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## صلاحيات وواجبات أعضاء مجلس الإدارة في المملكة العربية السعودية والشريعة الإسلامية (القانون الإسلامي)

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### ملخص

نظرًا لعولمة الأعمال ومفهوم الأنشطة التجارية بلا حدود، فإن هذه الظواهر الجديدة تحتاج إلى أن تكون إدارة الأعمال منفتحة وتعتمد وممارسة مهارات الإدارة مع وضع المعايير الدولية في الاعتبار، وإبلاء الاعتبار الجيد لظروف تدويل الأعمال من خلال المديرين الذين لديهم الصلاحيات المنصوص عليها في العقد والقانون. أظهرت الأزمات المالية في السنوات السابقة أهمية واجبات المديرين لإدارة شؤون الشركة بشكل صحيح؛ كانت هذه الأزمات نتيجة العديد من حالات الغش وسوء الإدارة. تم تقنين واجبات أعضاء مجلس الإدارة في عدد من الدول -كالمملكة المتحدة أو إيرادها بشكل ضمني في المملكة العربية السعودية- لتعزيز وضوح القانون وتسهيل فهم مسؤوليات المديرين تجاه الشركة والآخرين. كما يهدف إلى منع الاحتيال وسوء الإدارة الذي يؤدي إلى انهيار الشركات.

تفحص هذه المقالة وتحلل صلاحيات وواجبات أعضاء مجلس الإدارة في المملكة العربية السعودية والشريعة الإسلامية (القانون الإسلامي) من أجل توضيح مدى فعالية هذه الأنظمة. وذلك من خلال تقييم نقدي للتشريعات ذات الصلة بصلاحيات وواجبات أعضاء مجلس الإدارة في المملكة العربية السعودية وإيراد السوابق القضائية بشأن موضوع الدراسة وإظهار المشكلات العملية التي قد تتجم عن بعض التشريعات. من خلال القيام بذلك، تقدم الدراسة صورة دقيقة لسلطات وواجبات المديرين، وتوفر حلولاً للمشاكل العملية للتشريع في نفس السياق.

**كلمات دلالية:** واجبات المدير، صلاحيات مدير الشركة، القانون السعودي، القانون الإسلامي.



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# **The powers and duties of company directors in Saudi Arabian law and Islamic law**

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## **Abstract**

This article investigates and analyses the powers and duties of the directors in Saudi Arabia and Islamic law in order to demonstrate the extent to which these regulation work effectively. This is by a critical evaluation of relevant legislation and case law on the subject matter of the study and demonstrating practical problems, which may result from some legislation. By doing this, the study provides an accurate picture of the directors' powers and duties, and provides solutions to practical problems of legislation in the same context.

Keywords: directors' duties; Saudi Arabia law; Islamic law.

## **1. Introduction**

As the globalisation of business introduced the concept of borderless business activities, these new phenomena need business management to be open and adopt management skills with the international dimension in mind, and give good consideration to the circumstances of the globalisation of business. One of the most prominent perspectives on current global business activities is Saudi Arabia's Vision 2030<sup>2</sup> that aims to increase the contribution of the private sector to the gross domestic product (GDP) and to attract foreign investment to Saudi Arabia, which means wider

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<sup>2</sup> See Saudi Arabia' vision 2030, available at <http://vision2030.gov.sa/en> access date 16/July/2018.



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economic openness to the world. Several large Saudi projects<sup>3</sup> will also serve as a centre for international communication in the economic, cultural, legal and other fields that have undoubtedly brought and will bring in many foreign companies. Therefore, Saudi Arabian Companies Law 2015 (SACL 2015) has been issued to provide a legal environment for incubators and incentives for the initiative and investment, in order to enhance the value of companies and develop their activities and contribute to Saudi economy. It is necessary for foreign companies and Saudi Arabia companies

The Saudi legislator gives broad powers to the company directors to achieve the company's purposes and promote its sustainability. The directors of companies must maintain independence to perform their powers and duties as they deem fit for the success of the company, but this management of the company is subject to a number of controls and balances, both those contained in the legislation or the constitution of the company. The importance of these balances in preventing directors from abuse of position in the event of failure to comply with the duties will be discussed below.

It is noteworthy to mention the sources of the directors' duties, before addressing these duties. During ruling on the disputes related to directors' duties in Saudi Arabia, it is imperative to refer to the provisions stipulated in the Saudi Arabian Companies Law 2015 (SACL 2015) and other legislation related to the directors' function. The law is the primary source for the directors' duties. Accordingly, it is imperative that the judges, when a dispute is presented to them in this matter, seek to find an answer in the legal provisions.<sup>4</sup>

In the event that the judges do not find any relevant legislative provisions or do not find an answer in the legislative provisions of the presented dispute, they will resort to

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<sup>3</sup> For example *NEOM*, The Saudi *Aramco* listing in the capital (stock) markets, *Red Sea* project, The Saudi-Egypt Causeway that links Asia with Africa with a causeway and bridge, *Silicon Valley* in Saudi Arabia and others.

<sup>4</sup> Dr Muhammad Hassan Al-Jabr, Saudi Commercial Law, Riyadh, (2000), ISBN 99-331-440-5, p. 23.



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another source, which is the provisions of Islamic law. Islamic law is considered as the general law in Saudi Arabia, which regulates all legal ties of any nature and subject to all persons. Therefore, if there were no legal provisions answer and solve the presented dispute, then it is necessary to refer to the provisions of Islamic law to search for the required answer. However, it should be noted that it is not resorted to the provisions of Islamic law unless the legislative provisions are silent or unclear. However, there is a question when the provisions of Islamic law conflict with commercial legislation. Whereas, Islamic law is considered in this case as Civil Law, it has been agreed in the event of a conflict between the provisions of the Civil Law and the provisions of the Commercial Law, the commercial law provision should prevail over the civil law provision if provisions were in the same degree.<sup>5</sup>

One of the sources for directors' duties is the company's articles of association. The company's constitution is usually that which regulates the company's management and the powers of directors and imposes restrictions on the powers of directors. As in the contract of appointment of the director, it may stipulate the directors' powers and impose some restrictions on them. The company purpose determined in the articles of association of the company is considered one of the sources of the directors' duties. The company purpose is the real project that the shareholders have targeted to achieve, and directors must commit to act to achieve the purpose determined in the company's articles of association, accordingly, the directors' powers are restricted to this purpose. General assembly decisions may grant permission to the directors to breach some duties, such as a conflict of the personal interests with the interests of the company or competition and the like, it may also restrict some of the powers of the director, as an attachment to the resolution to appoint the director.

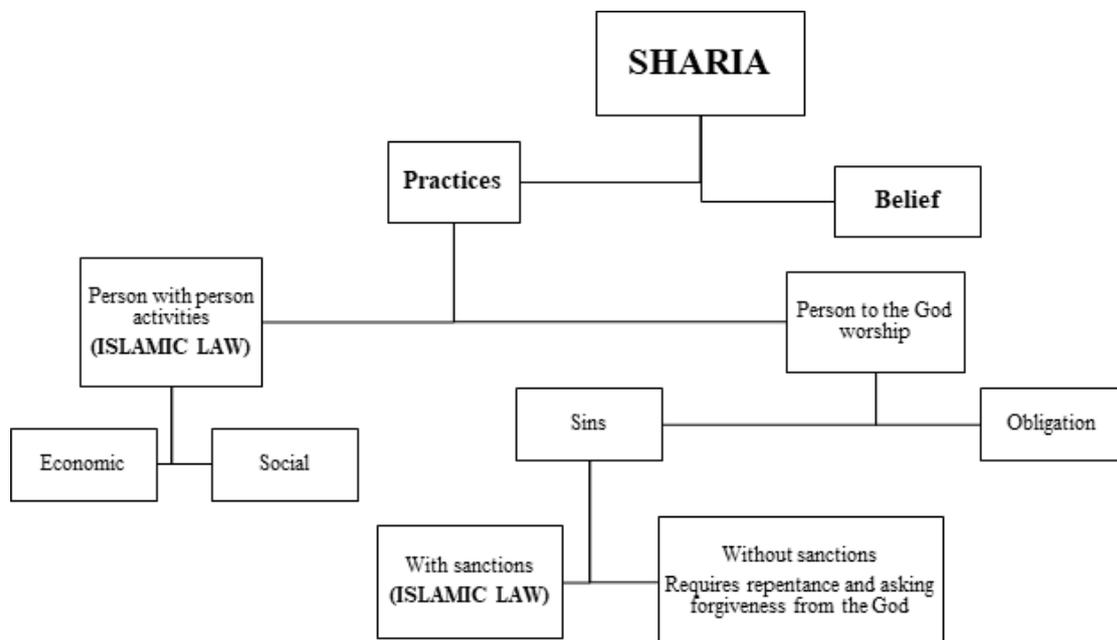
Finally, another of the sources for the directors' duties is commercial custom, which means the set of unwritten rules that with regard to a specific matter in a particular way with a belief in binding it and the necessity to follow its provisions. In the event

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<sup>5</sup> Muhsin Shafiq, Commercial Law, *Dar Al-Nahdhat Al-Arabia*, Cairo, (1997) para 21.

of a conflict between legislative provisions and commercial customs, the legislative provisions should prevail over the commercial customs.<sup>6</sup>

In this regard, it is worth noting that the difference between the term Sharia and Islamic law, as it is well known that Sharia includes all Islamic provisions, and it includes beliefs and practices. Not all of these provisions may fall within the concept of Islamic law. Practices in Islamic law are divided into a person to the God worship or a person with another person activity. A person to the God worship is divided into two parts, obligation or sins. As for sins, they are two parts, which sin with sanctions (this fall or that sin without sanctions, which requires repentance and asking forgiveness from the God. As for a person with another person activities, it is divided into two parts: economic and social, and they are all fall within the concept of Islamic law. Therefore, it can be said that Islamic law is what the judiciary can deal according to the provisions of Sharia (see figure below).



<sup>6</sup> Ibid.



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Islamic law does not prohibit in the management of companies any organisational legislation or administrative regulation intended to protect the interests of the company and in order to continue to achieve the desired purpose, provided that this legislation does not conflict with the provisions of Sharia. The basis for managing companies and what the director is permitted to do is due to the custom of traders. The director in Islamic law is an agent of the shareholders, as the company's management is based on agency theory. Therefore, the company's director is required to have the honesty, integrity, experience and knowledge.<sup>7</sup>

The approach followed in this study is to combine the Saudi Arabian law and Islamic law because Islamic law in relation to Saudi law is like the common law to the UK law. Many legal provisions in Saudi Arabian law are explained by the provisions of Islamic law.

## **2. Duty to act within powers to achieve the purposes of the company**

Directors of companies have broad responsibilities for the management of the business of the company. These powers are not absolute but are subject to restrictions limiting them in either a company's constitution, the purposes so conferred or provisions of the SACL 2015. Therefore, the SACL 2015, explicitly stipulates that the directors of companies must act within their powers, in accordance with the company's constitution and for the purposes so conferred.<sup>8</sup> Directors are fiduciaries, therefore, a fiduciary is expected to be very loyal to the company so that there is no conflict of duties between the fiduciary and the company, and the fiduciary must not benefit from their position as a fiduciary or exercise their powers for personal benefit.

In the SACL 2015, the powers of the directors are absolute unless the company's articles of association restrict these powers, and if the company's articles of association do not determine that, the powers are within the scope of the duties

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<sup>7</sup> Kamal Ibn Al-Humam, Fateh Al-Qadeer, Dar AlKutub AlElmiah, Beirut, (2003), part 5 p 9.

<sup>8</sup> SACL 2015, Arts 29, 30 and 75; SACGR 2019, Art 21.



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stipulated in the SACL 2015 and which consistent with the purposes of the company. Articles 29 and 75 of the SACL 2015 stipulate that the directors undertake all regular management actions that fall within the purpose of the company, and represent the same before courts and arbitral tribunals and any third party unless the company's articles of association explicitly stipulate the restriction of their power. Saudi law grants broad powers to directors to exercise management of the company. Article 22 of Saudi Arabian Corporate Governance Regulations 2019 (SACGR 2019) also affirmed that the company's directors have the broadest powers in the management of the company to achieve its purposes. Therefore, the phrase "*all management actions and the acts that fall within the purpose of the company*"<sup>9</sup> stipulated in the SACL 2015 interprets the extent of the directors' powers in the company's management. In this regard, Al-Rasheed<sup>10</sup> says that the position of director (the acts assigned to be done) is not determined on the basis of an agency or delegation, but rather that it is determined on the basis derived from the nature of the company and its business. But the power of the director is not completely absolute, there are some restrictions, for example, adherence to the purpose of the company so the director cannot do business that it is inconsistent with what is stated in the company's articles of association, otherwise, the director is considered exceeding her/his powers and is being held liable. Also, the director is restricted by the principle of specialisation; it is not possible to override the powers of others that determined in the company's articles of association or what has been approved in the general assembly meetings or even what violates the SACL 2015, such as when the director exceeds the power of the board of directors unless it was delegated by the board of directors. The SACL 2015 restricts the power of the director in several businesses, which are, donations, guaranteeing the company to others, resorting to arbitration, reconciliation regarding the rights of the company, selling or mortgaging real property unless such sale falls within the scope

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<sup>9</sup> SACL 2015, Art 29.

<sup>10</sup> Abdulaziz Al-Rasheed, (2010), The liability of the chairman and members of the board of directors of the joint-stock company. Master Dissertation. Department of Commercial and Arbitration Law, College of Law, Al-Khalijia University, Bahrain. P51.



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of the company's purposes, and selling or mortgaging the company's place of business, except with the consent of the shareholders or an explicit provision in the company's articles of association.<sup>11</sup>

Perhaps the intention of this is that the Saudi legislature seeks to protect the company and the shareholders and others due to the seriousness of the power granted to a director in this regard, so the legislator stipulated the necessity of authorising these acts with controls and conditions for their exercise by the company's articles of association or the general assembly meetings of shareholders; for example, the directors of the company can be granted the power to absolve the company's debtors of their obligations with specific controls in the company's articles of association, such as showing the maximum value of the debt that is waived, the period that must be exhausted before the release, the total debts that may be waived during the same financial year and so forth from the controls.<sup>12</sup> The Saudi legislator allows the board of directors to sell or mortgage the company's assets, the company's business place, or release the company's debtors of their liabilities, and contract loans for any periods of time.<sup>13</sup> Whereas in the former Saudi Arabian Companies Law 1965, the board of directors may not contract loans with a term of more than three years or sell or mortgage the company's estates, sell or mortgage the company's business place, or release the company's debtors of their liabilities unless expressly stipulated in the company's articles of association.<sup>14</sup>

As for the duty to undertake the purposes of the company, every company is established to implement a specific purpose that stated in the company's articles of association that the shareholders aim to achieve through the company. There are some duties that are explicitly stipulated in the SACL 2015 that relate to the company's business and its financial life, and which some consider different duties for directors.

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<sup>11</sup> SACL 2015, Art 30.

<sup>12</sup> Al-Jabr (n 4) 335-336.

<sup>13</sup> SACL 2015, Art 75.

<sup>14</sup> The former Saudi Arabian Companies Law 1965, Art 73.



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However, after scrutiny, it can be said that these duties are within the scope of the duty to undertake the purposes of the company. Among these duties, is the duty to register the company in the Commercial Register and to publish its Articles of Association and bylaws and any amendment on it.<sup>15</sup> The duty to prepare the company's annual financial statements and a report on its operations and financial position.<sup>16</sup> There is a duty to protect the statutory reserves of the company, as the SACL 2015, obliges to set aside 10% of each year of net profits to form a reserve called the statutory reserve of the company until the company's total reserve reaches 30% of the company's paid-up capital.<sup>17</sup> Finally, there is a duty to report the company's losses in the event that the losses total 50% of its capital, the company's directors must record this incident in the commercial register and invite the shareholders to a general assembly meetings to consider whether the company shall continue to exist or to be dissolved and if the company's directors neglect to invite the shareholders or the shareholders fail to pass a resolution in order for the company continue to exist or to be dissolved, the company shall be deemed dissolved by the virtue of the law.<sup>18</sup>

Islamic law is consistent with Saudi Arabian law that the director may act in the company's business in the interest that leads to its success. The directors have all power if they are granted by shareholders, and this principle is limited by what the people in the same field are accustomed to in terms of trade and company requirements.<sup>19</sup> However, Islamic law restricts the directors in their acts to what the Sharia permits. If the directors have acted in respect of something that is forbidden by

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<sup>15</sup> SACL 2015, Arts 13 and 22.

<sup>16</sup> SACL 2015, Art 175.

<sup>17</sup> SACL 2015, Art 129.

<sup>18</sup> SACL 2015, Art 181.

<sup>19</sup> Ibn Rushd Al-Qurtubi, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid*, *Maktabat Al-Kulyat Al-Azhryah*, Cairo, (1986), part 2 p 280.



Sharia (such as dealing with usury or fraud in transactions and similar forbidden transactions) their acts are invalid, and they are liable for their acts.<sup>20</sup>

### 3. Duty to exercise reasonable care

In order to ascertain the performance of the company directors and their care of duties, several things must be considered, including the consideration of the nature and manner of the company's business, in accordance with the circumstances surrounding it with what is not inconsistent with the company's articles of association and the provisions of the director's contract of appointment. The provisions of Islamic law must also be considered to determine the level of care required by the director.<sup>21</sup>

In general, the level of care in Islamic law has two standards in accordance with the meaning of performing care. First, the commitment to caring for the usual person. The second is the commitment to achieve the desired purpose. What is meant by performing the usual person care is that the person does the care of the usual person in the same circumstances and position to try to reach the desired purpose and s/he does not have to achieve this purpose. The care here is subjective and objective standard and it is agreed upon by appointment contract, custom or determined by law, and the typical example of the duty to do the usual person care is the care of a doctor, as s/he does not commit to healing the patient, but rather s/he is obliged to do care that matches the scientific principles in the medical field.<sup>22</sup> As for the commitment to achieve the desired purpose, it is the subject of the person doing a work that leads to achieving a specific result, such as the commitment of the contractor to establish a specific building, and the commitment of the tenant to return the leased property after the end of the lease. In this type of commitment, the result (the desired purpose) is intended, and the effort and care that the person exerts to achieve are only a means to

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<sup>20</sup> Aladdin al-Kasani, *Badayea Al-Sanaiya fi Tartib Al-Sharia*, Second Edition, *Dar AlKutub AlElmiah*, Beirut, (1986), part 6 p 68-72.

<sup>21</sup> The Basic Law of Governance of the kingdom of Saudi Arabia 1992, art 7.

<sup>22</sup> Al-Alfy, Muhammed Jabr, Health Insurance and Use of Health Cards, *Journal of the Islamic Fiqh Academy*, Thirteenth Issue, (2001) 3/482.



achieve the commitment (the result/the desired purpose) and effort and care are not the subject of the commitment, therefore, if the result (the desired purpose) is not achieved, the liability is held.<sup>23</sup>

Islamic jurisprudence has clearly distinguished between these two types of the commitment of care. In the commitment to do the usual person's care, there is no liability that if a director does reasonable care, without neglect or exceed the usual norm. In the event that the achievement of the result is stipulated as a condition in directors' acts, the condition is invalid and the directors are not liable if they fail to achieve the desired purpose if they did the reasonable care.<sup>24</sup>

The Saudi legislature adopted the director commitment in a manner that is consistent with Islamic law and exerted the care of the usual person's care (objective-subjective standard).<sup>25</sup> However, the subjective standard at least has to be not less than the objective standard. If the director proves that s/he is doing this care on a personal level, s/he remains liable if the care is less than the substantive level, then s/he must provide reasonable care as those who are in the same position. The directors must be obligated to perform their duties and commitment to the limits of their power determined in the law or the articles of association of the company or under the appointment contract,<sup>26</sup> and to refrain from any activity that harms the company and the purpose that the company is established to achieve.<sup>27</sup> Fahmy<sup>28</sup> confirms that directors must carry out the business and exercise the powers that they have granted, they must make every effort to improve the company's management and monitor the

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<sup>23</sup> Ibid.

<sup>24</sup> Al-Baghdadi, Ghiath Al-Din, *Majmae Al-Dhamanat, Dar AlKutub AlElmiah*, Beirut, (1971) part 2 p 47.

<sup>25</sup> SACGR 2019, Art 21.

<sup>26</sup> Dr. Abdul-Razzaq Al-Sanhouri, Explaining the Civil Law, *Dar Al-Nahdhat Al-Arabia*, Alexandria (2004), Part 1, p. 428.

<sup>27</sup> Muhyi-Al-Din Al Nawawi, *Almjmw'a Shrha AlMhdhb, Dar AlKutub AlElmiah*, Beirut, (2016) part 15 p 123.

<sup>28</sup> Mahmoud Mohamed Fahmy, The liability of the members of a board of directors of a company whether in their personal capacity or as representatives of others, *Majalet Misr Al-Mueasira*, (1985) 401 p. 6.



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progress of its business and achieve the purposes for which the company is established, and their commitment in this regard is a commitment to exercise reasonable care not to achieve the result (desired purpose), and therefore if the directors carry out their duties carefully, there is no liability, even if the company's conditions worsen. In the judgment declared by the Commercial Court,<sup>29</sup> the respondents (two directors) were liable to pay compensation to the shareholders for the damages incurred by the company due to their negligence in the company's management. Where the respondents committed financial violations such as paying incentives and bonuses for the company employees including themselves despite not achieving profits in the activity of the company, but the source of these incentives and bonus was from the sale of assets in the company. It has been also proven that there were differences and inconsistencies in the company's accounts and budget and that there are deficiencies in the company's internal monitoring process. Accordingly, the court ruled the directors liable for negligence in the company's management.

#### **4. Duty to maintain confidentiality**

The SACL 2015 states that directors may not disclose the secret information related to the company that they acted for, and they also may not exploit what has come to their knowledge by reason of their position, to achieve an interest for themselves or their relatives or third parties.<sup>30</sup> This assertion from the Saudi Arabian legislature to obligate directors to maintain secrets is in accordance with Islamic law and most other legislation. Islamic law urges honesty, including maintaining the business secrets, as it is one of the requirements for fulfilling the obligations that the director has signed with the company to take into account its interests as like as take into account the

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<sup>29</sup> The Saudi Arabian Commercial Court, Q/3/847 (2016); 291 (2019).

<sup>30</sup> SACL 2015, Art 74.



interests of herself/himself and her/his family.<sup>31</sup> Islamic law also urges the importance of maintaining secrets and considered that disclosing secrets is a betrayal of trust.<sup>32</sup>

However, the Saudi Arabian legislature does not specify the meaning of secrets as stated in the SACL 2015. Some tend to exclude facts and information known to people, so it is not considered as secret.<sup>33</sup> However, there is another opinion, which is that the known facts and information of the people remain a secret because its confirmation from the director is confirmation of its correctness. This opinion is what the French court<sup>34</sup> adopted that revealing the secrets is not permissible, even if it focuses on facts or information that has become known to people because revealing the information by a director or an employee leads to confirm its correctness. Koman and Abdul-Hamid<sup>35</sup> argue that what is meant by company secrets is every specific fact or information or a specific number that is not subject to publication or declaration, and no one but the concerned person (director) knows about it, thus the facts and general information or previously published in any legal way are not considered as secrets.

Jubran<sup>36</sup> says that the nature of the obligation to maintain secrets is not absolute but rather relative, so the scope of the directors' duty to not divulging company secrets outside the General Assembly meeting is determined and then the directors may discuss these secrets during this meeting. Therefore, the directors are prohibited from discussing the secrets with the shareholders outside the scope of the general assembly meetings. Also, it is not considered a secret that the information required by the laws

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<sup>31</sup> The Noble Qur'an, *Surah Al-Ma'idah ayat 1, Surah Al-Isra ayat 34, Surah Al-Mu'minun ayat 8.*

<sup>32</sup> The Noble Qur'an, *Surah Al-Anfal ayat 27.*

<sup>33</sup> Abdul-Qadir, The duty of confidentiality in the framework of commercial companies, Vinnak, *Majallat al-Qānūn wa-al-Mujtam'* 2014 Issue 3, pp.48-79, 51 DOI: 10.12816/0010004.

<sup>34</sup> See [crime., 19 decembre 1986, I. p. 347] as cited in Feninekh, Abdul-Qadir., The duty of confidentiality in the framework of commercial companies, Vinnak, *Majallat al-Qānūn wa-al-Mujtam'* 2014 Issue 3, pp.48-79, 51 DOI: 10.12816/0010004.

<sup>35</sup> Koman, Muhammad. Abdul-Hamid, Reza, corporate crime in Saudi Arabia law., *Dar Al-Nahdhat Al-Arabia.*, Cairo, (1996) P. 153.

<sup>36</sup> Sadiq Jubran, The board of directors of the Saudi joint-stock company., First edition, Al-Halabi Publications, Beirut, 2006, pp. 287-290.



to place it at the disposal of shareholders in order to inform them of the information about the company before a period of the general assembly meeting or that information permitted by the laws to be published. However, the duty not to divulge secrets is limited to what the directors have known information about the company because of their positions only, which is without their positions in the company, they would not have known this information.<sup>37</sup>

Finally, article 74 of SACL 2015 stipulates the penalty for breach of this duty, as it provides two penalties that must be applied together, namely the dismissal of the director from the company's management and the compensation for the damages incurred by the company due to the disclosure of the secret information.

Confidentiality in Islamic law is based on the concept of trust, and maintaining trust is an obligation.<sup>38</sup> Almighty said in the Noble Quran<sup>39</sup> "O you who have believed, do not betray Allah and the Messenger, nor betray your trusts while you know".<sup>40</sup> Also, this is the principle of the Prophet Muhammad (peace be upon him), in all his acts in the works that need to maintain confidentiality.<sup>41</sup> This is the principle of the companions of the Prophet (PBUH).<sup>42</sup> Therefore, divulging business secrets is a breach of trust, and its consequences are grave, it is cheating and fraud. Rather, it is a sign of hypocrisy and bad morals. The Prophet Muhammad (PBUH) said that "The hypocrite signs are three if they talk, they lie, if they promise, they renege if they are trusted, they betray".<sup>43</sup>

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<sup>37</sup> SACL 2015, Art 74.

<sup>38</sup> Al-Raghib al-Isfahani, *Al-Mufradat fi Gharib al-Quran*, Dar Al-Qalam, Beirut, (2009), 25.

<sup>39</sup> The Noble Qur'an, *Surah Al-Anfal ayat 27*.

<sup>40</sup> See Sahih International at <http://corpus.quran.com/translation.jsp?chapter=8&verse=27> [accessed 13 April 2020].

<sup>41</sup> Muhammad Al-Bukhari, *Sahih al-Bukhari*, First edition, Dar Touq Al-Najat, Damascus, (2002), 2948.

<sup>42</sup> *Ibid*, 2318.

<sup>43</sup> Muhammad Ibn Al-Arabi, *Aridah al-Ahwadhi bi-Sharh Sahih al-Tirmidhi*, Dar Al-Fikr, Beirut, (1995), part 5 p 308.



The basic principle is that all secrets in Islamic law must be maintained, whether small or large, but the liability of divulging the secrets is emphasised in two things. First, that when divulging secrets leads to damage.<sup>44</sup> Secondly, the secret shall not be about something is prohibited in Sharia, such as a crime or a violation that must be disclosed.<sup>45</sup>

### **5. Duty to avoid conflicts of interest and to declare any personal interest**

The duty to avoid conflicts of interest when exercising managerial powers is one of the directors' fiduciary duties, which is associated with the trust entrusted to them. The SACL 2015 stipulates that the director may not have a direct or indirect interest in the transactions and contracts that are concluded for the company's account except with prior permission from the ordinary general assembly, renewed annually.<sup>46</sup> The SACL 2015 seeks to ensure that directors act in the company's best interest in the first place, and to prevent them from using their power and position to obtain financial benefits that conflict with the interests of the company. This indirectly includes the relatives of the directors and those connected to them. Therefore, it is emphasized in the same law that directors may not use company information to achieve an interest for them, a relative, or others.<sup>47</sup>

The SACL 2015 also obliges directors to declare any interest they have, directly or indirectly, in the transactions and contracts that are concluded for the company. The directors must inform the board of directors of this interest, and this declaration shall be recorded in the minutes of the board of directors meeting. The concerned director may not participate in voting for the resolution to be adopted in this respect, whether it is in the board of directors or the shareholders' meetings.<sup>48</sup> In the event the director fails to declare her/his interest, the company or any interested party may claim before

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<sup>44</sup> The Noble Qur'an, *Surah Al-baqarah ayat 282*.

<sup>45</sup> The Noble Qur'an, *Surah Al-mujadilah ayat 9*.

<sup>46</sup> SACL 2015, Arts 31 and 71.

<sup>47</sup> SACL 2015, Art 74.

<sup>48</sup> SACL 2015, Art 71(1).



the competent judicial authorities to avoidance the contract and oblige the director to return any profit or benefit that has been gained thereto from it.<sup>49</sup> In the former Saudi Arabian Companies Law 1965, a transaction that is performed through a public tender process is excluded from that if the director provides the best offer, then s/he does not need to obtain permission from the ordinary general assembly.<sup>50</sup> This exception was highly criticised, as the prohibition that the legislature wanted it, did not necessarily relate to purely financial budgets, rather, for ethical considerations. In addition, the presence of the director in her/his position gives them an advantage in providing the best offer, due to the availability of confidential information. Therefore, there is no equality and justice, and there is a restriction of freedom of competition, which may lead to future competitors being reluctant to enter into tenders for this company, which may harm the company's future interests.<sup>51</sup>

Islamic law is consistent with Saudi Arabian law to legalise the acts of the directors that lead to the success of the company within the limits of the power granted by shareholders and prevent wrongful acts. Since Islamic law considers the management of the company as an agency of the shareholders of the director, so Islamic law is strict in purchasing agents for their principals a commodity that the agents or their relatives own.<sup>52</sup> Therefore, Islamic law scholars differed regarding whether the agents can purchase for their principal a commodity that the agents or their relatives own.

Some Islamic law scholars have emphasised that the agents cannot purchase from themselves for their principal, even if the principal has authorised them to do so, because the rights to buy and sell will belong to one person.<sup>53</sup> As for buying from relatives, it is permissible to buy from them if it is bought at the same value or less if

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<sup>49</sup> SACL 2015, Art 71(2).

<sup>50</sup> The former Saudi Arabian Companies Law 1965, Art 69.

<sup>51</sup> Jubran (n 36) 276.

<sup>52</sup> Dr Abdulaziz Al-Khayyat, *Companies in Islamic Law*, Fourth Edition, Resalah Foundation, Beirut, (1994), 247-248.

<sup>53</sup> Al-Khatib Al-Shirbiny, *Mughni al-Muhtaj ila Ma'rifatil Ma'ani alfadh al-Minhaj, Dar AlKutub AlElmiah*, Beirut, (1994), part 2 p224-225.



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the principal has authorised the agent.<sup>54</sup> While some Islamic law scholars argue that the agents cannot purchase from themselves for their principal, unless if the principal has authorised them to do so.<sup>55</sup>

## **6. Duty not to participate in any business competitive with that of the company.**

The SACL 2015 stipulates that the director may not participate in any business that would compete with the company, or compete with the company in any of the branch activities that it carries out. The commitment to non-competition, in general, has got great attention from many studies, given the problems and legal difficulties it raises, the most important of which is that this commitment represents a restriction of the freedoms of work and contracting. The legal jurisprudence has sought to reconcile this obligation with the freedoms of work and contracting, by proposing criteria by which the scope of the obligation to be non-competitive can be determined.<sup>56</sup>

Therefore, the prohibition against non-competition is not always permanent, as a company's director may avoid this ban by obtaining authorisation to compete the company by following the procedures stipulated in SACGR 2019. The director must inform the board of directors of the competitive business that s/he has or wishes to do and prove this declaration shall be recorded in the minutes of the board of directors meeting. The concerned director may not participate in voting for the resolution to be adopted in this respect, whether it is in the board of directors or the shareholders' meetings.<sup>57</sup> Marqis notes that the duty not to participate in any business competitive with that of the company is an obligation to refrain from an act (non-competition).

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<sup>54</sup> Hafiz Aurangzeb, *Al-Fatawa al-Hindiyya*, Dar AlKutub AlElmiah, Beirut, (2000), part 3 p 589.

<sup>55</sup> Mansour El-Bahouty, *Kashaf Al-Qina'a ean Matn Al-Eqna'a*, Dar AlKutub AlElmiah, Beirut, (2001), part 3 p 473.

<sup>56</sup> Reda El-Sayed Abdel-Hamid., *Trade Law*, *Dar Al-Nahdhat Al-Arabia*, Cairo, 2001, Part 1 p. 217.

<sup>57</sup> SACL 2015, Art 72; SACGR 2019, Art 46.



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This duty is always considered as a commitment to achieve a result, and it is not sufficient to exert an effort or a certain level of care in order to achieve this.<sup>58</sup>

The phrase "participate in any business competitive with that of the company" as stated in Article 72 of the SACL 2015 is general, as it includes all types of competition, so includes trading in one of the types of company activity, by establishing a company or a sole proprietorship or the ownership of a controlling percentage of shares or stakes in a company or any other entity engages in business activities that are similar to the activities of the company or its group. Also included in these businesses competitive is accepting membership in the board of directors of a company, an entity that competing with the company or its group or managing the affairs of a company or any other entity competing with the company or its subsidiaries, regardless of the form and size of this company or the entity competing, except for managing the affairs of the subsidiary companies. Also included in the concept of business competition, the director acting as an overt or covert commercial agent for another company or entity competing with the company or its group.<sup>59</sup> Because the competition of the company leads intentionally or unintentionally to exploit the information and secrets of the company stated in Article 74 of the SACL 2015 that it is not permissible to use what has come to their knowledge by reason of their position to achieve an interest for themselves or their relatives or others.

The SACL 2015 also indicated that the penalty resulting from the breach of the duty not to participate in any business competitive with that of the company is reasonable compensation for the damages incurred by the company as a result of the breach of this duty.<sup>60</sup> In the former Saudi Arabian Companies Law 1965,<sup>61</sup> the penalty for breaching the duty not to participate in any business competitive with that of the

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<sup>58</sup> Marqis, Suleiman., Explaining the Civil Law, Second edition, Law and Economy, Cairo, 1992, Part 4, p. 71.

<sup>59</sup> SACGR 2019, Art 47.

<sup>60</sup> SACL 2015, Arts 72 and 74.

<sup>61</sup> SACL 2015, Art 70.



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company was reasonable compensation or considering the operations performed by the director for her/his own account conducted for the company. The choice would be for the company to choose between the two. It should be noted that SACGR 2019 stipulate that in the event that the general assembly rejects to grant or renew the authorisation granted to the director to compete with the company, the director must present her/his resignation within a period specified by the general assembly, otherwise the director is deemed terminated by the force of law unless s/he decides to withdraw from the competition of the company.<sup>62</sup> In the judgment declared by the Commercial Court,<sup>63</sup> the respondent (a director) is obligated to return the property (building), which is the subject of the company's competition, the activity of the company is to buy or rent buildings and re-rent them as residential units. The company claimed to the director that after the expiry of the company lease contract for the building (the subject of the dispute), the director rented the building for his own account, and the rent was not renewed for the company's account. The company considered that as competing with the company's activity. Whereas, the former Saudi Arabian Companies Law 1965 stipulated that the penalty for the competition with the company is the choice between equity compensation or considering the operations done for the company account, which the plaintiff chose the second option. Accordingly, the court judged that.

However, the problem with the duty not to participate in any business competitive with that of the company is that it does not specify the range of time or place. The director may practice activity for the same type of company activity in another city, so is this participate considered as competition or not. Because the director may participate in any business competitive in another city, and after the development of her/his business, s/he resigns and competes with the company in the same place and time. In addition, the Saudi Arabian legislature does not stipulate that the time limit in non-competition be specified after the directors leave their position in the company.

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<sup>62</sup> SACGR 2019, Art 48.

<sup>63</sup> The Saudi Arabian Commercial Court, 10/TG/1/7 (2013); 213/TG/2/1 (2014).



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While the Saudi Arabian Labor Law 2005 stipulates that if the nature of the work allows an employee (director) to get to know the clients of the employer, the employer may stipulate in the appointment contract that the employee (director) must not compete with the company after the end of the contract. The validity of this condition must be written and determined in terms of time, place and type of work, and the duration of the ban on competition must not exceed two years from the end of the relationship between the two parties.<sup>64</sup> It should also be noted that the duty not to participate in any business competitive with that of the company is not subject to some professions even if it is formed in the form of a professional company such as lawyers, engineers, accountants, doctors, and other professions.<sup>65</sup>

A question is also raised about the validity of the authorisation from the general assembly. If the company is sold and the members of the general assembly become different, does the former authorisation from the former shareholders become valid or need to issue another authorisation? Originally, the rights, responsibilities and liabilities arising from the agreements concluded by the company are transferred from the seller to the buyer.<sup>66</sup> Saudi Arabian laws do not provide explicit provision for the transfer of these rights and liabilities from the seller to the buyer, except that the principles of law in general and Islamic law agree on that. Unless otherwise specified in the contract of sale.

The question also arises whether the directors' commitment not to compete with the company is a personal commitment that s/he undertakes alone or extends to other people as members of her/his family. Al-Qalyoubi<sup>67</sup> holds in this matter that the directors' commitment not to compete with the company is a personal commitment that s/he shoulders only without her/his family. However, assuming this leads to

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<sup>64</sup> The Saudi Arabian Labor Law 2005 Art 83.

<sup>65</sup> Samira Al-Qalyoubi, Explaining Commercial Law, *Dar Al-Nahdhat Al-Arabia*, Cairo, (2013), Part 1 p. 555.

<sup>66</sup> Al-Qalyoubi (n 65) 302-304.

<sup>67</sup> *Ibid*, 331.



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evading the duty not to compete indirectly. In Saudi Arabian law, this is not explicitly stated. In practice, it is left to the judge's discretion when there is a dispute about this matter and looking into the circumstances of the case; because the principle in Islamic law is a person is not bound by any obligation unless s/he obliges herself/himself to do so.<sup>68</sup>

In Islamic law, the agent's acts must be in accordance with the condition of the principal and the power granted, the agent shall never betray, nor does the agent acts for her/his own fortune. The agent, while performing the agency, is bound by the provisions of the Sharia that do not harm the principal. The prophet Muhammed (PBUH) said, "There should be neither harming nor reciprocating harm".<sup>69</sup>

### **7. Duty not to accept benefits from third parties**

In the context of the conduct of integrity and propriety, SACGR 2019 states that directors must not accept a benefit, in particular gifts from another party who has business dealings with the company. It is excluded from the application of this duty if it is unreasonable to consider the acceptance of benefit (gifts) leads to a conflict of interests and duties.<sup>70</sup> The acceptance of benefits (gifts) by a director from a party may be considered a criminal offence and a breach of the duty. There is no explicit provision from the Saudi Arabian legislature linking the acceptance of gifts, by the director, to the crime of bribery, except elsewhere in another law, where the legislature linked the state employee's acceptance of gifts to bribery.<sup>71</sup> Otherwise, the acceptance of gifts from the director is subject to the discretionary authority of the judge, which depends on the provisions of Islamic law.

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<sup>68</sup> Sharia jurisprudence principle "*Al'asl Bara'at Althimah*" which means each person's liability is innocent until proven otherwise.

<sup>69</sup> El-Bahouty, (n 55) part 3 p 473.

<sup>70</sup> SACGR 2019, Art 49.

<sup>71</sup> The Saudi Arabian Civil Service Law 1976, art 12.



In Islamic law, the basic principle of accepting gifts by workers is prevention and prohibition.<sup>72</sup> So, in all that the workers benefit from in-kind or cash property, the facilities or any services that granted to them for their work other from other than the employer is not permissible.<sup>73</sup> However, if the gift is caused by doing something, it is part of the meaning of bribery, and it must be rejected. The rule of that is what Ibn-Taymiyyah<sup>74</sup> said if the person is removed from that position and s/he will be still given that gifts, so the position is not the reason for the gifts, then it is permissible to accept it as the gifts that are from family and friends; and if otherwise, the reason for the gift is her/his position, it is part of the meaning of bribery. Al-Shirbiny<sup>75</sup> said, in the context of mentioning the reasons for the inadmissibility of gifts, one of them is the gift to the workers, as it is forbidden for them to accept the gift from those who do not usually gift it before they were in the position.

However, the director may accept gifts in Islamic law provided that the company (the employer) authorises the director to accept the gifts after the gift is disclosed and its amount. This is based on the saying of the prophet Muhammad,<sup>76</sup> "whoever we have employed on work, must s/he bring what was given a little or much, and what we give him/her from that, s/he takes". This is express in the fact that it is permissible for the workers or employees to accept gifts because of their work if they are permitted from their employer (the company). Ibn Hajar<sup>77</sup> said regarding what is prohibited from workers 'gifts, this is prohibited if the employer (the company) does not authorise it. Because it is forbidden only to cut off the causes of dishonesty and prevent the causes of the corruption of jobs and business. Therefore, the directors often are safe from

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<sup>72</sup> Ibn Qayyim al-Jawziyya, *I'laam ul Muwaqqi'een 'an Rabb il 'Aalameen*, Dar AlKutub AlElmiah, Beirut, (1991) part 3 p 114.

<sup>73</sup> Ibn Hajar Al-Asqalani, *Fath al-Bari fi Sharh Sahih Al-Bukhari*, Dar Al-Salam, Cairo, (2001), part 13 p 167.

<sup>74</sup> Ibn-Taymiyyah, *Majmu al-Fatwa al-Kubra*, King Fahd Printing Center, Medina, (2004), part 6 p 157.

<sup>75</sup> Al-Khatib Al-Shirbiny, *Mughni al-Muhtaj ila Ma'rifatil Ma'ani alfadh al-Minhaj*, Dar AlKutub AlElmiah, Beirut, (1994), part 3 p 558.

<sup>76</sup> Muslim ibn Al-Hajjaj, *Sahih Muslim*, Dar AlKutub AlElmiah, Beirut, (2006), par 3415.

<sup>77</sup> Ibn Hajar (n 73) 167.



being accused of dishonesty and corruption if the employer knows and authorises the gifts.

SACGR 2019 stipulate that accepting gifts that are forbidden are those gifts that may lead to a conflict of interest. As for what the worker or employee benefits from all kinds of gifts, if the custom is tolerance to accept it, then it does not enter into what is prohibited from the gifts of workers and employees.<sup>78</sup> This is fully consistent with Islamic law as mentioned above where is prevented the acceptance of gifts only to prevent dishonesty, corruption and harm.

As for the hospitality offered to directors, some scholars of Islamic law stated that what is increased on the familiar usual hospitality due to the position is attached to the gifts of employees and workers that is prevented to be accepted.<sup>79</sup> Some Islamic law scholars set a condition for accepting gifts by workers, after disclosing them and obtaining permission. This condition is that the worker (director) must reward the person who gifted her/him with the same value of the gift because if s/he does so, the worker (director) will void the effect of the gift and remove its power.<sup>80</sup>

#### **8. Duty to act in the interests of the company and consider the interests of the stakeholders.**

The SACL 2015 and the Corporate Governance Regulations 2019 implicitly state for the duty to act for the interests of the company in more than one place by imposing duties on directors to avoid conflicts of personal interests with the interests of the company as well as imposing penalties on directors in the event of acting against the interests of the company.<sup>81</sup>

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<sup>78</sup> SACGR 2019, art 49.

<sup>79</sup> Ibn-Taymiyyah (n 74) part 4 p 174-175.

<sup>80</sup> Al-Shafi'i, Muhammad., *Al-Umm, Dar Al-Maarifah*, Beirut, (1990), part 2 p 63.

<sup>81</sup> SACL 2015 arts 31, 72, 74 and 211; SACGR 2019, arts 21, 43, 49 and 86.



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SACGR 2019 also provide that the company director must take into account the interests of stakeholders when managing the company.<sup>82</sup> The OECD has confirmed that considering the interests of stakeholders is a high ethical standard that is certainly in the company's long-term interest, making it more credible and trustworthy.<sup>83</sup> Taking into account the interests of the company's employees is also among the interests that directors must take into account when managing the company.<sup>84</sup> OECD Principles of Corporate Governance state that mechanisms to enhance the performance of employee participation should be allowed in the context of corporate governance such as the representation of staff on boards and in governance processes and the mechanisms of sharing of profits, pension commitments and others related to performance enhancement. This incorporating implies its importance as the employee is the human capital of the company and is of value to the company and not just a tool that manages the company's financial assets. The powers of the director include setting development and incentive programmes for the employees of the company, listening to their opinions and discussing them in decisions affecting them functionally or health and safety issues in the company.<sup>85</sup> Employees may also be granted shares in the company or a percentage of the profits made by the company and other matters that benefit the employees.<sup>86</sup> This may be a good reason to retain qualified employees or boost morale as this will result in long-term company benefits.

The director must also take into account the interests of suppliers and customers in terms of strengthening the company's relationships, which is important for achieving long-term gains.<sup>87</sup> Economic studies have confirmed that customer loyalty to the brand reduces marketing costs and stabilises the volume of production and sales,

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<sup>82</sup> SACGR 2019, arts 83 and 86.

<sup>83</sup> G20/OECD, 'Principles of Corporate Governance' (2015) <<https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>> accessed 30 January 2020; Annotations to the OECD Principles of Corporate Governance (2004)

<<http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf>> accessed 30 January 2020.

<sup>84</sup> SACGR 2019, arts 83(4) and 84.

<sup>85</sup> G20/OECD (n 83).

<sup>86</sup> SACGR 2019, art 85(2).

<sup>87</sup> SACGR 2019, art 83(3).



thereby increasing operating profits.<sup>88</sup> Directors should take into account the social contribution of the company, whether these social initiatives are provided to employees of the company in particular or to society in general.<sup>89</sup> This is by directors establishing social programs and determining the necessary methods for proposing social initiatives by the company in the field of social work.<sup>90</sup> Perhaps the purpose is to promote good relations with society. The company can participate in community planning and problem solving. This enhances the company's long-term reputation and creates loyalty and satisfaction from society (the consumers).

Finally, corporate governance stipulates that managers must consider the need to act with integrity towards shareholders, and protect their rights to ensure equality and fairness among them.<sup>91</sup> This means not favouring one shareholder or group of shareholders over the rest, especially if some shareholders are weaker than others.

## **9. Duty to be a liquidator upon the dissolution of the company**

One of the duties of the director stipulated in the SACL 2015 is to be a liquidator for the company.<sup>92</sup> This is upon the dissolution of the company, the directors will automatically be in the liquidator's role until a liquidator is appointed for the company. In this case, the directors take the provisions of the liquidators and their duties and the mechanism of work in the event that there is more than one director, so it is like there is more than a liquidator.<sup>93</sup> Article 206 of the SACL 2015 stipulates that if there are two or more liquidators, they must act jointly and their actions shall be valid only if made jointly unless the appointment resolution or the authority that appointed them authorizes them to act individually. Whereas in UK law, a director cannot become a liquidator but rather the official receiver can become the company

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<sup>88</sup> L Cerioni, 'The Success of the Company in S. 172(1) of the UK CA 2006: Towards an Enlightened Directors Primacy' (2008) 4(1) Original L Rev 8, 13-14.

<sup>89</sup> SACGR 2019, art 83(5).

<sup>90</sup> SACGR 2019, arts 87 and 88.

<sup>91</sup> SACGR 2019, art 4.

<sup>92</sup> SACL 2015 art 203.

<sup>93</sup> SACL 2015 art 206.



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liquidator during any vacancy and continues in office until another person becomes liquidator.<sup>94</sup> In addition, UK law requires liquidators to be only independent and qualified insolvency practitioners. Therefore, directors could not be liquidators of their own company, as this would create a conflict of interest.<sup>95</sup>

However, the problem in the event that the resolution to appoint the director does not contain any provision to work as a liquidator in the event of the dissolution of the company. Perhaps the Saudi Arabian legislature intends this to continue to carry out the company's business until a liquidator is appointed, where in many cases the shareholders do not agree on the appointment of a liquidator, and the director will carry out the liquidator's work until a liquidator is appointed, either by the shareholders (voluntarily) or through the judiciary (Involuntary). Since it is one of the duties of the director to be a liquidator in the event of the company's termination and dissolution, it should be mentioned briefly what are the powers and duties of the liquidator.

The SACL 2015 indicates that the liquidator's powers are determined by the company's articles of association or the resolution to appoint the liquidator, and all their acts are valid and binding on the company as long as it is within the powers granted to them.<sup>96</sup> If the liquidator's powers are not determined, the SACL 2015 stipulates that the liquidator may conduct all business required for liquidation.<sup>97</sup> Among the most important of these conducting business is the representation of the company before the judicial authorities and third party,<sup>98</sup> converting the company's assets into cash, including the sale of movables and immovable property whether by auction or by any appropriate method ensures obtaining the highest price.<sup>99</sup> The liquidator may not sell the company's property in one lot nor offer it as a contribution

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<sup>94</sup> Insolvency Act 1986, s 136(2)(3).

<sup>95</sup> See *Re Ipcon Fashions Ltd*, [1989] 5 BCC 733.

<sup>96</sup> SACL 2015 art 205(3).

<sup>97</sup> SACL 2015 art 207(1).

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*



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in another company unless authorized to do that by the party that has appointed them.<sup>100</sup> The liquidators also may not commence new operations unless they are necessary to perform pending tasks.<sup>101</sup>

The SACL 2015 also provides that one of the duties of the liquidator is to pay off the company's debts if duly payable and to set aside the necessary sums for future payment they are undue or contested and then distribute among the shareholders any surplus.<sup>102</sup> However, the SACL 2015 does not state the duty to refund the company's debts from others, which were expressly stipulated in the former Companies Law 1965,<sup>103</sup> even though this duty is within the concept of conduct all business required for liquidation.

The liquidators must also publish the resolution issued for their appointment and the restrictions imposed on their powers by the methods prescribed in the company's articles of association.<sup>104</sup> The liquidators, within three months of commencing their work as a liquidator, must make an inventory of all the company's assets and liabilities. At the end of every financial year, the liquidators must prepare financial statements and a report on the liquidation operations.<sup>105</sup>

Just as the duty to avoid conflicts of interest is one of the duties of directors, it is one of the duties of the liquidator. Article 211 of the SACL 2015 stipulates that the liquidator may not use the company's funds, assets or rights against third parties in a manner conflicts with the interests of the company. However, the Saudi legislature does not address the matter of the liquidators selling the company's assets to themselves or to any member of their family. The Islamic law states that the agent is not permitted to sell the principal's money to herself/himself because it is not valid

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<sup>100</sup> SACL 2015 art 207(2).

<sup>101</sup> SACL 2015 art 207(3).

<sup>102</sup> SACL 2015 art 208(1)(3).

<sup>103</sup> The former Saudi Arabian Companies Law 1965, arts 222 and 223.

<sup>104</sup> SACL 2015 art 205(3).

<sup>105</sup> SACL 2015 art 209(1)(3).



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that s/he is the seller and buyer at the same time unless the principal has authorised.<sup>106</sup> Also, Islamic law permits the agent to sell to a member of her/his family, provided that the sale is more than the value offered so that s/he is the highest price unless the principal authorises the sale otherwise.<sup>107</sup>

Article 212 of the SACL 2015 states that the liquidator may not divulge the secrets of the company that has come to their knowledge by reason of their position, to other than the concerned authorities. The penalty for breach of this duty is made civil and criminal, imprisonment for a period not exceeding one year as maximum and penalised for not more than one million Saudi Riyals<sup>108</sup> or by either of these two penalties.

The SACL 2015 also provides that the liquidators must take into account the need to act with integrity towards creditors, and protect their rights in a manner that ensure equality and fairness among them. This means not favouring one creditor or group of creditors over the rest.<sup>109</sup>

Finally, Article 79 of the SACL 2015 states that the liquidator, after obtaining the approval of the ordinary general assembly, must institute a liability action against the company directors for wrongful acts that cause prejudice to the shareholders. However, the problem with this duty is that when the directors become the liquidators, it is unreasonable to expect that a suit will be brought against themselves! Basically, the liquidator's function is to examine the directors' work before dissolution the company, and if the liquidator was the director, then the purpose of the liquidator's function is negated.

By examining this duty, and inferring the reason for enacting this duty on the director, it may be, as previously mentioned, that the Saudi Arabian legislator intended this to

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<sup>106</sup> Al-Shirbiny (n 75) part 2 p224-225.

<sup>107</sup> Hafiz Aurangzeb, *Al-Fatawa al-Hindiyya, Dar AlKutub AlElmiah*, Beirut, (2000), part 3 p 589.

<sup>108</sup> 1 USD = 3.75 Saudi Riyals, Fixed exchange rate.

<sup>109</sup> SACL 2015 art 211(E).



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continue to carry out the company's business until a liquidator is appointed, where in many cases the shareholders do not agree on the appointment of a liquidator, and the director will carry out the liquidator's work until a liquidator is appointed, either by the shareholders (voluntarily) or through the judiciary (Involuntary). However, the administrative procedures for approving the director to be as a liquidator and the company's representative before the third party take much time to be approved their acts as a legal representative of the company. Therefore, the purpose of automatically appointing directors as a liquidator is not fulfilled in order to conduct the company's business until the appointment of the liquidator.

Since the SACL 2015 does not determine a cut-off point before the company's winding up for the directors' duty to act in the interest of the creditors to be triggered, consequently, the directors will act in the interest of the company (shareholders) until the winding up of the company, and then the director may operate as a liquidator if a liquidator is not appointed. This may create a state of uncertainty, such as if the directors knew that there was no reasonable prospect that the company would avoid going into insolvent liquidation, so they are caught between two options, of either acting in the interest of the company (shareholders) or acting in the interest of the creditors as considered they will be liquidators. Acting as a director means maintaining the company's assets; while acting as a liquidator means converting the company's assets into cash money. In the event that the directors knew that there was no reasonable prospect that the company would avoid going into dissolution or insolvent liquidation, and the price of the company's assets is high, will the director act as a liquidator and sell these assets at the best price, which will be in the interest of the shareholders and creditors after the liquidation, or the directors must wait for the company to be dissolved and be liquidated and then sell assets at the current price, which may decrease.

## **10. Conclusion.**



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One of the general reasons for codifying the duties of directors is to enhance the clarity of the law and make it easier for the responsibilities of directors towards others to be understood without the need for a legal consultant to interpret these duties. However, the general duties of directors in Saudi Arabian law are still not self-contained. These duties need recourse to the provisions of Islamic law to interpret them or to complete that which is non-stipulated. For example, in the need to resort to the provisions of Islamic law, in the interpretation and determination of the duty to exercise reasonable care.

Just as understanding the provisions of Islamic law is not so easy; the director needs sufficient knowledge and background to understand the Islamic law provisions. As the company directors must perform their duties as they see fit to achieve the company's purpose, but understanding these unclear or non stipulated duties will be a task that is very difficult especially for the directors who do not have a legal background or even a sufficient background on Islamic law.

The directors' duties are presented in a scattered and not explicit manner in many articles of the SACL 2015. Some of these duties are stated in the form of duties, while others are stated in the form of prohibitions against the director, while others are stated in the form of penalties if a director breached some prohibitions. The duties also are not fully stated in the SACL 2015, as some of these duties are stated in the SACGR 2019. The duties mentioned in the SACL 2015 are scattered, some are stated in the companies section in general, some of the duties are stated in the section of the limited liability companies, and some duties are stated in the context of the joint-stock companies. Whoever sees this chaos in presenting the directors' duties will assume that the legislature, during dealing with one of the forms of companies, stated some duties for only the directors of this company regardless of the position of the provision (article) in the SACL 2015, which gives the impression that this duty is limited to only the directors of this company form or the legislature does not give the same interest and great importance in managing these companies.



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The SACL 2015 does not impose any duty on the directors to take into account the interests of creditors before the commencement of the winding up of the company. According to the provision of the SACL 2015, the director acts in the interests of the shareholders until the winding up of the company and then the function of the liquidator will be applied, who must take into account the need to act with integrity towards the creditors, and protect their rights to ensure equality and fairness among them. Failure to stipulate this duty in the corporate law may lead to a lack of trust between creditors and companies, especially in regard to large, long-term debt, or may lead to the need to provide extensive guarantees to creditors by companies. Even if Islamic law maintains the rights of creditors, it would be worthy of the Saudi legislature to state a cut-off point, through which the directors must take into account the interests of creditors, rather than the interests of shareholders, and impose personal liability on the directors in the event that this duty is breached. This indicates a degree of weakness in the Saudi Arabian legislation. This weakness must be recognised in order to promote the future legal reform in Saudi Arabia. One of the reasons for this weakness may be entirely relying on the provisions of Islamic law, and the familiarity of Saudi Arabian people with Islamic law provisions. However, the expansion of the commercial business in Saudi Arabia, the development of these forms of business and the entry of foreign investors, found that understanding the provisions of Islamic law is not an easy matter for everyone.

In the absence of the duty to take into account the interest of creditors, which the Saudi legislature should have stipulated, the Saudi legislature stated in detail some overlapping duties, such as differentiation and stipulating the duty not to participate in any business competitive with that of the company and the duty to avoid conflict of interests. The duty not to participate in any business competitive with that of the company is included implicitly in the duty to avoid conflicts of interest. Despite the stipulation of the duty not to participate in any business competitive, the Saudi legislature does not determine the scope of time or place for competition. The SACL



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2015 also does not stipulate that the period for non-competition be determined after the directors left their position in the company.

Finally, as mentioned previously, one of the duties of the director stipulated in the SACL 2015 is to be a liquidator for the company where the circumstances require. This is upon the dissolution of the company, the directors will automatically be in the liquidator's rule until a liquidator is appointed for the company. This may create a state of uncertainty, such as if the directors knew that there was no reasonable prospect that the company would avoid going into insolvent liquidation, so they are between two options, either acting in the interests of the company (shareholders) or acting in the interest of the creditors as considered they will be liquidators. Further, the administrative procedures for approving the director to be as a liquidator and the company's representative before the third party take much time to be approved their acts as a legal representative of the company. Therefore, the purpose of automatically appointing directors as a liquidator is not fulfilled in order to conduct the company's business until the appointment of the liquidator.



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