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INTRODUCING THE BUSINESS JUDGMENT RULE IN SELECT COUNTRIES OF THE ARABIAN GULF

Abstract

Examining the corporate practices of the Gulf Corporation Council (GCC) member states, this paper demonstrates the imperative that GCC nations implement rational board practice models and improve current laws and regulations that pertain to corporate boards of directors. GCC member countries increasingly need to diversify revenue-generating streams; improved corporate board practices are likely to increase income from foreign corporations and investments. Rational board policies protect board members from frivolous challenges related to legal culpability because they operate on a “good faith” model, augmenting corporate growth. Providing a coherent analysis of the business judgment rule, a significant aspect of rational board practices, this paper examines how the rule has worked in the United States and provides a standard for GCC countries to emulate. Shifting domestic policies to this rational model will promote foreign investments and result in financial stability, benefits that current reform practices initiated by the GCC have not yet accomplished.

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INTRODUCTION

In the hands of the board of directors lies the most important role in the corporation: the decision-making authority to propel the corporation forward. Running a corporation inherently involves risk-taking and speculative situations. To maintain the fiduciary duties owed to the shareholders and act in the shareholders' best interests, reassurance of legal protection is necessary for the board to feel competent making sound, but potentially risky, business decisions. The United States recognized this necessity with the creation of the business judgment rule, which protects companies from frivolous litigation about how they conduct their business in the absence of evidence demonstrating the board of directors' blatant violation of good faith. Although essential for advancing business interests, this rule is not universal, particularly in developing markets. Absence of the business judgment rule potentially impedes the development of markets as directors are less likely to take risks due to litigation concerns while investors worry about the liability for? business decisions without some sort of guiding framework.

The Gulf Corporation Council (GCC) offers an ideal opportunity to examine the potential benefits of this type of rule in developing markets. GCC member states are entering a new phase of economic initiatives driven by the beginning of the end of the high demand for oil that lasted for more than half a century. Attracting foreign investments through portfolio investments and the instalment of qualified foreign board members are aspects of these economic visions. Foreign shareholders in GCC corporations want to see a management team that can make sound, but precarious decisions to advance corporate interests and grow their overseas investments. Ideally, foreign board members in a GCC corporation – often from the United States, Canada, and the United Kingdom – would make decisions that favour the corporation and its shareholders. But trepidation that making a risky, but *bona*

fide business decision may result in civil or criminal penalties without a stabilizing business judgment rule may deter foreign board members and investors. After first examining the existing structures in the GCC, this paper examines the business judgment rule and its origin in Delaware before considering how GCC countries could invoke this rule at the local level, and its potential impact on the development of a regional economy.

The United States has a strong history of capital market practice and serves as a common example for emerging markets. With effective capital markets tools, like the US Securities & Exchange Commission and Financial Industry Regulatory Authority, as well as relevant capital markets laws, US regulations offer specific regulatory guidance for GCC member states. As the current US rules on corporate regulations are seen as global models, the world watches US executive compensation guidelines, insider trading punishments, and whistleblower protection policies. Accordingly, incorporating these practices in GCC member states will enhance the reputation of these markets.

The hope is that current regulations in GCC countries will benefit from the US model by replicating what is necessary and proposing alternatives to what is inapplicable given existing legal or cultural systems. If these countries modify their capital market regulations, foreign investors will no longer worry that the financial and capital market regulations in the GCC are insufficient for investments. A rule that provides protection and boundaries for directors will support directors to advance corporations and encourage investors. The goal, beyond individual GCC member state visions, is to achieve the objectives of the GCC founders: the unification of financial and capital markets policies and regulations across the region.

I. GCC MARKETS AND FUTURE ASPIRATIONS

The regional GCC was established on May 25, 1981, with six member states: Kuwait, Saudi Arabia, the United Arab Emirates (UAE), Bahrain, Qatar, and Oman. The founding states believed that “Unity Makes Strength,” emphasizing that the basic objectives of the GCC were to for-

multate similar economic, commercial, and financial regulations.¹ Unfortunately, integration and unification of the GCC financial markets is not yet a reality.² Today, each GCC member state retains its own distinct capital and financial markets policies and regulations.³ Each GCC country is also independently preparing and planning for a diversified regional economy.⁴

Each plan is centred on creating a local economy with alternative sources of income, reliant on advancing financial stability with an economic model that attracts promising investments.⁵ Profound changes to stock exchange practices have reshaped the capital market industry, including modifications to companies' laws,⁶ foreign investment reg-

¹ Cooperation Council for the Arab States Charter, art. 4, May 25, 1981, 26 I.L.M. 1131 [hereinafter GCC Charter].

² Ishaan Tharoor, "The Persian Gulf Crisis over Qatar, Explained", *Washington Post*, 2017, available at: https://www.washingtonpost.com/news/worldviews/wp/2017/06/06/the-persian-gulf-crisis-over-qatar-explained/?noredirect=on&utm_term=.8a2189d2a5ad [last accessed 9.6.2022] (noting that three GCC member states (Saudi Arabia, the UAE, and Bahrain) cut ties with another GCC member (Qatar) over a political dispute).

³ But see Dubai Financial Services Authority, available at: <https://www.dfsa.ae/> [last accessed 6.6.2022]; Dubai International Financial Centre, available at: <https://www.difc.ae/> [last accessed 7.6.2022].

⁴ See e.g. *UAE Vision 2021*, available at: <https://www.vision2021.ae/en/national-agenda-2021/list/economy-circle> [last accessed 3.9.2021]; *Saudi Arabia Vision 2030*, available at: <https://vision2030.gov.sa/en> [last accessed 2.9.2021]; *Qatar National Vision 2030*, available at: <https://www.mdps.gov.qa/en/qnv1/pages/default.aspx> [last accessed 7.6.2022]; *From Regional Pioneer to Global Contender: Our Vision, The Economic Vision 2030 for Bahrain*, available at: <https://www.bahrain.bh/wps/wcm/connect/38f53f2f-9ad6-423d-9c96-2dbf17810c94/Vision%2B2030%2BEnglish%2B%28low%2Bresolution%29.pdf?MOD=AJPERES> [last accessed 6.6.2022]; *Oman Vision 2040*, available at: <https://www.2040.om/en/> [last accessed 7.6.2022].

⁵ K.C. Ulrichsen, *Economic Diversification in Gulf Cooperation Council (GCC) States (2017)*, 2017, available at: <https://www.bakerinstitute.org/search-results/?addsearch=EC+ONOMIC+DIVERSIFICATION+IN+GULF+COOPERATION+COUNCIL+%28GCC%29+STATES+Kristian+> [last accessed 9.6.2022].

⁶ Companies Law No. 1 of 2016 (Kuwait), available at: <https://e.kdipa.gov.kw/main/E012016.pdf> [last accessed 9.6.2022]; Companies Law Royal Decree No. M/3 of 2015 (Saudi Arabia), available at: <https://mci.gov.sa/en/Regulations/Pages/details.aspx?lawId=07140004-6a05-48e3-bb04-a8250094bb85> [last accessed 9.6.2022]; Commercial Companies Law No. 18 of 2019 (Oman), available at: <https://mjla.gov.om/eng/legislation/decrees/details.aspx?Id=548&type=L> [last accessed 9.6.2022]; Commercial Companies Law No. 11 of 2015 (Qatar), available at: <https://www.jbapartner.com/images/download/Law-No--11-of-2015---Promulgating-the-Commercial-Companies-Law---English.pdf> [last accessed 9.6.2022]; Commercial Companies Law No. 2 of 2015 (U.A.E.); Commercial Com-

ulations to incentivize foreign investors,⁷ public-private partnerships where foreign investors can be strategic investors in new projects,⁸ and stock exchange laws enhancing the function of supervisory bodies.⁹

However, the GCC cannot successfully achieve strong markets without effective domestic and regional financial and capital market regulations. Foreign investors will not engage with GCC member states if these countries lack some of the protective regulations offered in developed markets, such as a business judgment rule where board responsibility is clearly defined. Without sufficient protections, interested foreign investors and board members may be apprehensive due to the existing grey areas of director responsibility.

As the GCC is aware of foreign investors' concerns, new corporate governance rules could guarantee a market system where transparency leads, reducing any scepticism foreign investors may have on how these new emerging markets perform and how efficient they are with implementing rules that guarantee and maintain investor protections.

panies Law No. 21 of 2001 (Bahr.), available at: <https://bahrainbusinesslaws.com/laws/Commercial-Companies-Law> [last accessed 9.6.2022].

⁷ Direct Investment Promotion Authority Law No. 116 of 2013 (Kuwait), available at: <https://kdipa.gov.kw/about-kdipa/law-decisions/> [last accessed 9.6.2022]; Regulating Non-Qatari Capital Investment in the Economic Activity Law No.1 of 2019 (Qatar), available at: <https://investmentpolicy.unctad.org/investment-laws/laws/314/qatar-law-no-1-of-2019> [last accessed 9.6.2022]; Foreign Capital Investment Law Royal Decree No. 50 of 2019 (Oman).

⁸ Regulating Partnership between the Public Sector and the Private Sector in the Emirate of Dubai Law No. 22 of 2015 (U.A.E.), available at: [https://www.dof.gov.ae/en-us/publications/Lists/ContentListing/Attachments/532/PPP%20Law%20No.%20\(22\)%20of%202015.pdf](https://www.dof.gov.ae/en-us/publications/Lists/ContentListing/Attachments/532/PPP%20Law%20No.%20(22)%20of%202015.pdf) [last accessed 9.6.2022].

⁹ A capital market authority, like the US SEC, is relatively new in the GCC member states. Capital Market Authority, Royal Decree No. 80/98 of 1998 (Oman), available at: <https://cma.gov.om/Home/AboutCMA/EstablishmentoftheCMA> [last accessed 9.6.2022]; Securities & Commodities Authority Federal Law No. 4 of 2000 (U.A.E.), available at: <https://www.sca.gov.ae/en/regulations/regulations-listing.aspx#page=1> [last accessed 9.6.2022]; Capital Market Law, Royal Decree No. M/30 of 2003 (Saudi Arabia), available at: <https://cma.org.sa/en/RulesRegulations/CMALaw/Pages/default.aspx> [last accessed 9.6.2022]; Law No. 33 of 2005 (Qatar), available at: <https://www.qfma.org.qa/English/AboutUs/Pages/Whoweare.aspx> [last accessed 9.6.2022]; Establishment of the Capital Markets Authority Law No. 7 of 2010 (Kuwait), available at: <https://www.cma.gov.kw/en/web/cma/cma-handbook> [last accessed 9.6.2022]; Bahrain Capital Mrkts. Supervision Directorate, available at: <https://www.cbb.gov.bh/capital-markets/> [last accessed 22.9.2021].

II. GCC CORPORATE GOVERNANCE

One of the most important issues foreign investors prioritize when considering foreign capital market investment opportunities is the existence of good corporate governance practices in publicly traded corporations.¹⁰ When these practices exist, foreign investors then want to know how effective these rules are in composing the board of directors, monitoring board decisions, eliminating conflicts of interest, protecting the voting system and minority rights, and including independent members. These practices indicate a system where the corporation is bound by certain exemplary criteria to promote strong corporate goals.¹¹

1. DEVELOPING A STRONG BOARD OF DIRECTORS

With all member states observing the best international practices in capital markets growth,¹² GCC-based corporations have gradually accepted corporate governance and integrated in accordance with recommendations for governance regimes in privately held companies¹³ and

¹⁰ H. Alregab, "The Role of Corporate Governance in Attracting Foreign Investment: An Empirical Investigation of Saudi-listed Firms in Light of Vision 2030", *International Journal of Financial Economics*, 2021, available at: <https://doi.org/10.1002/ijfe.2420> [last accessed 9.6.2022]. Relatedly, foreign ownership may improve corporate government practices in public corporations. R. Shubita, M.F. Shubita, "The Impact of Foreign Ownership on Corporate Governance: Evidence from an Emerging Market", *Investment Management & Financial Innovations*, 2019, p. 101.

¹¹ OECD, *Principles of Corporate Governance* (1999), available at: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN\(99\)6&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En) [last accessed 9.6.2022].

¹² See e.g. Establishment of the Capital Markets Authority Law No. 7 of 2010, art. 3 (Kuwait), available at: <https://www.cma.gov.kw/en/web/cma/cma-handbook> [last accessed 9.6.2022]; QMFA Regulation, arts. 2, 5, available at: <https://www.qfma.org.qa/English/RulesRegulations/Pages/QFMARegulation.aspx> [last accessed 12.9.2021].

¹³ P. Masons, *Corporate Governance: The Benefits of Good Practice for Private Companies in the GCC*, 2013, <https://docplayer.net/14936335-Corporate-governance-the-benefits-of-good-practice-for-private-companies-in-the-gcc-february-2013.html> [last accessed 9.6.2022]; B.I. Eulaiwi, *Four Essays on Corporate Governance, Ownership Structure and Capital Structure of GCC Firms*, 2018 (Ph.D. dissertation, Curtin University), available at: <https://espace.curtin.edu.au/handle/20.500.11937/81265> [last accessed 9.6.2022].

in GCC member state governments.¹⁴ Board members are mostly local citizens elected by the shareholders' general assembly or appointed by the corporation as independent directors adhering to corporate governance rules.¹⁵

Yet these elected or appointed board members often do not need to be citizens of a GCC member state.¹⁶ In fact, many GCC states incentivize foreign investors to form and run companies in the country with certain income tax exemptions and other benefits: arbitration for dispute settlement, guarantees against expropriation, corporate land allocations, and other incentives and privileges. Yet, a board of directors formed of mostly non-citizens may be apprehensive in the absence of a business judgment rule and avoid making aggressive *bona fide* business decisions owing to potential liability, limiting corporate growth. While all board members need to know the boundaries of their managerial power, non-citizen board members are more concerned with how the local judicial system responds when a concerned shareholder sues the board alleging that the board committed a managerial mistake. In other words, GCC member state efforts to attract foreign investments are insufficient *per se* without the adoption of a business judgment rule.

Oman was the first GCC country to adopt a corporate governance code in 2002, followed by Bahrain in 2010 and Kuwait in 2013.¹⁷ Responding to constant developments in corporate governance, Oman then is-

¹⁴ Primarily Kuwait. See M.E. Al-Wasmi, *Corporate Governance Practice in the GCC: Kuwait as a Case Study*, 2011 (Ph.D. dissertation, Brunel University) [on file with author].

¹⁵ The corporate governance rules of each GCC state require a minimum number of independent directors in the board formation. See e.g. Issuance of the Executive Bylaws of Law No. 7 of 2010 Resolution No. 72 of 2015, art. 2-2 (Kuwait), available at: <https://www.cma.gov.kw/en/web/cma/by-law-documents> [last accessed 9.6.2022]; QMFA Regulation, art. 6, available at: <https://www.qfma.org.qa/English/RulesRegulations/Pages/QFMARegulation.aspx> [last accessed 12.9.2021].

¹⁶ See e.g. Commercial Companies Law No. 2 of 2015, art. 151 (U.A.E.) (requiring the Chairman and majority of board members to be UAE nationals). But see Foreign Direct Investment Federal Law Decree No. 19 of 2018 (U.A.E.) (extending opportunities for 100% foreign ownership of publicly traded corporations in limited sectors).

¹⁷ A.A.-N. Abdallah, A.K. Ismail, "Corporate Governance Practices, Ownership Structure, and Corporate Performance in the GCC Countries", *Journal of International Financial Markets*, 2017, p. 98.

sued a new corporate governance code in 2015,¹⁸ Kuwait in 2015,¹⁹ and Bahrain in 2018.²⁰ The UAE issued its first corporate governance guide in 2016,²¹ which it updated in February 2020,²² while Qatar issued its corporate governance code in 2016,²³ and Saudi Arabia issued its corporate governance regulations in 2017.²⁴ These codes aim to implement rules that work for all corporations by establishing a clear separation between corporate management and shareholders, improving overall credibility in the stock markets, and promoting updated worldwide corporate governance practices to attract foreign direct investments.²⁵

Corporate governance enforcement mechanisms differ between the GCC countries. Some follow a soft law approach, like Kuwait, where “comply or explain” rules are normal; if a corporation does not comply it explains its non-compliance in a corporate report.²⁶ Bahrain adheres to the “comply or explain” principle as well, making the rules of the code mandatory in the absence of a proper explanation.²⁷ In Qatar, a corpora-

¹⁸ Corporate Governance Code of 2015 (Oman), available at: <https://www.oman-arab-bank.com/wp-content/uploads/corporate-governance-en.pdf> [last accessed 9.6.2022].

¹⁹ Capital Markets Authority Resolution No. 48 of 2015 (Kuwait), available at: https://www.cma.gov.kw/documents/20622/373820/%D9%82%D8%B1%D8%A7%D8%B1+%D8%B1%D9%82%D9%85+%2848%29+%D9%84%D8%B3%D9%86%D8%A9+2015_2015-7-1.pdf/e82b899e-db09-45be-b031-dc9a27bb7f60 [last accessed 9.6.2022].

²⁰ Corporate Governance Code of 2018 (Bahr.), available at: <https://www.moic.gov.bh/en/Tiles/BusinessServices/Commercial%20Registration%20and%20Companies%20Control/corporate%20governance/corporate-governance> [last accessed 9.6.2022].

²¹ O. Al Zaabi, *Governance Regulations in Force Adopt the Best Global Practices*, 2016, available at: <https://www.sca.gov.ae/en/media-center/news/3/1/2016/governance-regulations-in-force-adopt-the-best-global-practices.aspx> [last accessed 9.6.2022].

²² Securities & Commodities Authority Federal Law No. 4 of 2000 (U.A.E.).

²³ *Governance & Disclosure Securities*, available at: https://www.qfma.org.qa/English/issuinglistingsecurities/pages/governance_and_disclosure.aspx [last accessed 12.10.2021].

²⁴ Corporate Governance Regulations of 2017 (Saudi Arabia), available at: https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CGRegulations_en.pdf [last accessed 9.6.2022].

²⁵ M.H.A. Salman, H. Nobanee, “Recent Developments in Corporate Governance Codes in the GCC Region”, *Research World Economy*, 2019, p. 108.

²⁶ Issuance of the Executive Bylaws of Law No. 7 of 2010 Resolution No. 72 of 2015, art. 3-13 (Kuwait), available at: <https://www.cma.gov.kw/en/web/cma/by-law-documents> [last accessed 9.6.2022].

²⁷ Bahrain Corporate Governance Code of 2018, *supra* note 20, ch. 1, § 2 (describing the principle of comply or explain).

tion need not comply with the rules for valid reasons if the authority accepts that non-compliance does not compromise the public, market interest, and investor protections.²⁸

On the other hand, the UAE does not follow the “comply or explain” practice, but rather endows the Securities & Commodities Authority with discretionary power on a case-by-case basis.²⁹ Saudi Arabia’s corporate governance rules are mandatory unless flagged as “guidance”.³⁰ Meanwhile, Oman provides a binding framework for corporate governance in public corporations,³¹ yet without any clear sanctions for non-compliance.³²

2. SHAREHOLDER OR STAKEHOLDER PRIMACY?

Determining directors’ duties depends on the model of corporate governance each GCC state follows. Under the shareholder value approach, directors should pursue the best interests of the corporation and its shareholders, known as “shareholder primacy”.³³ The US state of Delaware is an example of this model where the corporation and its shareholders come first.³⁴ As Delaware Supreme Court Chief Justice Leo E. Strine, Jr. expressed, “Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder

²⁸ Governance Code for Companies & Legal Entities Listed on the Main Market Issued by the QFMA’s Board pursuant to Decision No. 5 of 2016, art. 2 ch. 2 (Qatar).

²⁹ Chairman of Authority’s Board of Directors’ Decision No. 3/Chairman of 2020 concerning Approval of Joint Stock Companies Governance Guide, art. 82 (U.A.E.), available at: <https://www.sca.gov.ae/en/regulations/regulations-listing.aspx#page=1> [last accessed 9.6.2022].

³⁰ Corporate Governance Regulations of 2017, *supra* note 24, art. 2.

³¹ Oman Corporate Governance Code of 2015, *supra* note 18.

³² *Ibid.*, annex. no. 3, cl. 9.

³³ B. Sheehy, “Scrooge – The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate”, *University of Miami Business Law Review*, 2005, Volume 14, p. 193.

³⁴ L.E. Strine, Jr., “The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law”, *Wake Forest Law Review*, 2015, Volume 50, p. 761.

welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare”.³⁵

In contrast, in a stakeholder model of corporate governance, the board must observe and incorporate other stakeholders’ interests instead of only focusing on maximizing shareholder wealth.³⁶ These stakeholders may be shareholders, employees, customers, creditors, others in the general community,³⁷ or “any group or individual who can affect, or is affected by, the achievement of a corporation’s purpose”.³⁸ The stakeholder model is increasingly used in Japan and some countries in the European Union,³⁹ mainly Germany and France.⁴⁰ In this model, board members do not breach their fiduciary duty when making decisions that favour non-shareholder stakeholders. A stark example of this is in the landmark Delaware case, *Revlon v. MacAndrews & Forbes Holdings*, when the court concluded that:

under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment and followed a course that ended the auction for Revlon, absent court intervention, to the ultimate detriment of its shareholders. No such defensive measure can be sustained when it represents a breach of the directors’ fundamental duty of care.⁴¹

All GCC member states’ corporate governance practices include respect for the rights of the stakeholders to ensure the law protects stake-

³⁵ Ibid.

³⁶ N. Craig Smith, D. Rönnegard, “Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools”, *Journal of Business Ethics*, 2016, Volume 134, p. 463.

³⁷ J. Hung, *Shareholder Primacy Theory vs. Stakeholder Theory*, 2020, available at: <https://ssrn.com/abstract=3564804> [last accessed 9.6.2022]; C.M. Bruner, “Corporate Governance in a Time of Crisis”, *Journal of Corporate Law*, 2011, Volume 36, p. 325.

³⁸ R.E. Freeman, *Strategic Management: A Stakeholder Approach*, Cambridge University Press, 2010.

³⁹ J. Slawotsky, “Sustainable Capitalism: Revelations from the Japanese Model”, *Hastings Journal of Law*, 2012, Volume 63, p. 17.

⁴⁰ B.R. Cheffins, “The History of Corporate Governance”, in M. Wright, D. Siegel, K. Keasey, I. Filatotchev (eds.), *Oxford Handbook of Corporate Governance*, Oxford University Press, 2013.

⁴¹ *Revlon v. MacAndrews & Forbes*, 506 A.2d 173, p. 182 (Del. 1986).

holders to some degree. Nevertheless, GCC corporate governance practices are still predominantly shareholder centric.

The Omani Corporate Governance Code advocates only a general rule to respect the rights of stakeholders,⁴² avoiding any recommendation regarding directors' obligations to the stakeholders. Similarly, the Qatari Corporate Governance Code does not proffer any directors' obligations to the stakeholders, but emphasizes that directors should respect the rights of the stakeholders and their access to information in a way that does not prejudice the interests of the corporation.⁴³

Kuwait's Corporate Governance Code leans more toward shareholder primacy than stakeholder preference, though it acknowledges that stakeholders have rights.⁴⁴ The Saudi Corporate Governance Regulations do not differ much from the Kuwaiti rules: there are no stakeholder obligations on the directors other than good governance for stakeholders to exercise their rights without prejudicing the corporation's interests or the interests of its shareholders.⁴⁵ The UAE Corporate Governance Guide follows the same path.⁴⁶ The Bahraini Corporate Governance code grants similar rights to stakeholders, requiring that directors serve the interests of the shareholders and stakeholders equally.⁴⁷ However, respecting stakeholder interests does not mean that the board owes stakeholders a fiduciary duty.

Overall, the GCC states' corporate governance models are more aligned with a shareholder value model. While acknowledging the rights of stakeholders, the models suggest that maximizing shareholder wealth remains the norm. This is unlike the Delaware law, which sharply sides with the shareholders⁴⁸ as a purely shareholder primacy model.⁴⁹ Yet, the GCC models and Delaware law both still emphasize

⁴² Omani Corporate Governance Code, *supra* note 18.

⁴³ QMFA Regulation, *supra* note 12, art. 38.

⁴⁴ Executive Bylaws, *supra* note 26, art. 10-1.

⁴⁵ Saudi Corporate Governance Regulations, *supra* note 24, arts. 83, 86-2.

⁴⁶ Al Zaabi, *supra* note 21, art. 14.

⁴⁷ Bahraini Corporate Governance Code, *supra* note 20, §2(5)a.

⁴⁸ L.E. Strine Jr., "Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon", *Washington & Lee Law Review*, 2017, Volume 74, p. 1165.

⁴⁹ In *Revlon*, the court emphasized that the goal is to benefit the shareholders as the owners of the entity. See *Revlon v. MacAndrews & Forbes*, 506 A.2d 173, p. 182 (Del. 1986).

shareholder value-based management. The next section examines the business judgment rule in Delaware and its equivalent in the GCC countries, helping to create a benchmark for how the GCC may benefit from the extensive Delaware corporate experience.⁵⁰

III. DELAWARE BUSINESS JUDGMENT RULE: THE RATIONALE AND THE EXPERIENCE

The business judgment rule traces its roots to the early nineteenth century.⁵¹ In Delaware, the business rule is considered a standard for judicial review when assessing directors' actions, shielding directors from legal actions because of their corporate decision-making – provided certain prerequisites have been fulfilled.⁵² In other words, the rule presents a rebuttable presumption that directors are not personally liable for making everyday business decisions if they were informed, debated all options, acted in good faith, were disinterested in the decision, and acted in the interests of the corporation.⁵³ Under the business judgment rule, the board is not liable for honest mistakes made within the ordinary course of corporate business decision-making if these prerequisites were met. If so, the court will uphold the board's decisions even if the corporation or its shareholders were harmed by these decisions.⁵⁴

The rationale behind the business judgment rule is self-evident. It allows the board to make business decisions without fear of accountability for *bona fide* mistakes made in running the business. In other words, the rule is considered a safe harbour for decisions made by a loyal board of directors as agents of the corporation's shareholders and encourages

⁵⁰ L.S. Black, Jr., *Why Corporations Choose Delaware*, Delaware Department of State, 2007.

⁵¹ S.S. Arshat, "The Business Judgment Rule Revisited", *Hofstra Law Review*, 1979, Volume 8, p. 93.

⁵² D. Branson, "The Rule that Isn't a Rule: The Business Judgment Rule", *Valparaiso University Law Review*, 2002, Volume 36, p. 631.

⁵³ D.G. Smith, *The Modern Business Judgment Rule* (BYU Law Research Paper Series No. 15-09, 2015), available at: <https://ssrn.com/abstract=2620536> [last accessed 9.6.2022].

⁵⁴ *Ibid.*

managerial risk-taking based on well-informed decisions – even if the decision ultimately leads to unintended or undesirable consequences.⁵⁵

Some scholars see the business judgment rule as an ultimate standard of judicial review where the court reviews the business decisions of the board in some circumstances.⁵⁶ Delaware courts look at the business rule as a “presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company,”⁵⁷ and for the greater good of its shareholders. Essentially, the business judgment rule has two purposes: to protect a loyal board from personal liability by granting immunity and to avoid court interference with sound business judgments in the absence of egregious conduct.⁵⁸

For the board to have personal liability, the plaintiff must show some type of fraud, illegality, or conflict of interest related to the business decisions.⁵⁹ Therefore, decisions made by an informed, disinterested board acting in the corporation’s interest will not normally be reviewed by a court.

In Delaware, the presumption of the business judgment rule may be rebutted if the plaintiff proves that the board’s conduct was grossly negligent⁶⁰ – the proper standard for the business judgment rule for the informed decisions⁶¹ – by demonstrating fraud, bad faith, or self-dealing by the board of directors.⁶² Then, the directors have the burden of proof to demonstrate that the business decision challenged was fair to the corporation and its shareholders,⁶³ applying a judicial standard of review called the “entire fairness doctrine”.⁶⁴

⁵⁵ J. Armour, J. Gordon, “Systemic Harms and Shareholder Value”, *Journal of Legal Analysis*, 2014, Volume 6, p. 51.

⁵⁶ Branson, *supra* note 52.

⁵⁷ *Aronson v. Lewis*, 474 A.2d 805, p. 812 (Del. 1984).

⁵⁸ *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, p. 262 (Del. Ch. 1998) (quoting *Aronson v. Lewis*, 473 A.2d p. 815 and *Gagliardi v. TriFoods, Int’l, Inc.*, 683 A.2d 1049 (Del. Ch. 1996)).

⁵⁹ S.M. Bainbridge, “The Business Judgment Rule as Abstention Doctrine”, *Vanderbilt Law Review*, 2019, Volume 57, p. 83.

⁶⁰ *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, p. 654 (Del. 2014).

⁶¹ *Smith v. Van Gorkom*, 488 A. 2d 858, p. 873 (Del. 1985).

⁶² *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, pp. 260-61 (Del.1993).

⁶³ *Ibid.*, pp. 260-61.

⁶⁴ *Cinerama, Inc. v. Technicolor*, 663 A.2d 1156, p. 1162 (Del. 1995).

Under the entire fairness doctrine, if the plaintiff proves a breach of fiduciary duties by the board, the court shifts the burden of proof to the board to prove entire fairness to the corporation and its shareholders in the decision.⁶⁵ In the seminal case of *Krasner v. Moffet*,⁶⁶ the Delaware Court of Chancery demonstrated two examples where the board may not rely on entire fairness to explain its business decisions even if the board rationally believes that its decisions were made on entirely fair grounds⁶⁷: “When the majority of a board of directors is the ultimate decisionmaker and a majority of the board is interested in the transaction the presumption of the business judgment rule is rebutted,”⁶⁸ and “when the presumption of the business judgment rule has been rebutted, the entire fairness rule is implicated, and defendants bear the burden of proof.”⁶⁹ As Delaware law evolved, the Delaware Supreme Court overtly stated in *Kahn v. M&F Worldwide Corp.* that the business judgment rule applied instead of the entire fairness doctrine if: (1) the transaction was approved by a functioning committee of independent directors; or (2) the transaction was approved by an informed vote of a majority of the minority stockholders.⁷⁰

Compatible with the business judgment rule, exculpatory clauses protect directors from personal financial liability for decisions made in good faith and adhering to the essence of the business judgment rule. The rationale behind these clauses is obvious: to have a clear-minded board of directors without personal liability for any claims alleging a breach of the duty of care under the business judgment rule if all factors are met.⁷¹ These exculpatory clauses are democratic in nature; the shareholders must approve their inclusion in the corporate charter.⁷²

⁶⁵ The Delaware Supreme Court even applied a heightened standard of review or “enhanced scrutiny standard” in certain cases, requiring a high burden of proof to apply the business judgment rule. *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

⁶⁶ *Krasner v. Moffet*, 826 A.2d 277, p. 287 (Del. 2003).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, p. 654 (Del. 2014).

⁷¹ *Prod. Res. Grp. v. NCT Grp.*, 863 A.2d 772 (Del. Ch. 2004).

⁷² Conaglen, Hill, *supra* note 76.

In Delaware, exculpatory clauses in corporate charters are the norm.⁷³ The inclusion of the exculpatory clauses in corporate charters in Delaware started with the enactment of the General Corporation Law in 1986⁷⁴ following *Smith v. Van Gorkom*,⁷⁵ when the court held that the directors of a corporation were grossly negligent and made uninformed business decision.⁷⁶

Of course, exculpatory clauses only shield managerial decisions made by the board in good faith.⁷⁷ According to Delaware General Corporation Law § 102(b)(7), the directors' personal liability is not eliminated or limited "[f]or any breach of the director's duty of loyalty to the corporation or its stockholders; for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or for any transaction from which the director derived an improper personal benefit".⁷⁸

The business judgment rule is now found in other US states⁷⁹ – notably Indiana,⁸⁰ Virginia,⁸¹ Maryland,⁸² and Nevada⁸³ – and other countries. Many countries have codified variations of the rule, including

⁷³ J.J. Hanks Jr., "Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification", *Business Law*, 1988, Volume 43, pp. 1208-09.

⁷⁴ Del. Code Ann. Tit. 8 § 102(b)(7) (2009). See also Hanks, *supra* note 73.

⁷⁵ *Smith v. Van Gorkom*, 488 A. 2d 858, p. 873 (Del. 1985).

⁷⁶ M. Conaglen, J.G. Hill, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis* (ECGI Working Paper Series, No. 351/2017, 2018), available at: https://ecgi.global/sites/default/files/working_papers/documents/finalconaglenhill.pdf [last accessed 9.6.2022].

⁷⁷ C.M. Elson, R.B. Thompson, "Van Gorkom's Legacy: The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives", *Northwestern University Law Review*, 2002, Volume 96, p. 583.

⁷⁸ Del. Code Ann. Tit. 8, § 102(b)(7) (2009).

⁷⁹ More than forty US states have codified their own version of the business judgment rule. *Corporations and Other Business Associations: Cases and Materials*, Wolters Kluwer Law & Business, 7th ed., 2014.

⁸⁰ Branson, *supra* note 52.

⁸¹ L.V. Parker Jr., "Virginia is for Lovers and Directors: Important Differences Between Fiduciary Duties in Virginia and Delaware", *William & Mary Business Law Review*, 2011, Volume 2, p. 51.

⁸² B.S. Sharfman, "Understanding Maryland's Business Judgment Rule", *Duquesne Business Law Journal*, 2006, Volume 8, p. 1.

⁸³ Nev. Rev. Stat. § 78.138(3).

common law countries like Australia,⁸⁴ Malaysia,⁸⁵ and South Africa,⁸⁶ and civil law countries like Germany⁸⁷ and Spain.⁸⁸ However, the business judgment rule has not yet appeared in the GCC.

Examining the GCC member states' laws through the lens of Delaware corporate law gives rise to consideration of the business judgment rule to inform board practices and eliminate directors' fears in GCC member states. The ability to incorporate the business judgment rule in GCC member states enhances the likelihood that a board will achieve its goals for the greater good of the corporation.

IV. THE PARAMETERS OF DIRECTORS' OBLIGATIONS IN PUBLIC CORPORATIONS UNDER GCC MEMBER STATE LAWS

Examining directors' duties in the GCC through the business judgment rule lens requires an understanding of the codified directors' duties for the public corporations listed on eight GCC stock exchanges, starting with the duty of loyalty, the duty of care, and related laws that build upon these two main duties. Directors' duties are described in the company laws of each GCC member state,⁸⁹ the capital markets regulations of each country, and any related bylaws and regulations.

⁸⁴ Corporations Act 2001 (Cth) (Austl.).

⁸⁵ Companies Act of 2016, art. 214 (Malaysia), available at: [https://www.ssm.com.my/Pages/Legal_Framework/Companies%20-Act%20-1965-\(Repealed\)/aktabi_20160915_companiesact2016act777_0.pdf](https://www.ssm.com.my/Pages/Legal_Framework/Companies%20-Act%20-1965-(Repealed)/aktabi_20160915_companiesact2016act777_0.pdf) [last accessed 9.6.2022].

⁸⁶ Companies Act 71 of 2008, art. 74(3)-(4) (S. Afr.).

⁸⁷ *Aktiengesetz* [Stock Corporation Act], Sept. 6, 1965, BGBL. 1 p. 1142 (Ger.), available at: <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/german-stock-corporation-act.pdf?revision=5ed8a77d-c173-4acc-befd-297d6314891f&revision=5ed8a77d-c173-4acc-befd-297d6314891f> [last accessed 9.6.2022].

⁸⁸ Corporate Enterprises Act, art. 226 (B.O.E. 2010, 161) (Spain), available at: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Corporate_Enterprises_Act_2015_-_Ley_de_Sociedades_de_Capital.PDF [last accessed 9.6.2022].

⁸⁹ As the GCC member states are civil law countries, the main source of obligations is the codified regulations. The court interprets and applies the obligations from a code; thus, the code is the main source that shapes directors' obligations, not the court. The

1. THE DUTY OF LOYALTY

All GCC countries' laws prohibit directors from indulging in conduct incompatible with their loyalty to the corporation. However, how far the duty of loyalty extends on some issues varies between the member states. For example, no natural or legal person can be a board member of more than five public corporations headquartered in Kuwait,⁹⁰ and may not be chairman of the board of directors for more than one shareholding corporation headquartered in Kuwait.⁹¹ On the other hand, Qatari law generally permits an individual to be a member of only three public corporations with principal offices in Qatar,⁹² and a person can only be chairman or vice chairman of no more than two corporations in Qatar.⁹³ The rest of the GCC member states follow the same concept with different limitations on how many simultaneous board memberships one person can hold.⁹⁴ In addition, the managing directors are generally not allowed to manage corporations that compete with each other, or those that have similar objectives, without the approval of the shareholders' general assembly.⁹⁵ Nor can directors participate in activities that would compete with the corporation or trade for their own or others' advantage in the corporation's field of business without prior authorization from the general assembly.⁹⁶

opposite might be true in common law countries like the United States even with the prevalence of more codified laws and regulations.

⁹⁰ Companies Law No. 1 of 2016, art. 194 (Kuwait).

⁹¹ *Ibid.*

⁹² Commercial Companies Law No. 11 of 2015, art. 98 (Qatar).

⁹³ *Ibid.*, art. 98.

⁹⁴ Commercial Companies Law No. 2 of 2015, art. 149 (U.A.E.); Corporate Governance Regulations of 2017, art. 17 (Saudi Arabia); Commercial Companies Law No. 21 of 2001, art. 8 (Bahr.); Ministerial Decision No. 27 of 2021 Issuing the Public Joint Stock Companies Regulation, art. 115 (Oman).

⁹⁵ Kuwait Companies Law, art. 106; Saudi Arabia Corporate Governance Regulations, art. 47; UAE Commercial Companies Law, art. 86; Qatar Commercial Companies Law, art. 245.

⁹⁶ Kuwait Companies Law, art. 197; Saudi Arabia Companies Law Royal Decree No. M/3 of 2015, art. 72; Oman Commercial Companies Law, art. 203; UAE Commercial Companies Law, art. 152; Qatar Commercial Companies Law, art. 245; Bahrain Commercial Companies Law, art. 279.

Insider trading is strictly prohibited in all GCC member states' laws, as it impedes the directors' loyalty. Directors may not use their own knowledge of privileged insider information to buy or sell stocks for their own personal interest or on behalf of third parties.⁹⁷

In all instances, directors face joint and several liability when the duty of loyalty to the corporation is violated. In this case, any shareholder of the corporation may file a liability lawsuit against any member of the board when the corporation hesitates or fails to proceed with the lawsuit.⁹⁸

2. THE DUTY OF CARE

All GCC member states' laws relating to business entities prioritize the interests of the corporation and its shareholders, making the board of directors fundamentally responsible for fraud, the misuse of power, and other violations of the law. Notably, this responsibility is more conspicuous when vesting power to make managerial decisions for the corporation with the board of directors. Besides the duty of loyalty, board members are personally or jointly liable for unanimously approved managerial decisions that harm the corporation in the absence of an individual objection.

While a board is liable for mistakes that happen from everyday business decisions, the GCC member state laws use different "mistake" etymologies. The Kuwaiti law uses the term "management errors",⁹⁹ while

⁹⁷ Saudi Arabia Capital Market Law, art. 50; Kuwait CMA Law, art. 118; Qatar Financial Market Authority Law, art. 40; Securities & Commodities Authority Federal Law No. 4 of 2000, arts. 39–41 (U.A.E.); Executive Regulation of the Capital Market Law Decision No. 1 of 2009, arts. 300–16 (Oman), available at: <http://www.usoman.com/upload-files/rules.pdf> [last accessed 9.6.2022]; "Disclosure Standards", in *Central Bank of Bahrain: Rulebook* arts. 56–60, 2019, available at: <https://cbben.thomsonreuters.com/rulebook/cbb-disclosure-standards> [last accessed 9.6.2022].

⁹⁸ Kuwait Companies Law, arts. 201–02; Saudi Arabia Companies Law, arts. 78–79; UAE Commercial Companies Law, arts. 162–65; Qatar Commercial Companies Law, arts. 113–16; Oman Commercial Companies Law, arts. 206–08; Bahrain Commercial Companies Law, arts. 185–87.

⁹⁹ Kuwait Companies Law, art. 201.

the Saudi law uses the term “wrongful acts committed by the board”,¹⁰⁰ and the Bahraini law uses the term “mismanagement”.¹⁰¹ The UAE law uses the term “error in management”,¹⁰² the Qatari law uses the term “gross mistake”,¹⁰³ and the Omani law uses the phrase “negligence committed by the board during the performance of their duties, and the failure to act as prudent persons under certain circumstances”.¹⁰⁴

However, none of these laws define “mistake”, nor do they provide the elements that allow a court of law to consistently determine whether a managerial decision was a mistake. The general policy is to consider mistakes as fact driven, applying a case-by-case approach. The Saudi definition of “wrongful acts committed by the board” includes routine mistakes committed by the board, while the “management errors” definition under the Kuwaiti law is not concise, as it includes a situation where the outcome of the decision does not meet expectations – even if the board made *bona fide* decisions. The Bahraini “mismanagement” term is broad, as ordinary mistakes or negligence are, by definition, mismanagement. Similarly, the term “error in management” in the UAE law is too broad as it could include every single error. On the other hand, even though Qatari law requires a “gross” mistake, the board is not immune from responsibility for undesired business outcomes. In fact, even though the Qatari legislature requires a higher standard of mistake (i.e., gross, rather than ordinary), board members may find themselves culpable without a codified business judgment rule as a safe harbour for the board’s intentions since the law did not clearly define a “gross mistake”. Similarly, the Omani law clearly makes ordinary negligence actionable *per se*, without establishing certain circumstances where the board members should act prudently.

The status quo of current GCC member states’ laws leads to unintended consequences. To avoid responsibility, a board is more apprehensive in its daily business decision-making, which eliminates the entrepreneurial spirit that should characterize the board. In this situation, board members are concerned about whether even rational decision-

¹⁰⁰ Saudi Arabia Companies Law, art. 78.

¹⁰¹ Bahrain Commercial Companies Law, art. 185.

¹⁰² UAE Commercial Companies Law, art. 162.

¹⁰³ Qatar Commercial Companies Law, art. 113.

¹⁰⁴ Oman Commercial Companies Law, art. 206.

making appears negligent, leading the board to act with extreme caution and making its managerial rule more of a bureaucracy. Some laws, like the UAE and Qatari commercial companies' laws, will even hold an absent board member liable, unless it is proved that the member was unaware of the decision or was unable to object to it later.¹⁰⁵

Furthermore, the corporation cannot issue a provision obviating the board's liability, and any decision that discharges the board from liability for a business decision is null and void by law,¹⁰⁶ even without a court order. While the corporation is authorized to file a liability suit against the board on behalf of the shareholders, if the corporation fails to file suit, each shareholder may individually file suit on behalf of the corporation pursuing damages from the board for failure to exercise its duty of care.¹⁰⁷

In either case, the board is aware that its ordinary mistakes might be actionable and that a court of law might not decide in the board's favour in the absence of a clear business judgment rule that protects its members. Without a business judgment rule, the board may be actionable for ordinary mistakes or high shareholder dissatisfaction. Implementation of a business judgment rule, however, would protect the board when it makes decisions in good faith – even if these decisions fail to produce the desired outcome and lead to shareholder dissatisfaction. And, even if shareholders are disappointed with the board's efforts, the board can feel protected by a rule that recognizes its good faith decision making without imposing undue responsibility.

Ultimately, the duties of care and loyalty are essential components of the business judgment rule. Because these loyalties exist in similar capacities in GCC member states, the business judgment rule can likely be

¹⁰⁵ Qatar Commercial Companies Law, art. 114; UAE Commercial Companies Law, art. 162.

¹⁰⁶ Kuwait Companies Law, art. 201; Saudi Arabia Companies Law, art. 78; UAE Commercial Companies Law, art. 162; Qatari Commercial Companies Law, art. 116; Bahrain Commercial Companies Law, art. 185; Oman Commercial Companies Law, art. 207.

¹⁰⁷ Most jurisdictions in the GCC have a five-year statute of limitations from the day of the mistake to file suit. However, the UAE law uses a shorter statute of limitations, i.e., three years from the day of the mistake. UAE Commercial Companies Law, art. 326; Kuwait Companies Law, arts. 203–05; Saudi Arabia Companies Law, art. 78; Qatar Commercial Companies Law, arts. 116–17; Bahrain Commercial Companies Law, art. 186; Oman Commercial Companies Law, art. 208.

codified without conflicting with existing corporate governance practices in GCC states.

V. THE GCC THROUGH THE LENS OF THE BUSINESS JUDGMENT RULE: A STEP TOWARD MODERNIZATION

The next few years are promising for the GCC. Member states are allowing the private sector to play a substantial role as more listed corporations on local stock exchanges enhance financial benefits for each GCC country by creating job opportunities, improving government revenues from corporate taxes,¹⁰⁸ and attracting portfolio investments.¹⁰⁹ Relatedly, GCC member states are working diligently to modernize the current regulations.¹¹⁰

Privatization projects are also encouraged in the GCC member states as part of the economic vision, allowing the local private sector and foreign investors to be a part of the privatized projects, including

¹⁰⁸ Income Tax Decree No. 3 of 1955, art. 2 cl. 11 (Kuwait) (amended by Law No. 2 of 2008 and the Executive Bylaws Issued by the Ministerial Order No. 29 of 2008 (Kuwait)); Income Tax Law No. 24 of 2018 (Qatar), available at: <https://www.gta.gov.qa/en/what-is-corporate-income-tax/> [last accessed 9.6.2022]; Saudi Corporate Income Tax Ministerial Decision, 2004, available at: <https://www.saudiembassy.net/corporate-income-tax> [last accessed 9.6.2022]; *Tax Rate*, Sultanate of Oman Tax Authority, available at: <https://tms.taxoman.gov.om/portal/web/taxportal/tax-rate> [last accessed 12.10.2021]; *Corporate Tax*, U.A.E. Gov. Portal, available at: <https://u.ae/en/information-and-services/finance-and-investment/taxation/other-taxes/corporate-tax> [last accessed 12.10.2021]; *0% Corporate Income Tax Rate and Other Benefits to Doing Business in Bahrain*, 2021, available at: <https://www.bahrainedb.com/bahrain-pulse/advantages-0-corporate-income-taxes/> [last accessed 9.6.2022].

¹⁰⁹ S.H. Khayat, "Determinants of International Foreign Portfolio Investment Flows to GCC Countries: An Empirical Evidence", *International Journal of Business Management*, 2020, Volume 15, p. 51.

¹¹⁰ Many GCC states continue to amend the capital markets laws and insolvency and bankruptcy laws. See e.g. Bankruptcy Federal Law Decree No. 9 of 2016 (U.A.E.), available at: <https://www.mof.gov.ae/en/lawsAndPolitics/govLaws/Documents/Bankruptcy%20law%20in%20English%2004%20May%202017%20%28ready%20for%20publishing%29.pdf> [last accessed 9.6.2022]; Reorganization and Bankruptcy Law No. 22 of 2018 (Bahr.), available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=109200 [last accessed 9.6.2022].

publicly traded corporations.¹¹¹ For these public corporations to function and flourish, the boards of directors running these corporation need to make many business decisions. Accordingly, board members need crystal clear rules on joint and personal responsibility, as flawed and inadequate rules encourage members to act cautiously when making managerial decisions to avoid liability.

A dynamic and clear rule determining the boundaries of board responsibility is needed for both local and foreign board members. No board member wants to be personally responsible for honest, but inevitable, ordinary mistakes when running a corporation. This unjust responsibility involves, not just financial losses to the corporation and shareholders, but also reputational concerns. Impacting a foreign board member's reputation can harm a member's career, even in the board member's native country where the same result could be considered a forgivable mistake under the business judgment rule. While these ramifications could directly affect the board members, they may also have harmful consequences on the visions of the GCC member states.

The unintended consequences of not having a business judgment rule may result in board member deficits. For instance, lengthy statutes of limitations for shareholder suits in most GCC countries¹¹² could lead members to fear unnecessary repercussions after their departure.¹¹³ Alternatively, an ordinary mistake that would be considered negligence in many circumstances could be actionable under the criminal codes of GCC member states.¹¹⁴ Moreover, without a solid basis for a business judgment rule as a benchmark for the liability suit, criminal liability may arise.

¹¹¹ See e.g. Privatization Law No. 37 of 2010 (Kuwait), available at: <https://e.kdipa.gov.kw/main/E372010.pdf> [last accessed 9.6.2022]; A.M. Mansour, "Public Policy and Privatization: The Case of the Qatari Experience", *Public Administration & Development*, 2007, Volume 27, p. 283.

¹¹² See discussion *supra* note 107 for the statutes of limitations in each of the GCC states.

¹¹³ Compared with the three-year statute of limitations for breaching a fiduciary duty in Delaware. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, p. 584 (Del. Ch. 2007).

¹¹⁴ See e.g. Kuwait Companies Law, art. 205; UAE Commercial Companies Law, art. 167; Qatar Commercial Companies Law, art. 117.

Shareholders of public corporations may even be hesitant to invest more in a corporation or might sell their shares owing to what they consider poor board performance. By the same token, foreign investors in the GCC stock exchanges might reconsider the value of their investments under such a fragile responsibility system, recognizing that lawsuits filed by local shareholders could lead to an even more volatile stock price, which affects investors' overseas portfolios and results in shareholders withdrawing their investment.¹¹⁵

Moreover, without the existence of such a rule, the court in each GCC member state must apply the local code where words like "error in management", "mismanagement", "wrongful acts committed by the board", and "negligence committed by the board" imply broad accountability. Even an ordinary mistake could be considered a "gross mistake" if the court finds the outcome harsh to the shareholders or the corporation, as no rule safeguards a board's *bona fide* mistakes. Ultimately, the judicial system will function better with a clear, codified rule (like the business judgment rule) to apply in liability cases.

Overall, the GCC member states need a better platform to reverse the undesired effects of restrained board decision-making to create an environment where board members can help corporations excel and flourish, and to establish a codified rule for judicial examination of board liability. Accordingly, I propose the following approaches: establishing a codified business judgment rule within the local laws of each member state; defining the elements of a "mistake" needed to rebut the business judgment rule; reducing the statute of limitations period for liability cases; and encouraging corporate exculpatory clauses for the board's liability.

¹¹⁵ These overseas investors usually buy on the GCC stock exchanges through ETFs (exchange traded funds) established for trading in foreign stocks, usually upgraded to the MSCI emerging market index. See e.g. *I-Shares MSCI Kuwait ETF*, iShares, available at: <https://www.ishares.com/us/products/312763/ishares-msci-kuwait-etf-fund>, [last accessed 20.10.2021]; *I-Shares MSCI Qatar ETF*, iShares, available at: <https://www.ishares.com/us/products/264273/ishares-msci-qatar-capped-etf> [last accessed 20.10.2021]; *I-Shares MSCI Saudi Arabia ETF*, iShares, available at: <https://www.ishares.com/us/products/271542/ishares-msci-saudi-arabia-capped-etf> [last accessed 20.10.2021].

1. A STATUTORY GCC BUSINESS JUDGMENT RULE

A statutory business judgment rule for each GCC member state would reverse the unintended consequences of the current approach and facilitate the economic visions each country is pursuing. The rule would enable the board of directors to make risk-tolerant decisions when running a corporation without worrying about liability for *bona fide* negligence. Also, as Delaware is considered the de facto federal corporate law in the United States,¹¹⁶ application of this rule would not surprise foreign directors from North America or Europe in GCC member states.¹¹⁷ This could encourage well-qualified candidates to serve on corporate boards in GCC member states as they are familiar with their duties and decision-making responsibilities. This could also make the GCC a hub for attracting strong, experienced local and foreign directors to the boards of different publicly traded corporations on the GCC member states' stock exchanges.

Moreover, the business judgment rule is a guide for courts when examining the honesty of the board's business decisions, as judges are not business experts, but are well qualified to apply the elements of the business judgment rule.¹¹⁸ A clear, dynamic rule will enable judges to not merely examine the goal of the decision, but also the circumstanc-

¹¹⁶ P. Molk, "Delaware's Dominance and the Future of Organizational Law", *Georgia Law Review*, 2021, Volume 55, p. 1111.

¹¹⁷ More than 66% of US Fortune 500 Corporations are incorporated in Delaware along with more than 1 million other business entities. Business communities outside the United States, especially those involved in corporate law, are familiar with Delaware as the most well-known location for corporate filings in the United States. *About Delaware Division of Corporations*, available at: <https://corp.delaware.gov/aboutagency/> [last accessed 15.10.2021].

¹¹⁸ In the GCC member states' courts, judges sit in different dockets and practice more than one legal specialty. However, because of their unique role in business law, as well the common law in the United States, Delaware judges not only apply, but also create corporate law rules. "Delaware chancellors sit at 'the center of the corporate law universe.' Unlike other courts, which face corporate cases only episodically, such cases make up a very high percentage of the Delaware chancellors' docket. The frequency with which they face such cases provide a strong incentive for Delaware's chancellors to master both doctrine and the business environment in which the doctrine works (...)". Bainbridge, *supra* note 59, p. 121.

es surrounding the decision-making process. In the GCC, judges often play the role of business experts when determining whether the board erred in making a business decision, with no clear elements or rules to help unravel the puzzle. Yet, in *In Re Walt Disney Company Derivate Litigation* (2005), the Court of Chancery synopsised the role of the judges within the business judgment rule.¹¹⁹

Delaware law is clear that the business and affairs of a corporation are managed by or under the direction of its board of directors. The business judgment rule serves to protect and promote the role of the board as the ultimate manager of the corporation. Because courts are ill equipped to engage in post hoc substantive review of business decisions, the business judgment rule ‘operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation’.

Furthermore, the inclusion of a business judgment rule will benefit the shareholders of the publicly listed corporations in the GCC.¹²⁰ Through the rule’s lens, rational shareholders will be able to assess the boards’ decisions relying on the elements of the rule, ensuring that shareholders will not inappropriately urge the corporation to file suit or file a personal suit unless solid evidence exists to assert a claim against the board. In time, application of the business judgment rule by courts will clarify how the rule is presented, rationalized, and applied in the region.

2. ELEMENTS OF THE “MISTAKE” NEEDED TO REBUT THE BUSINESS JUDGMENT RULE

Apart from the Qatari law defining conduct as a “gross mistake”, the current GCC member states’ laws do not define the “mistake” for which board members are held accountable, enabling either a regular mistake or negligence actionable under these laws. For a more coherent business judgment rule, the laws should clarify that an ordinary mistake made by the board in good faith is not *per se* a cause of action. Accordingly, the standard of mistake should start at a minimum with gross

¹¹⁹ *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005).

¹²⁰ Particularly active overseas shareholders who invest in the GCC stock exchanges.

negligence, like the current Qatari law. A definition of gross negligence should be available for the court to examine as well. As defined by Black's Law Dictionary, gross negligence is "the lack of slight diligence or care" or "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party".¹²¹ In *Smith v. Van Gorkom*, the court stated that the taking by directors of uninformed business decisions constitutes gross negligence, hence the business judgment rule does not grant protection.¹²² As Howell explained: "The *Van Gorkom* decision stripped corporate directors and officers of the protective cloak formerly provided by the business judgment rule, rendering them liable for the tort of gross negligence for the violation of their duties under the rule".¹²³

On the other hand, the business judgment rule presumption should be rebuttable when gross negligence clearly occurred¹²⁴ or if the plaintiff can show bad faith or self-dealing by the board members¹²⁵ as well as fraud, illegality, or conflict of interest – conduct that is more than mere negligence.¹²⁶ Another way to rebut the business judgment rule is to show that there is no rational business purpose behind a board's decision, as the court found in *Kahn v. M&F Worldwide*: "Where business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose".¹²⁷ If the codified business judgment rule is clear enough to define a mistake that forms the basis for a liability suit and how a mistake can be rebutted by the board members, the court will be able to proceed with clarity.

¹²¹ *Black's Law Dictionary*, Thomson Reuters, 7th ed., 1999.

¹²² *Smith v. Van Gorkom*, 488 A. 2d 858, p. 873 (Del. 1985).

¹²³ L.A. Howell, "Post *Smith v. Van Gorkom* Director Liability Legislation with a Pro-active Perspective", *Cleveland State Law Review*, 1998, Volume 36, p. 559.

¹²⁴ *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, p. 654 (Del. 2014).

¹²⁵ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del.1993).

¹²⁶ Bainbridge, *supra* note 59.

¹²⁷ *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635.

3. SHORTER STATUTE OF LIMITATIONS FOR LIABILITY CASES

The statute of limitations for bringing a liability suit in the GCC member states is typically five years from the day the decision was made, except in the UAE, which recognizes liability for only a three-year period. This five-year period is not extensive and does not facilitate the objectives of each GCC member state's economic vision. Board members remain vulnerable from the day the decision is made and are not relieved of this vulnerability for five years. Moreover, since some board members are not citizens of GCC member states, a long statute of limitations leaves non-citizen directors liable even if they leave the GCC.

A two-year statute of limitations will lead to better outcomes.¹²⁸ If the corporation or shareholders think that they have a case against the board, they need to file within two-years of when the decision was made,¹²⁹ which will reduce the burden on board members and ease the burden on the court system. This burden may arise when a shareholder files a liability case against the board members the day before the statute of limitations expires. As a case takes time to proceed, the court may not hear the case until months after the filing date. Yet, as time passes, board members may truly forget the rationale behind decisions made five years ago. In that time, numerous decisions will have been made by the board, including by board members who serve on the boards of more than one corporation. Despite written records, a board member may not have sufficient recollection to adequately confirm that the decision was made in good faith.

A five-year statute of limitations requires extensive records and an impressive memory to reduce board member concerns about potential liability suits filed before the statute of limitations expires. Moreover, the statute of limitations imposes additional burdens on non-citizen board members, requiring presence for a lawsuit even after the conclusion of a member's term regardless of whether the board mem-

¹²⁸ The proposed two-year statute of limitations does not mean that the corporation or the shareholders will be unable to file suit after two years if the board's error constitutes a criminal offence; the liability lawsuit does not lapse until the criminal suit lapses.

¹²⁹ Which is shorter than the three-year period of Delaware fiduciary duty statutes of limitations. See discussion *supra* note 113.

ber remains in the country. The likely financial burdens and potential criminal responsibility may even deter former board members from responding to the litigation, decreasing shareholder access to justice. Although a shorter statute of limitations does not eliminate these concerns, it would drastically reduce sustained concern from board members and increase the likelihood that all board members are available to respond to the lawsuit.

Scepticism over whether the board members committed a mistake should induce application of the business rule, and any other rebuttal from the corporation or its shareholders should be timely filed so that board members have peace of mind to continue making business decisions without fear of potential lawsuits.¹³⁰ In fact, a lengthy window for bringing a liability suit harms board members. When looking at the effect of lengthy statutes of limitations on potential wrongdoers, Kelly stated that “Ordinarily, one wronged by another’s conduct will seek legal redress fairly soon after the injury. Because of this common pattern of behavior the accused wrongdoer may reasonably expect that he will not be sued long after the event. He may then argue that a long-delayed suit is a wrong to him, regardless of its substantive merits”.¹³¹

Moreover, defendant directors will be better prepared to present evidence to disprove any claims if the statute of limitations period is shorter. The court, on the other hand, will handle cases more efficiently because two years is reasonable enough for any defendant directors (including non-resident board members) to appear in court and defend their decision.

¹³⁰ T.T. Ochoa, A. Wistrich, “The Puzzling Purposes of Statutes of Limitation”, *Pacific Law Journal*, 1997, Volume 28, p. 453.

¹³¹ P.J. Kelley, “The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience”, *Wayne Law Review*, 1978, Volume 24, p. 1644.

4. ENCOURAGING CORPORATE EXCULPATORY CLAUSES FOR THE BOARD'S LIABILITY

None of the GCC member states' laws allow shareholders to approve exculpatory clauses in the articles of incorporation,¹³² unlike the Delaware law where shareholders approve such exculpatory clauses as directors' defence for breach of the duty of care¹³³ or for ordinary mistakes made in good faith. Under article 102(b)(7) of the Delaware General Corporation Law, such exculpatory clauses are permitted to eliminate or limit directors' duty of care liability except: "any breach of the director's duty of loyalty to the corporation or its stockholders; for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (...) for any transaction from which the director derived an improper personal benefit".¹³⁴

Under the business judgment rule, directors are liable for only gross reckless mistakes, not ordinary mistakes. However, even if the business judgment rule is the *de iure* rule, a court could determine that the directors, while not liable for honest decisions made in good faith, are liable under the general rules of negligence. In other words, the result or the outcome of a board's decision may be the base for a negligence suit. But while the duty of good faith does not prevent liability due to negligence, the elements of negligence can be challenging to determine. Therefore, an exculpatory clause is necessary to avoid board liability for general determinations of negligence (not gross negligence) under the business judgment rule. For instance, if a decision is made to sell a corporation's inventory or land, and the price of the inventory or the land increases shortly after the deal (e.g., an imminent supply chain crisis raises inventory demand or the value of land changes) directors should know they are not responsible if the decision was made in good faith, with ade-

¹³² The board's liability cannot be exculpated by shareholders vote, and any decision that discharges the board from the liability of the business decisions is null with no exceptions.

¹³³ J.L. Reed, M. Neiderman, "Good Faith and the Ability of Directors to Assert 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty", *Delaware Journal of Corporate Law*, 2004, Volume 29, p. 111.

¹³⁴ Del. Code Ann. tit. 8, § 102(b)(7) (2009).

quate information, and with the honest belief that they acted with due diligence.

While the business judgment rule might protect directors from liability when the elements are satisfied, the outcome of a decision could still open the door for shareholder suits over regular mistakes (e.g., shareholders alleging that supply chain or eminent domain should have been expected under such circumstances). Because daily business decisions contain risk by default, exculpatory clauses for ordinary mistakes should be implemented along with the business judgment rule. Essentially, the GCC member states' laws should not only adopt the business judgment rule model, but also allow exculpatory clauses for directors to prevent shareholder suits for ordinary mistakes when the business judgment rule conditions are satisfied. Of course, exculpatory clauses in the region should not eliminate or limit any actions based on bad faith conduct, similar to Delaware law.

CONCLUSION

The progression of member states' economic visions requires collective GCC efforts to improve the regional economy by diversifying and attracting more foreign investors, as each member state independently proceeds to expand its domestic economy. GCC member states are developing new markets, but their market laws are still not comprehensive and do not include sufficient protections to entice new shareholders, particularly foreign portfolio investors or highly qualified foreign directors. To induce foreign investors and foreign directors to transfer their experiences and increase GCC corporations' global competitive advantage, states need to protect corporate boards of directors, empowering members to make *bona fide* decisions that help grow corporations without assuming full liability if the decisions do not bring about the desired result.

As the market in the United States has existed for a long time, Delaware has adapted corporate governance to implement the business judgment rule and help directors, as well as shareholders, feel safe. The rule enables directors to make decisions in good faith while ensuring that shareholders retain the ability to hold directors liable in appropri-

ate circumstances. The GCC needs individual member states to implement a rule like the business judgment rule to improve corporate governance practices that will enable corporations to grow and expand the regional economy. Fortunately, the business judgment rule and its elements – particularly the classification of “mistakes”, a shorter statute of limitations, and exculpatory clauses – appear to be compatible with existing corporate governance practices in GCC member states.

In an ever-changing world, diversifying the GCC member states’ economies is not a choice – it is a necessity. States need a developed plan for updating their laws to attract foreign investors and qualified individuals who are eager to participate in the developing regional economy and feel sufficiently protected from frivolous litigation based on how they conduct a corporation’s business.