

# SOME KEY FEATURES OF SAUDI ARABIA'S NEW CIVIL TRANSACTIONS LAW

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Saudi Arabian legislation has historically been enshrined in the Islamic principles of Shari'a, which the international community considered a foreign concept giving rise to uncertainty of its meaning and interpretation.

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On 19 June 2023, by Royal Decree M/191, the Kingdom of Saudi Arabia ("KSA") enacted its first Civil Transactions Law ("CTL") to govern civil and commercial transactions in the kingdom. The CTL will come into force 180 days from the date of its publication in the official gazette, i.e. around 16 December 2023. The CTL forms part of an extensive legislative reform designed to instil confidence in the kingdom's legal landscape with the aim of having a *"positive impact on the business environment, [to] increase its attractiveness, and [to] contribute to regulating economic movement and the stability of financial rights"*. HH Crown Prince of KSA Mohammed bin Salman says the new law will *"enhance transparency and increase*

*the ability to predict judgements in the field of civil transactions reducing discrepancies in judicial reasoning to reach prompt justice"*.

Set out below are some of the key features of the CTL.

## FORMATION OF CONTRACTS

The CTL provides that a contract is formed once an offer is made and accepted as this constitutes an "intention to create legal relations". Although not expressly stated in the CTL, it is assumed that an offer can only be accepted if consideration is part of what is agreed. Therefore, the CTL recognises the classic requirements for the formation of contracts which apply in both common law and civil law jurisdictions.

Article 42 of the CTL recognises the validity of agreements to agree. It stipulates that provided the essential terms of contract are agreed, the parties may leave certain details to be agreed later. Like the position under the UAE Civil Code, if the parties then fall into dispute as to the matters which have not been agreed, the court has the power to interfere and resolve the dispute taking into account *"the nature of the transaction and the provisions of the law and custom"*.

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Article 45 also recognises the validity of framework agreements that establish "*the basic terms and conditions binding*" on the contracting parties. Framework agreements are often used between buyers and suppliers of goods to establish the basic terms of future purchases of goods and services. Article 45 provides that such framework agreements "*form part of the contracts entered into between the parties*".

## GOOD FAITH OBLIGATIONS

Article 41 of the CTL is another interesting provision. It introduces the obligation on parties to negotiate contracts in good faith.

Most civil law jurisdictions require contracting parties to *perform* their contractual obligations in good faith. Certain jurisdictions, however, go further and impose a pre-contractual duty to *negotiate* in good faith. For example, under the French Civil Code whilst parties remain entirely free to initiate, conduct and break negotiations, this freedom remains subject to a specific codified requirement of good faith.

Article 41 of the CTL provides:

"1. Contract negotiations may not oblige the contracting parties to conclude the contract. The defaulting party, under bad faith, shall compensate the other party against any loss incurred, excluding the expected profit of the contract.

2. Entering bargaining with no intention of reaching an agreement or failure to inform any substantial term of the contract to the other party are acts that constitute bad faith".

Similar to the position under Article 1112 of the French Civil Code, Article 41.1 of the CTL provides that parties may be liable if they wrongfully break negotiations. It is not the withdrawal from negotiations that is sanctioned but rather the abusive withdrawal of negotiations, i.e. if it is done in bad faith. Bad faith may well be established in circumstances where negotiations have reached an advanced stage before being abruptly broken without legitimate reason i.e. when the negotiations have given rise to a reasonable expectation by the other party that the deal will be concluded.

Article 41.1 of the CTL provides that the party who unjustifiably, unilaterally interrupts negotiations could be liable to compensate the other party for certain losses suffered. However, similar to the position under French law, the CTL excludes the recoverability of loss of profits from the anticipated contract. The compensation will essentially be restricted to wasted expenses incurred during the negotiations in expectation of entering the contract.

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Like under the French Civil Code, Article 41.2 also appears to impose a separate general pre-contractual duty of information meaning that parties should be transparent about relevant facts and circumstances such that a breach of the law may arise where critical information has been intentionally withheld by one party to the other.

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## TERMINATION OF CONTRACTS

Articles 105 to 114 of the CTL deal with termination of contracts. Like the position under UAE law, a contract may be terminated by:

- mutual consent according to its terms;
- exercise of an option to cancel the contract;
- for breach of an obligation; or
- an automatic cancellation for impossibility to perform.

Article 108 provides that a contract may be terminated for breach without the need for a court order.

Similar to the position in other civil law jurisdictions, a party may also withhold or suspend performance of its obligations if the other party fails to discharge a mutual or corresponding obligation that has since become due for performance (Article 110).

## CONSTRUCTION CONTRACTS

Part 3 of the CTL deals with "Incoming Contracts on Work" (i.e. construction contracts), or as referred to by neighbouring countries "Muqawala Contracts".

The CTL includes detailed provisions dealing with contractors' and employers' obligations, subcontracting and termination of construction contracts.

Even though there are no express provisions to that effect under Part 3, it is likely that a contractor would be entitled to rely on Article 110 to argue that it is entitled to suspend work if it has not been paid by the employer for any work performed and certified and or claims that have been certified or accepted despite the contractor's performance beyond the due date.

Although the CTL helpfully introduces provisions dealing with construction contracts, it does not consolidate the full regime applicable to construction contracts under KSA law. For example, unlike the UAE Civil Code, the CTL does not deal with the liability of contractors or designers.

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The UAE Civil Code imposes decennial liability on a contractor and supervising architect or designer for a period of ten years from the date of the “delivery” of the work. This liability covers collapse whether total or partial, as well as any other defect that threatens the safety and stability of the building. The UAE Civil Code expressly prohibits any agreement excluding or limiting decennial liability. No equivalent exists in the CTL, but a similar obligation does exist under KSA law albeit in separate legislation, namely in the Saudi Building Code Application Law together with its implementing regulations, introduced in 2017 and 2018 respectively and amended in 2019.

## FORCE MAJEURE

Article 125 of the CTL provides for an exemption of liability in the event of a force majeure unless the contracting parties agree that the *“debtor shall bear the consequences of force majeure”* (Article 174).

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The CTL does not contain any detailed guidance on what needs to be established in order for something to be a force majeure event. In contrast, the UAE Civil Code and Qatar Civil Code expressly set out the threshold required to be met including the impact on performance and foreseeability.

The UAE Civil Code distinguishes between temporary, permanent, total and partial impossibility and deals with its consequences by entitling a party to cancel the relevant obligation. The UAE Civil Code states that in cases where performance is totally impossible, the *“corresponding obligation shall cease, and the contract shall be automatically cancelled”* (Article 273(1)) and where performance is partially

impossible *“that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is made aware”* (Article 273(2)).

Qatari law explicitly specifies that for an event to qualify as an “event of force majeure”, the event must be beyond the control of the parties, have been unforeseeable at the time the agreement was entered into, and render the performance of contractual obligations impossible. Article 258 of the Qatari Civil Code No. (22) of 2004 also provides that even where a party could be excused from performing its obligations due to an “event of force majeure”, it can still be liable for the consequences of that event.

The CTL, however, does not address the consequential impact of events of force majeure. Instead, Shari’a principles will apply. Whilst the position under Shari’a may be similar to that laid out in the Emirati or Qatari Civil Codes, the fact that it remains uncodified means that it is important for parties to carefully draft their contractual force majeure provisions to avoid uncertainty.

## CONCLUSION

The CTL helpfully contains a set of final provisions which codify 41 Shari’a principles, which are designed to apply where the CTL is silent on a specific issue.

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The landmark introduction of the CTL is a positive development for KSA. Whilst it remains to be seen how the CTL will be applied in practice and interpreted by the courts, its introduction is no doubt a welcomed development in the Kingdom in line with its 2030 Vision to build a “*vibrant society, a thriving economy and ambitious nation*”.

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