

SAUDI ARABIA'S CIVIL TRANSACTIONS LAW: CONSTRUCTION CONTRACTS

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In our previous article, we discussed some key features of the Kingdom of Saudi Arabia's ("KSA") landmark new Civil Transactions Law ("CTL") which enters into force in December 2023. In this follow-up article we look more closely at construction contracts under the CTL.

Prior to the issuance of the CTL, there was no written construction law in KSA save for public sector contracts which were and remain subject to the 2006 Government Tenders and Procurement Law ("GTPL"). All construction contracts in the private sector were subject to the contracting parties' consent and law principles.

Articles 461 to 478 of the CTL now contain detailed provisions dealing with contractors and employers' obligations, subcontracting and termination of construction contracts. Other key principles included elsewhere in the CTL will also be relevant to construction contracts and claims.

KEY PRINCIPLES RELEVANT TO CONSTRUCTION CLAIMS

The CTL contains various principles which will be familiar to legal practitioners in the region.

Good faith: the CTL includes not only an overarching duty to perform contracts in good faith (Article 95) but also a specific duty to conduct negotiations in good faith (Article 41). This duty may impact the negotiations of variations and claims for extension of time and additional payment.

Abuse of right: the CTL provides that the legitimate exercise of a right may be unlawful (Article 29). The exercise of a right will be considered unlawful in any of the following circumstances if:

- it is exercised solely with the intention to cause harm;
- the interests or benefits are disproportionate to the harm that will be suffered by others; or
- it is exercised to obtain an unlawful benefit.

"The CTL provides that if the parties have not agreed on the time for completion, the contractor is required to complete the works in accordance with 'accepted principles and within the reasonable period required by the nature of the work' (Article 465)."

A contractor may be able to successfully argue that reliance on a time bar notice (e.g., FIDIC clause 20.1) by the employer to object to a claim would be contrary to the duty of good faith and/or an abuse of right in circumstances where the claim had been clearly communicated and acknowledged (e.g., in meetings and other correspondence).

Right to withhold or suspend performance: under the CTL a party has the right to withhold or suspend performance of its obligations if the other party fails to discharge a mutual corresponding obligation that has since become due for performance (Article 110). 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 work performed and certified or claims that have been certified or accepted despite the contractor's performance beyond the due date.

Power of court to adjust pre-agreed damages: a court has discretion to adjust the pre-agreed amount of compensation to ensure that damages are equal to the actual

loss suffered. Article 179 of the CTL provides that the court may:

- at the request of the debtor, reduce the pre-agreed compensation if the debtor proves that the amount is "exaggerated" or that the debtor has partly fulfilled its obligation; or
- at the request of the creditor, increase the pre-agreed compensation to make it equal to the loss suffered if the creditor proves that it suffered greater loss because of the debtor's fraud or gross negligence.

"The CTL provides that if the price for the work is not specified in the contract, the contractor will be entitled to fair remuneration (Article 472)."

Article 179 also confirms that those provisions are mandatory and may not be excluded by parties' agreement.

Similar to the position under UAE law, contractors may be able to rely on those provisions to resist the application of liquidated damages if they are able to demonstrate that the employer did not suffer any loss or that the liquidated damages are grossly disproportionate to the actual harm suffered.

SPECIFIC PROVISIONS APPLICABLE TO CONSTRUCTION CONTRACTS

Time for completion of the work

The CTL provides that if the parties have not agreed on the time for completion, the contractor is required to complete the works in accordance with "accepted principles and within the reasonable period required by the nature of the work" (Article 465). In the (unlikely) event that time for completion is not fixed in the contract, such time will be a reasonable period determined by reference to the nature of the works and to industry custom and practice.

In contrast to the GTPL, the CTL does not provide contractors in the private sector with a statutory entitlement to extensions of time. As a result, a contractor must rely on its contractual entitlement. However, as indicated above the court may rely on general principles of good faith and abuse of right when considering time related construction claims.

Price

"While Article 249 of the UAE Civil Code applies to any type of contracts, it is interesting to note that Article 471.3 of the CTL deals specifically with construction contracts."

The CTL provides that if the price for the work is not specified in the contract, the contractor will be entitled to fair remuneration (Article 472). Therefore, if an employer instructs a variation for works which were not contemplated for and for which there are no rates specified in the contract, then the contractor will be entitled to fair or reasonable rates plus the value of materials.

The CTL also includes provisions dealing with price adjustments in lump sum and remeasurement contracts.

In the case of a re-measurement contract, the contractor must immediately notify the employer of any significant increase in the anticipated quantities, failing which the contractor loses its right to claim extra costs for any excess over the estimated

quantity (Article 470.1). Where the increase in quantities is substantial, the employer is entitled to terminate the contract but must do so without delay and must pay the contractor the value of the work performed to be assessed in accordance with the terms of the contract (Article 470.2).

In the case of a lump sum contract, the contractor is not entitled to additional payment for works which are a necessary part of the execution of the agreed design (i.e., within scope or specification) (Article 471.1). However, the CTL allows for variations to the works instructed by the employer and those requested by the contractor and agreed by the employer (Article 471.2).

Further, Article 471.3 provides that *"if the contractual balance"* between the employer's and the contractor's obligations *"collapses due to general exceptional circumstances that could not have been foreseen"* at the time of contracting and *"the basis for the financial assessment"* of the construction contract is *"destroyed"*, then the court has the power to extend time for completion, adjust the remuneration of the contractor or terminate the contract. This provision is interesting. It is similar to Article 249 of the UAE Civil Code on *"exceptional circumstances"* which allows the court to adjust the effect of a contract if *"exceptional circumstances of a public nature which would not have been foreseen occur"* in order to *"reduce the oppressive obligation to a reasonable level"*. However, while Article 249 of the UAE Civil Code applies to any type of contracts, it is interesting to note that Article 471.3 of the CTL deals specifically with construction contracts. It remains to be seen how the KSA courts will apply this provision in practice.

TERMINATION OF THE CONSTRUCTION CONTRACT

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

- mutual consent according to its terms;

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- 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.

As regards construction contracts, Article 475 provides that the contract comes to an end with the completion of the works. Article 476 allows termination of the contract by either party if performance has become impossible due to external factors. The party requesting termination must compensate the other party for any damage arising out of the termination.

Where a contractor is no longer able to perform for a reason beyond his control, he will be entitled to recover the value of the completed works and any costs or expenses incurred. However, compensation will be capped to the value derived by the employer from such works (Article 477).

CONCLUSION

The introduction of the CTL is part of an extensive legislative reform designed to enhance KSA's legal landscape in line with the Kingdom's 2030 vision. The specific provisions dealing with construction contracts and other key principles of the CTL provide greater certainty as to contractors and employers' rights and obligations and how these are to be interpreted. This is no doubt a welcome development for all contractors operating in the Kingdom.

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