a bold step by establishing in 1961 a secular system of commercial law. That continued to be the situation until 1977 when, in response to the general

7 Note the provisions of the Omani Banking Law which appear to confer upon contracting parties the right to choose both jurisdiction and law.