

GAR KNOW HOW CONSTRUCTION ARBITRATION

Saudi Arabia

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Legal system

- 1 **Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?**

Saudi Arabia's Legal system is underpinned by principles of the Islamic Sharia. In particular, Saudi Arabia subscribes to the Hanabali school of Islamic interpretation (one of four traditional schools of jurisprudence within Sunni Islam).

The power to enact legislation is vested in the King of Saudi Arabia, the Council of Ministers and the Majlis Al-Shura (the Consultative Assembly of Saudi Arabia). Individual Ministers may draft and propose legislation relevant to their own ministries, which are then voted on by the Council of Ministers and finally approved by the King. The Majlis Al-Shura primarily acts as policy advisor to the King, but is also empowered to propose new legislation directly to the King and to interpret existing laws. Sharia principles will fill the gap where the law is silent.

Laws and regulations are issued by Royal Decree (with the exception of banking regulations, which are enacted by Royal Decree and Ministerial Resolution). Royal Decrees are published in the Official Gazette.

Laws rarely have retrospective effect. When they do, it will be indicated in the text of the legislation itself and will usually incorporate a grace period to permit those impacted to comply.

Contract formation

- 2 **What are the requirements for a construction contract to be formed? When is a “letter of intent” from an employer to a contractor given contractual effect?**

To demonstrate contract formation in Saudi Arabia, there must be (i) an offer by one party; (ii) acceptance by the counterparty; (iii) certainty as to subject matter and price; (iv) sufficient capacity to contract; and (v) no offence to the principles of Sharia.

Generally, Sharia law does not permit contracts over assets not yet in existence. Construction contracts come under an exception known as *istisna'a* – a recognised type of contract for construction of a pre-agreed building or asset for a fixed price and pre-agreed delivery date.

For a letter of intent to have contractual effect, the parties must have intended for it to be binding and capable of enforcement. Practically speaking, in the construction context, it must be very clearly drafted in order to be accepted as binding by the Saudi court.

Choice of laws, seat, arbitrator and language

- 3 **Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?**

The New Arbitration Law 2012, which was enacted in June 2012, is broadly based upon the UNCITRAL Model Law. The 2012 Law permits parties to select the Governing Law, the seat, applicable institutional rules, and the language of the arbitration. Parties are also free to appoint arbitrators of their choosing, however, the 2012 Law prescribes certain requirements (for example, as per article 14, at least one arbitrator (the chairman in the case of multiple arbitrators) must hold a university degree in either Sharia or law). At all times, the arbitration must comply with Sharia principles.

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

There are three terms that may be implied, including: (i) that all contracts must be performed in accordance with the principle of good faith; (ii) force majeure; and (iii) in construction contracts, a contractor may be compensated for unforeseen and/or materially different site conditions, which arise during the performance of a contract.

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

Certifiers must act impartially. It is unlikely that a contractor would be able to bring a claim directly against a certifier, without a direct contractual relationship, unless it can be shown that the certifier had acted fraudulently. A contractor may, however, claim against an employer on the basis that a certificate is manifestly unfair and has caused the contractor loss.

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

Saudi law does not address expressly concurrent and competing delay. The Saudi courts will typically allow the appointment of an expert to address delay issues.

Article 52 of the Procurement Law 2006 applies to public works contracts, and permits an extension of time if the relevant Minister (or Ministry) extends the contract term for one of three reasons: (i) the employer requests additional works; (ii) the relevant public authority suspends the works through no fault of the contractor; and (iii) the annual budget allocated to the works is insufficient for completion by the original completion date.

Disruption

7 How does the law view “disruption” to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer’s breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

To succeed in a claim for disruption, a contractor must show that the loss suffered was direct, fair and proportionate, and that the contractor took reasonable steps to mitigate those losses. Under Sharia law, a claimant may usually only recover damages in the amount of loss actually incurred.

Acceleration

- 8 How does the law view “constructive acceleration” (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

There is no doctrine of prevention in Saudi Arabia. To succeed in a claim for constructive acceleration, a contractor must show loss that was unavoidable and that the acceleration came about because of a refusal to grant an extension of time, which reasonably should have been granted. The court would likely want to see written evidence of a contractor putting the employer on notice of the likely costs prior to the acceleration.

Force majeure and hardship

- 9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

The Saudi courts will generally only recognise force majeure events that make performance impossible, for example, political instability or natural disasters. Events that make the contract more expensive or burdensome will not generally be accepted.

In the case of public works contracts, article 51 of the Procurement Law 2006 permits extension of a contract period with no penalty for delay “if the delay is due to unforeseen circumstances or for reasons beyond the contractor’s control, provided that the period of delay is proportionate to these reasons”.

- 10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

Other than the trend towards compensation for materially different site conditions (discussed at question 4), there is no general entitlement to compensation for a contract becoming unduly expensive or more onerous than expected. However, there is a general doctrine of economic hardship under which a claimant may claim a modification in contract price where that claimant can show that there has been a grave and unforeseeable increase, which makes performance of the contract unduly burdensome so as to risk the claimant’s solvency. The doctrine of economic hardship imparts a high threshold, and requires evidence of an impact greater than the ordinary losses a contractor may usually experience in performing a construction project.

With regard to public works contracts, article 43 of the Procurement Law 2006 permits an amendment to the contract price where there has been a variation in applicable customs, duties, taxes or fees effective after the date for bid submission.

Impossibility

- 11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

There is no general doctrine of impossibility in Saudi Arabia. The Islamic concept of Gharar (roughly translated as a hazardous or risky transaction) could potentially operate to excuse performance of an obligation that is unduly onerous, uncertain or one party taking advantage of the other’s property. If a court determines that a contract or contractual term is Gharar, with regard to the facts, it will be set aside.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

- 12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer’s requirements in design and build forms?

Saudi courts will generally enforce onerous terms, although parties may argue under Sharia law that a particular term should be disregarded on the basis that it is fayed, which means it is excessive and contrary to the spirit of the contract.

Duty to warn

- 13 When must the contractor warn the employer of an error in a design provided by the employer?

If a contractor was aware of an error but proceeded without informing the employer, it may be considered to have acted contrary to the duty of good faith.

Good faith

- 14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party’s discretion whether to terminate or suspend the contract; or (c) the employer’s discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

Yes, Sharia principles recognise a general duty of good faith, although it would be rare for this duty to allow a party to avoid the clear terms of a contract. As to scenarios (a)–(c), these would be interpreted according to the surrounding facts of each individual case, with particular regard to the knowledge of each party.

Time bars

- 15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 (“otherwise in connection with the contract”)? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

Saudi courts generally uphold the written terms of a contract, pursuant to the Sharia principle that the contract is the law of the parties. Nevertheless, good faith claims, allegations of fraud, and criminal action are not subject to contractual time bars or limitation periods. In addition, Saudi courts are unlikely to dismiss a claim on the basis of a time-bar if it would be manifestly unfair to the claimant. There are several countervailing principles in Sharia law, which could allow an otherwise time-barred claim to proceed, even if the contractual notice has not been met, including unfairness and the principle that, generally, rights are not lost due to the passage of time.

Suspension

- 16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

An employer may generally suspend works for issues such as adverse weather conditions but must pay costs for that suspension time. Otherwise, suspension rights are as provided for in the contract.

With respect to public works contracts, article 54 of the Procurement Law 2006 provides that the only remedy available following a failure to pay by the government is in damages (ie, suspension is not permitted). In this situation, article 78 provides that a contractor may petition a committee (to be reformulated by the Ministry of Finance every three years) for relief.

Omissions and termination for convenience

- 17 May the employer exercise an express power to omit work; or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

If there is an express provision to omit work or the terminate the contract at will or for convenience, Saudi courts will generally uphold the provisions of the contract. Absent an express contractual provision relating to omission, there is no general principle of law that permits it.

Termination

- 18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

Saudi courts will generally uphold termination events in the contract. The courts will also permit termination for reasons not in the contract if the court considers there to be a valid ground for the termination. If there is no valid ground for the termination, the terminated party will be entitled to its direct losses.

For public works contracts, article 53 of the Procurement Law 2006 permits a public authority to terminate a contract, or to finish the works at the contractor's expense, with the right to claim damages if:

- the contractor commits bribery;
- the contractor causes delay and fails to rectify the situation with 15 days of notice;
- the contractor assigns or subcontracts without prior approval of the contracting public authority;
- the contractor becomes bankrupt or enters into receivership; or
- the contractor dies and his or her personal qualifications or attributes were of significant value to the bid.

The parties are not permitted to contract out of the termination events listed in article 53. Should the public authority replace a terminated contractor, it is entitled to claim any increase in contract price from the original contractor.

In addition, article 54 of the Procurement Law 2006 entitles a contractor to damages if the public authority terminates the contract with no valid ground.

- 19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

Parties may terminate for reasons not set out in the contract if the court considers the termination to be on a valid ground (for example, fraud).

20 What limits apply to exercising termination rights?

Termination must not run afoul of Sharia law principles. Otherwise, Saudi courts are guided by the express wording of the contract and examine the factual circumstances of any termination to determine whether it was valid.

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

Yes, beneficial possession may deem the works to be completed (or partially completed), subject to the factual circumstances.

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

Saudi courts will be guided by the express terms of the contract, including in relation to completion or takeover or warranties or liability periods. However, an employer may claim for latent defects that could not reasonably have been discovered prior to the certificate of completion being issued.

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

Sharia law prohibits liquidated damages where the damages "grossly exceed" actual damages. In practice, the Saudi court will be unlikely to uphold a liquidated damages clause if the amount claimed exceeds the loss suffered.

For public works contracts, article 48 of the Procurement Law 2006 stipulates a penalty for contractor delay of not greater than 6 per cent for supply contracts and 10 per cent for all other contracts. Article 84 of the Procurement Law provides that the failure to complete works within the agreed project deadlines will entitle the public authority to a penalty, which is calculated as the 'average daily cost' of the project, the formula for which is set out in the Procurement Law, up to a maximum of 10 per cent of the contract value.

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

Sharia law does not permit a party to benefit from its own wrongdoing and therefore it is unlikely an employer would be entitled to liquidated damages in circumstances where it has caused the critical delay. In this scenario, Saudi courts would be likely to permit an extension of time, and unlikely to uphold a "sweep up" provision, even if included on the basis that costs which were not contemplated at the time the contract was made would be recoverable as it is a fundamental principle of Sharia that contracts must be free from uncertainty.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

Saudi courts will generally uphold the terms of the contract as drafted (although note the answer to question 23). However, before a party can claim under a liquidated damages clause, it must show that it has actually suffered loss. Saudi courts may be unwilling to award liquidated damages if it is shown that the amount claimed exceeds the loss actually suffered.

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

Saudi courts will generally uphold the liquidated damages clause in the contract (although note questions 23 and 25).

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

A claimant must show direct loss. Lost profit claims are rarely allowed, particularly because an element of speculation (*gharar*) is inevitable in the assessment of lost profits in the majority of cases. There is no express duty to mitigate.

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

Contractors will be liable for rectification costs if they are demonstrably reasonable. The parties may agree on a regime that is stricter, with the limitation that Sharia law does not permit terms that are manifestly unfair.

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

Saudi courts will generally uphold the express terms of the contract, including a contractually agreed DNP.

In addition, article 76 of the Procurement Law 2006 imposes a mandatory 10-year warranty from the date of final handover in public works contracts against "partial or full collapse" of the project.

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

Saudi courts will generally uphold the express terms of the contract, including loss exclusions, unless they run afoul of Sharia law.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Although Saudi courts will generally uphold the express terms of the contract, including exclusions of liability, the courts tend to construe these types of exclusions narrowly. In addition, Saudi courts will be less likely to apply such an exclusion in cases of fraud, wilful misconduct, recklessness or gross negligence.

Liens

- 32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

There is no such concept of a lien in favour of a contractor.

Subcontractors

- 33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

Saudi courts will generally uphold conditional payment terms if they are clearly drafted in the contract, and do not offend Sharia principles, such as good faith or manifestly unfair terms.

- 34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

Under Sharia law, there is a narrow principle of transferable rights, under which a subcontractor may be able to claim against an employer. Otherwise, a subcontractor is unlikely to be permitted to make such a claim.

- 35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

The Saudi courts would likely allow the employer to hold the contractor to the arbitration agreement if the dispute concerns a subcontractor. The position would not change if the arbitration were to have its seat outside Saudi Arabia.

Third parties

- 36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

Third parties may obtain rights if the contract permits third party rights.

- 37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

Directors may face civil and criminal liability pursuant to the New Companies Law 2015 for decisions taken in bad faith. Whilst Saudi Arabia corporate law recognises separate legal personality, historically, the Saudi courts have been more willing to pierce the corporate veil than most common law jurisdictions.

Limitation and prescription periods

- 38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

There is no specific statutory limitation period in Saudi Arabia. Saudi courts will uphold contractual limitation periods if they accord with Sharia principles. As discussed above, in public works contracts, the contractor is subject to decennial liability pursuant to article 76 of the Procurement Law 2006: ie, the contractor is liable for any “partial or full collapse” of the project that occurs during 10 years from the date of final handover.

Other key laws

- 39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

All contracts must accord with Sharia principles.

- 40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Fundamental principles of Sharia will continue to be observed by Saudi Courts despite the parties’ designation of a foreign governing law. For example, Saudi Courts will not award interest, even if interest is provided for in the contract and permitted under the foreign governing law.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

- 41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

A contractor may be able to obtain enforcement of a DAB decision through the Saudi Board of Grievances, which would examine the underlying dispute only if the decision is considered to be contrary to Sharia principles.

Courts and arbitral tribunals

- 42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

No, although there are judges with construction experience.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

There is no system of judicial precedent in Saudi Arabia, nor are judgments routinely published (although there has been more publication recently). Construction disputes can be heard by the Sharia Court (the ordinary court of Saudi Arabia, which has a commercial division), the Board for the Settlement of Commercial Disputes, Labour Courts and the Board of Grievances. The Board of Grievances usually oversees domestic arbitrations.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

It is not usual for a judge or arbitrator to give any preliminary views, unless there is an issue of Sharia law.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

Under article 11 of the New Arbitration Law 2012, parties are bound by their agreement to arbitrate, but a party may be permitted to bring parallel proceedings before the Saudi courts if there are alleged issues of Sharia law. Saudi courts may still allow an arbitration to proceed even if the preconditions to arbitration have not been completed.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

No, pursuant to article 11 of the New Arbitration Law 2012, a Saudi seated arbitration will not be impacted by proceedings in other jurisdictions.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

Yes, pursuant to articles 31 to 36 of the New Arbitration Law 2012, the use of both party- and tribunal- appointed experts is permitted in arbitration. Saudi courts regularly appoint experts, who owe a duty to the court to act independently.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer)?

The Procurement Law 2006 applies to all construction contracts with Saudi public authorities. See questions 6, 9, 10, 16, 18, 23 and 29 above discussing specific provisions of the Procurement Law. Article 36 of the Procurement Law also prohibits change orders, which reduce the scope of works by greater than 20 per cent of the contract value or increase the scope by more than 10 per cent, after a contract has been entered into.

As per article 8 of the Board of Grievances Law, the Board of Grievances has jurisdiction over contracts involving public authorities. Article 10(2) of the New Arbitration Law 2012 provides that public entities may only submit to arbitration with permission of the Prime Minister (unless specifically provided for in another law). Enforcement is not permitted against government assets pursuant to article 21(1) of the New Enforcement Law.

Settlement offers

- 49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

There is no concept of settlement privilege in Saudi Arabia, although in practice, parties do put settlement offers before arbitral tribunals at the time costs are to be decided.

Privilege

- 50 Does the law of your jurisdiction recognise “without prejudice” privilege (such that “without privilege” communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

No, there is no concept of without prejudice communications in Saudi Arabia.

- 51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

Legal professional privilege is recognised in Saudi Arabia, although it may not apply to in-house counsel who are employed by the party.

Guarantees

- 52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

Oral guarantees are not effective, as guarantees must be issued in the standard form by the Saudi Arabian Monetary Authority. Generally, guarantees under Saudi law are considered voluntary obligations, which may not be enforced by the courts. In practice, this means that the wording must be certain, and in the form prescribed by the Saudi Arabian Monetary Authority.

- 53 Under the law of your jurisdiction, will the guarantor’s liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee’s wording affect the position?

Yes, the liability of the guarantor will be limited to the counterparty in the construction contract, as under Sharia law, assignments of rights under a contract are not effective against a non-party unless its consent has been explicitly obtained.

- 54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee’s wording affect the position?

Unless the wording of the guarantee specifies otherwise, a guarantor will be bound until released by the beneficiary of the guarantee, in writing.

On-demand bonds

- 55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

A bond call may be challenged if the bond runs afoul of Sharia principles, for example, if it relates to an interest payment. Otherwise, on-demand bonds are immediately enforceable.

- 56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts which the employer is entitled to (like sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

The court will enforce the bond according to its wording, unless it runs afoul of Sharia principles.

Further considerations

- 57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

At this time, we do not believe there are other material aspects of the law not covered above.



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Joseph is an experienced arbitration practitioner seated in Vinson & Elkins' Dubai office. He has acted as counsel in more than 20 international construction and commercial arbitrations under many of the major arbitral institutions and in ad hoc proceedings as well as in cross-border litigation. He also has experience in investigations. Joseph has represented multinational corporations, governments, and private clients across multiple sectors, with a focus on construction and engineering, as well as commercial, disputes. His particular experience includes disputes relating to government service contracts, power and water facilities, public-private partnerships, housing developments, telecommunications, mergers and acquisitions, joint ventures, water-storage facilities, and oil and gas production. Joseph appears regularly as an advocate in litigation and arbitration proceedings. He is an advocate of the Dubai International Financial Centre courts and has sat as a party-appointed and sole arbitrator.



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Emily is an associate in the Dubai office of Vinson & Elkins and a member of the firm's International Dispute Resolution & Arbitration practice group. She has broad experience of both litigation and international arbitration. She has represented sovereign governments, multinational corporations and private clients across a range of sectors, including oil and gas, telecoms, transport and other infrastructure projects. Emily has particular experience of anti-corruption and regulatory matters across the Middle East and North Africa region, including experience of both the US Foreign Corrupt Practices Act and the UK Bribery Act. She has appeared before the English High Court, the English Court of Appeal and the DIFC Court, in addition to arbitral tribunals constituted pursuant to various institutional rules.

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Amr Omran is an associate in the Dubai office of Vinson & Elkins and a member of the firm's international dispute resolution & arbitration practice group. Amr's practice focuses on advising clients in commercial, investment and construction disputes. He has advised and represented clients in international arbitrations including under the ICSID, ICC, DIAC, DIFC-LCIA and UNCITRAL Rules. Prior to moving to Dubai, Amr worked with the Egyptian Public Prosecution Office in Cairo, the World Bank Group in Washington, DC, and the Paris and Dubai offices of a leading international law firm. Amr is a native Arabic speaker and admitted to practise in Egypt and New York.