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Construction Law 2024

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Saudi Arabia: Law & Practice

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GLA & Company



SAUDI ARABIA



Law and Practice

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GLA & Company is a regional law firm based in the United Arab Emirates (UAE), providing strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm is proud to hold a diverse portfolio of clients, from start-ups to global enterprises. GLA's practice consists of a full-service law firm, from simple advisory work to complex contentious and non-contentious matters.

With extensive experience in advising clients in the key Gulf Cooperation Council (GCC) states of Kuwait, Saudi Arabia, Qatar, the UAE, Egypt and Lebanon, the firm offers unique insights for companies seeking quality legal services. Data protection and privacy is an area of special attention for the firm, considering the expansion and revamping of applicable laws and regulations across the GCC.

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1. General

1.1 Governing Law

The two major pieces of legislation that govern the construction law industry are the New Civil Transactions Law (NCTL) and the Saudi Building Code (SBC).

The NCTL was enacted by Royal Decree No M/191 of 2023.

The SBC (enacted by Royal Decree No M/43 of 2017 and amended by Royal Decree M/15 of 2019) and its implementing regulations play a crucial role in regulating the construction industry, and aim to streamline the execution of construction projects in Saudi Arabia. The SBC helps regulate the safety, efficiency and sustainability of buildings in the Kingdom.

1.2 Standard Contracts

In practice, the most common construction contracts used in Saudi Arabia stem from the International Federation of Consulting Engineers (FIDIC). The predominant forms are the first editions (published in 1999) of the following:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (also known as the Construction Contract or the “Red Book”);
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor (also known as the Plant and Design-Build Contract or the “Yellow Book”); and
- Conditions of Contract for EPC/Turnkey Projects (also known as the EPC/Turnkey Contract or the “Silver Book”).

It is common for FIDIC contracts to be modified, often in favour of the employer. Such redistribution of risk can be extensive. The engineer’s role in the FIDIC Red Book form is often limited; as such, the employer’s approval is needed for many important decisions.

While standard contracts are used, as with any standard forms, governing rules are critical for properly negotiating, analysing and applying contractual rights and obligations. Thus, it is always advisable to seek counsel in the jurisdiction of governance, in addition to counsel in the jurisdiction where the parties are domiciled and where the project will be executed.

2. Parties

2.1 The Employer

The employer would usually be:

- a state entity;
- a company owned by the state; or
- a local entity.

The employer’s obligations encompass a range of responsibilities and duties that employers must fulfil, in order to ensure compliance with legal requirements and to promote a safe and productive work environment. Employers also have obligations related to the administration of contracts, and to the proper understanding of and compliance with contractual obligations. Disputes can, and often do, result from:

- failure to administer the contract correctly;
- poorly drafted or incomplete claims;
- errors or omissions in contract documents; and
- incomplete design information or employer requirements.

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Employers must do their best to understand and fulfil their contractual obligations, in order to mitigate or avoid potential legal issues.

In addition to obligations stipulated in the contract, the employer has statutory rights and obligations, such as:

- to issue acceptance certificates;
- to fulfil payment obligations;
- to agree to additional work and changes; and
- to reasonably remunerate the contractor.

The employer also has the right to cancel the construction contract.

2.2 The Contractor

The contractor's basic obligations include the obligation to perform the work in accordance with their agreement with the employer, including doing so within the agreed timeframe and in a manner consistent with the contract specifications.

As with the employer, the contractor is subject to statutory rights and obligations that may not be covered in the contract. For example, the contractor has a duty of care to perform the agreed work and to guarantee the work completed by them.

The NCTL stipulates that, during the progress of the work, if it appears that the contractor is performing the work in a defective manner or in breach of the contract, the employer may notify the contractor to correct the method of performance within such reasonable time as determined by the employer. Where such period expires without remedy of such breach, the employer may demand termination of the contract or ask another contractor to perform the

work at the cost of the first contractor, under the provisions of Article 167 of the NCTL.

If the contractor delays in commencing or accomplishing the work to such an extent that they cannot possibly deliver the work within the agreed period, or if their actions indicate their intention to not fulfil their obligations or make the performance of their obligations impossible, the employer may demand the immediate termination of the contract.

2.3 The Subcontractors

Subcontracting is allowed if mentioned in the main contract. Given the size of the projects and the specialised work required, outsourcing is very common, especially in specialised areas such as:

- design/engineering;
- enabling and foundation work;
- mechanical, electrical and plumbing work;
- facade work; and
- any special systems-required project.

The contractor may assign the implementation of all or part of the work to a subcontractor, unless the legal texts, the agreement or the nature of the work require otherwise. The responsibility of the contractor remains against the employer. In this case, the subcontractor may not claim for themselves any rights or obligations entitled to the main contractor (Articles 473–474 of the NCTL).

2.4 The Financiers

Historically, Saudi Arabia's governmental projects have been self-funded, and recent budget announcements confirm continued investment in infrastructure and construction projects. The Public Investment Fund (PIF) has a world-class investment portfolio that focuses on sustainable investments both domestically and internation-

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ally. With effective and long-term investments, the PIF seeks to be a leading investor and to have an impact beyond the borders of the Kingdom of Saudi Arabia (KSA). This investment strategy is consistent with Vision 2030, which will lead the transformation of KSA's economy through active long-term investments and high standards of governance and transparency.

2.5 The Designer

In Saudi Arabia's construction industry, the designer is usually a foreign company or foreign contractor overlooking the project's specifics and design changes.

Various types of companies and institutions can act as designers in construction projects in Saudi Arabia, including the following.

Architectural Firms

Firms specialising in architectural design play a crucial role in designing the overall layout, aesthetics and functionality of buildings.

Engineering Firms

Engineering companies provide expertise in various fields (such as structural, mechanical, electrical and civil engineering), contributing to the technical aspects of the project design.

Design-and-Build Firms

These firms offer integrated services encompassing both design and construction, providing a streamlined approach to project delivery.

Consulting Firms

Consulting companies may offer specialised expertise in specific areas, such as environmental impact assessment, urban planning or interior design.

Government Agencies

In some cases, government entities may directly undertake design work for public infrastructure projects.

In general, the rights and obligations of the designer under a construction contract in Saudi Arabia are governed by the terms of the contract, as well as by relevant laws and regulations. Some common rights and obligations of the designer may include the following.

Rights:

- the right to be compensated for their design services as per the terms of the contract;
- the right to have their design work accurately interpreted and implemented by the contractor; and
- the right to enforce contract provisions related to intellectual property rights and ownership of design documents.

Obligations:

- the obligation to perform design work with due care, skill and diligence in accordance with professional standards and industry best practices;
- the obligation to deliver design documents and specifications within agreed-upon timeframes; and
- the obligation to co-ordinate with other project stakeholders, such as the employer and the contractor, to ensure the successful execution of the project.

The relationship between the designer, the employer and the contractor in Saudi Arabia can vary depending on the contractual arrangements and project delivery method. However, in general:

- the designer typically enters into a contract with the employer (client) to provide design services for the project;
- the designer collaborates closely with the employer to understand their requirements and preferences, translating them into design solutions;
- once the design is finalised, the designer may work alongside the contractor during the construction phase to provide clarifications, address design-related issues and ensure that the project is built according to the design's intent; and
- while the designer may have a direct contractual relationship with the employer, they also have a professional responsibility to co-operate with the contractor to facilitate the successful completion of the project.

3. Works

3.1 Scope

In general, the scope of works in a construction contract in Saudi Arabia is determined through a combination of documents, including the programme of requirements, specifications and other project documents.

The programme of requirements outlines the client's objectives, needs, and preferences for the project.

Specifications detail the technical requirements, materials and standards to be followed in the construction process.

Additionally, drawings, plans and schedules may be used to further describe and illustrate the scope of works, providing a comprehensive understanding of the project's requirements and deliverables.

3.2 Variations

In Saudi Arabia, the scope and price for variations requested by the employer are typically determined through the contract terms, which may include provisions outlining the process for evaluating and pricing variations based on agreed-upon rates or pricing mechanisms. The contract may also specify limitations on the scope and cost of variations to ensure that they are reasonable and within the project's budget.

If a variation is requested by the contractor, the scope and price are generally subject to negotiation between the parties, with the contractor submitting proposals detailing the proposed changes and associated costs. The contract may specify procedures for assessing and approving contractor-initiated variations, as well as mechanisms for resolving disputes related to scope or pricing disagreements.

Time-related costs associated with variations are typically dealt with through the contract's provisions on extensions of time and delay-related costs. The contract may specify procedures for assessing the impact of variations on the project schedule, and for determining any resulting time extensions and associated costs. Additionally, the parties may negotiate compensation for delay-related costs resulting from variations, such as additional overhead, prolongation costs or acceleration expenses.

3.3 Design

In Saudi Arabia, responsibilities for the design process are typically divided between the employer, designer, contractor and other parties.

The employer defines project objectives and approves designs, while the designer develops the concept and ensures compliance.

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The contractor implements the design during construction, collaborating with the designer to address any issues.

Consultants and subcontractors may also play specialised roles in the design process. The specific division of responsibilities varies based on project requirements and contractual arrangements. Effective co-ordination between all parties is crucial for successful project delivery.

3.4 Construction

In Saudi Arabia, responsibilities for the construction process are typically divided between the employer, contractor, subcontractors and other parties involved. The following is a breakdown of the possible divisions of work.

The employer (client):

- defines project requirements, objectives and specifications;
- provides necessary permits, approvals and access to the construction site;
- ensures compliance with regulatory requirements and standards; and
- may engage consultants or specialists for project oversight, inspections or quality assurance.

The contractor:

- oversees and manages the construction process, including scheduling, co-ordination and execution of the work;
- provides labour, equipment and materials necessary for construction;
- ensures compliance with design specifications, quality standards and safety regulations; and

- manages subcontractors and co-ordinates their work to ensure timely completion of the project.

Subcontractors:

- execute specific portions of the construction work as subcontracted by the main contractor; and
- provide specialised services, such as electrical, plumbing, HVAC or finishing works.

Consultants:

- provide technical expertise and support during the construction process, particularly in specialised areas such as structural engineering or mechanical, electrical or architectural design;
- conduct inspections, quality control checks and compliance assessments to ensure adherence to design and regulatory requirements; and
- provide guidance and recommendations to the employer and contractor regarding construction-related issues or changes.

Suppliers and vendors:

- supply construction materials, equipment and components as required for the project;
- co-ordinate delivery schedules and logistics to ensure timely availability of materials at the construction site; and
- provide technical support and assistance related to the installation or use of supplied products.

Government authorities provide regulatory oversight and approvals for construction projects, including permits, licences and inspections.

3.5 Site

In Saudi Arabia, the responsibility for the status of the construction site – including issues such as pollution, underground obstacles, geotechnical conditions and archaeological finds – is typically shared between the employer (client) and the contractor.

This division of responsibility is often governed by a combination of mandatory or regulatory laws and contractually agreed-upon terms. Government regulations mandate compliance with environmental protection, archaeological preservation and site safety standards, while construction contracts allocate responsibilities for site investigations, mitigation measures and any unexpected discoveries or obstacles encountered during construction.

3.6 Permits

In Saudi Arabia, construction projects typically require various permits, including building permits, environmental permits and approvals for specific activities such as excavation or demolition. The responsibility for obtaining necessary permits is typically shared between the employer (client) and the contractor. Government regulations mandate compliance with permit requirements, while construction contracts may allocate responsibilities for permit procurement and specify procedures for obtaining necessary permits.

3.7 Maintenance

In Saudi Arabia, the party responsible for the maintenance of the works is typically outlined in the construction contract, with responsibilities often falling on the contractor during a defects liability period. Maintenance works generally involve ensuring the continued functionality, safety and appearance of the completed construction project. Maintenance tasks may

include routine inspections, repairs, cleaning and upkeep of infrastructure, buildings and systems. Maintenance agreements may be included in specific contracts other than the construction contract, outlining ongoing maintenance responsibilities and arrangements between parties.

3.8 Other Functions

In Saudi Arabia, other functions in the construction process (such as operation, finance and transfer) are typically instructed by the employer to the contractor or third parties through contractual agreements. These functions may involve tasks such as:

- project-financing arrangements;
- operation and maintenance agreements for completed projects; and
- transfer of ownership or operational control upon completion.

Instructions for these functions are governed by contractual agreements between the parties involved in the construction project.

3.9 Tests

In Saudi Arabia, the typical process for testing the completion of works involves co-ordination between the contractor, employer and (possibly) third-party specialists. The specific tests conducted depend on the nature of the project and contractual requirements. Responsibilities for testing are typically divided as follows.

Contractor

The contractor is responsible for performing tests in accordance with the contract specifications, ensuring that the works meet the required standards and quality criteria.

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Employer

The employer oversees the testing process, ensuring that it is carried out in accordance with the contract requirements. The employer may also engage third-party specialists to conduct independent tests or inspections to verify compliance.

Third-Party Specialists

In some cases, third-party specialists such as testing laboratories or engineering firms may be hired to conduct specific tests or inspections as part of the completion process. Their role is to provide impartial assessments of the works' compliance with technical standards and specifications.

3.10 Completion, Takeover and Delivery

In Saudi Arabia, the processes of completion, takeover and delivery in construction projects are closely related and influence each other.

Completion refers to the point at which the construction works are finished according to the contract requirements.

Takeover occurs when the employer formally accepts the completed works from the contractor, typically after inspections and testing to ensure compliance with specifications.

Delivery involves transferring possession and control of the completed works to the employer.

These processes influence each other as the completion of works triggers the initiation of takeover procedures, and successful takeover precedes the formal delivery of the project. A certificate of completion is often issued to prove the completion of the project.

3.11 Defects and Defects Liability Period

In general, the contractor can be held liable for defects in the works for a specified warranty period agreed upon in the contract, typically ranging from one to five years. Contractual periods for discovering defects are often agreed upon between parties, outlining the timeframe within which defects must be identified and reported.

Remedies available to the employer in the event of a defect include:

- requiring the contractor to remedy the defect;
- withholding payments; or
- seeking damages for losses incurred.

These remedies may vary after takeover by the employer, depending on the contract terms. While there are no specific mandatory or regulatory laws governing the period for notifying the contractor of defects in Saudi Arabia, failure to notify the contractor within the agreed-upon timeframe may limit the employer's ability to seek remedies or damages for the defect.

4. Price

4.1 Contract Price

In Saudi Arabia, methods of establishing the contract price typically include:

- lump sum;
- unit price;
- cost-plus; and
- target cost.

The contract price is generally made up of various components, such as:

- labour costs;
- material costs;

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- overheads;
- profit margins; and
- any other agreed-upon expenses.

Milestone payments are commonly used in construction contracts in Saudi Arabia, where payments are made upon the achievement of predetermined project milestones or stages of completion.

4.2 Indexation

In Saudi Arabia, indexation of prices is commonly used in construction contracts to manage the risk of price fluctuations. The risk of large price fluctuations is typically divided between parties through contractual provisions specifying the method of indexation, such as tying prices to a specific cost index or allowing for adjustments based on changes in market conditions.

4.3 Payment

In Saudi Arabia, typical measures in construction contracts to manage late or non-payment include provisions for advanced payments, delayed payments and interim payments.

Advanced payments may be provided to the contractor to mobilise resources and start work, while delayed payments may incur penalties or interest charges for late payment. Interim payments are often based on completed work or milestones achieved, ensuring ongoing cash flow for the contractor throughout the project.

4.4 Invoicing

In Saudi Arabia, typical means of invoicing in construction contracts include:

- milestone-based invoicing;
- progress payments based on completed work; and
- interim payment certificates.

Invoices are often submitted by the contractor to the employer at specified intervals, reflecting the percentage of work completed or milestones achieved according to the contract terms.

5. Time

5.1 Planning and Programme

In Saudi Arabia, planning in construction contracts typically involves collaboration between the employer, contractor and other parties.

The employer defines project objectives and requirements, while the contractor develops a construction plan to meet these objectives. Other parties, such as consultants and subcontractors, may provide input and expertise during the planning process.

Planning is safeguarded through contractual provisions requiring the submission and approval of construction plans and schedules. Milestones, milestone payments and certificates are commonly used in Saudi Arabia to track progress and ensure that contractual obligations are met at key stages of the project.

5.2 Delays

In Saudi Arabia, in the event of delays, parties typically follow a process outlined in the contract, including:

- notifying each other of delays;
- assessing responsibilities; and
- seeking resolution through negotiation or dispute resolution mechanisms.

Typical obligations of the parties include:

- mitigating delays;
- providing timely notice of delays; and

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- co-operating to minimise impacts on the project.

Time-related costs are usually addressed through provisions in the contract, which may include mechanisms for compensating the affected party for additional costs incurred due to delays. Legal and/or contractual arrangements on concurrent delays may vary but often involve apportioning responsibility based on the cause and impact of delays, with the contract determining how concurrent delays are addressed and resolved.

5.3 Remedies in the Event of Delays

In Saudi Arabia, remedies generally available to the employer in the event of delays include:

- imposing liquidated damages;
- terminating the contract; or
- seeking specific performance remedies.

Liquidated damages are often specified in the contract and allow the employer to claim compensation for delays. Termination of the contract may be an option if the delays are substantial or persistent. Specific performance remedies may involve requiring the contractor to accelerate the work or take other measures to mitigate the delays.

5.4 Extension of Time

In Saudi Arabia, a contractor typically requests an extension of time by submitting a formal written notice to the employer, detailing the reasons for the delay and providing supporting documentation. Grounds for awarding an extension of time may include:

- unforeseen site conditions;
- design changes;
- force majeure events; or

- delays caused by the employer or other parties.

The extension of time is usually established, measured and proven through documentation – such as progress reports, correspondence, site records and expert analysis – demonstrating the impact of the delay on the project schedule.

5.5 Force Majeure

The application of force majeure in construction contracts is particularly relevant due to the inherent risks and uncertainties associated with construction projects. In Saudi Arabia, the application of force majeure in construction contracts is influenced both by general principles of contract law and by specific provisions of Saudi Arabian law. The Saudi Arabian legal system is based on Islamic law (Sharia), and contracts are generally governed by the principles of freedom of contract and good faith.

In the case of construction public procurement contracts, Article No 144 of the Government Tender and Procurement Law (GTPL) allows a party to a public procurement contract to seek to delay performance under the contract for a certain time proportional to the delay caused by force majeure. The contractor must also prove that the delay was due to “critical circumstances” or “causes beyond his control”.

To invoke force majeure in a construction contract in Saudi Arabia, the party seeking relief must demonstrate that the event in question meets the criteria specified in the force majeure clause. These criteria typically include:

- the occurrence of an event beyond the control of the parties;
- the event’s impact on the party’s ability to perform its contractual obligations; and

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- the absence of any reasonable measures that could have been taken to mitigate or avoid the event.

5.6 Unforeseen Circumstances

In Saudi Arabia, unforeseen circumstances in construction contracts are addressed through a combination of mandatory or regulatory law and contractual agreements between the parties.

Saudi Arabian law provides certain provisions governing unforeseen circumstances in construction contracts. Article 97 provides a potential route to relief upon the occurrence of “exceptional circumstances of a general character”, provided that the circumstances were not foreseeable at the time of entering into the contract. It is a “mandatory” term, meaning that any provision to the contrary is considered void.

In construction contracts in Saudi Arabia, addressing unforeseen circumstances typically involves the following approaches.

Force Majeure Clauses

Contracts may include force majeure clauses defining events or circumstances beyond the parties’ control, such as:

- natural disasters;
- acts of terrorism; or
- government actions.

These excuse performance or provide for extensions of time and/or adjustments to contract terms.

Change Order Procedures

Contracts often establish procedures for addressing changes in project scope, specifications or conditions due to unforeseen circumstances. This may involve:

- formal change order requests;
- negotiations between the parties; and
- adjustments to contract terms, including time extensions and additional compensation.

Notice Requirements

Contracts may include provisions requiring parties to provide timely notice of unforeseen circumstances (such as delays, disruptions or events triggering force majeure) to ensure prompt action and mitigation of potential impacts on the project.

Dispute Resolution Mechanisms

Construction contracts typically include provisions for resolving disputes arising from unforeseen circumstances (such as mediation, arbitration or litigation) to ensure timely and effective resolution of issues that cannot be resolved amicably between the parties.

5.7 Disruption

In Saudi Arabia, disruption is generally acknowledged as a valid ground for seeking an extension of time and/or compensation in construction contracts, provided that it meets certain criteria and is supported by contractual provisions or legal principles. Disruption refers to any event or circumstance that significantly impacts the progress or efficiency of the construction works, resulting in delays, increased costs or reduced productivity.

Establishing, measuring and proving disruption typically involves several steps, as follows.

Contractual Provisions

The construction contract may include provisions that specifically address disruption as a permissible ground for extension of time and/or compensation. These provisions may:

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- define disruption;
- specify the circumstances under which it applies; and
- outline the procedures for notifying the other party and documenting the impact of disruption events.

Documentation

Parties affected by disruption events should maintain detailed records documenting the occurrence, duration and impact of the disruption on the project schedule, productivity and costs. This documentation may include:

- daily progress reports;
- project schedules;
- correspondence;
- meeting minutes; and
- other relevant records.

Causation Analysis

Parties seeking an extension of time and/or compensation must demonstrate a causal link between the disruption event and the resulting delays or impacts on the project. This may involve:

- analysing the sequence of events;
- identifying the specific causes of disruption; and
- assessing their direct and indirect effects on the project's progress and performance.

Quantification of Losses

Once disruption is established, parties may need to quantify the resulting delays, costs or losses attributable to the disruption event. This may involve:

- assessing the additional time and resources required to complete the affected work;
- calculating the associated costs; and

- determining any resulting impacts on project milestones or critical path activities.

Expert Analysis

In complex cases or disputes involving disruption, parties may enlist the assistance of experts (such as delay analysts, quantity surveyors or construction claims consultants) to assess and quantify the impact of disruption objectively. These experts can provide independent analysis and expert testimony to support the parties' claims for extension of time and/or compensation.

6. Liability

6.1 Exclusion of Liability

Please see 9.2 Restricting Remedies.

6.2 Wilful Misconduct and Gross Negligence

It is stated in the Civil Code and enshrined in Sharia principles that compensation must be set out if wilful misconduct is detected.

6.3 Limitation of Liability

Please see 9.4 Excluded Damages.

7. Risk, Insurance and Securities

7.1 Indemnities

Indemnities are commonly used in Saudi Arabia, particularly in construction contracts, to limit risk and allocate responsibilities between parties. An indemnity is a contractual provision where one party agrees to compensate the other for specified losses, damages or liabilities arising from certain events or circumstances. Typical subjects for which one party would indemnify another in Saudi Arabia include the following.

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Third-Party Claims

One party may indemnify the other against claims, lawsuits or liabilities brought by third parties, including but not limited to claims for:

- bodily injury;
- property damage; or
- financial losses arising from the project.

Professional Negligence

Professionals such as architects, engineers or consultants may indemnify their clients or employers against claims arising from errors, omissions or negligence in their professional services.

Breach of Contract

Parties may indemnify each other for losses resulting from breaches of contractual obligations, including:

- failure to perform work as agreed;
- delays in project completion; or
- failure to meet quality standards.

Environmental Liabilities

Indemnities may cover environmental liabilities (such as contamination or pollution caused by the construction activities), ensuring that one party bears the costs of remediation or cleanup.

Regulatory Compliance

Parties may indemnify each other for losses resulting from non-compliance with laws, regulations or permits related to the project, including fines, penalties or legal expenses incurred as a result.

Product Liability

Manufacturers or suppliers may indemnify purchasers or users of their products against claims

for injuries or damages caused by defective products used in the construction project.

7.2 Guarantees

In Saudi Arabia, parties in construction contracts often use guarantees to limit risks. These guarantees provide assurance that contractual obligations will be fulfilled and serve as financial security in the case of default. Methods of providing guarantees include the following.

Bank Guarantees

Issued by banks, these guarantees assure payment or performance on behalf of the party. They may take the form of bid bonds, performance bonds or advance payment bonds.

Parent Company Guarantees

A parent company may provide a guarantee on behalf of its subsidiary, ensuring performance or payment obligations.

Retention Funds

Retention funds are withheld from payments and held in escrow until the satisfactory completion of the contract, serving as a form of guarantee for the paying party.

Insurance Guarantees

Insurance policies, such as performance or payment bonds, can serve as guarantees, covering losses in the case of default.

The use of guarantees in construction contracts is often governed by mandatory or regulatory law in Saudi Arabia, particularly regarding the form and enforceability of these guarantees. For example, the Saudi Arabian government may require specific types of guarantees for public contracts to ensure project completion and mitigate risks.

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The scope of guarantees varies depending on the parties involved and the nature of the contract. Generally, guarantees cover obligations such as:

- completion of work within specified time-frames;
- quality of workmanship and materials;
- payment of subcontractors and suppliers;
- compliance with contractual specifications and regulations; and
- compensation for damages or losses incurred due to default or non-performance.

7.3 Insurance

In construction contracts in Saudi Arabia, parties typically obtain various types of insurance to mitigate project risks. These include:

- contractor's all-risk (CAR) insurance covering damage to works and equipment;
- professional indemnity (PI) insurance protecting against professional negligence claims;
- public liability insurance for third-party injuries or property damage;
- employer's liability insurance for workplace injuries;
- third-party liability insurance for subcontractors; and
- delay in start-up (DSU) insurance covering losses from project delays.

These insurances collectively cover property damage, bodily injury, professional negligence and financial losses, ensuring project success while transferring and mitigating risks.

7.4 Insolvency

Saudi Arabia's Bankruptcy Law, Royal Decree No M50/1439 (Saudi Arabia Cabinet Decision No 264/1439), enacted in 2018, applies to individuals, corporations and non-Saudi investors with

assets or business operations in the Kingdom. Similar to Federal Decree-Law No 9/2016, it aims to modernise insolvency legal frameworks.

The law provides for protective/preventative settlement options and insolvency procedures allowing for restructuring or liquidation. These procedures include:

- preventative settlement;
- allowing debtors to request suspension of claims for up to 180 days;
- financial restructuring supervised by a court-appointed financial restructuring officer; and
- liquidation in cases of insolvency or bankruptcy.

7.5 Risk Sharing

Sharing responsibility for certain risks is common practice in construction contracts in Saudi Arabia. Risks such as design changes, unforeseen site conditions and force majeure events may be shared by the parties through contractual provisions. Construction contracts typically arrange for risk sharing by:

- allocating responsibilities;
- specifying procedures for addressing risks; and
- determining how costs associated with shared risks will be allocated between the parties.

Shared risks are generally priced in Saudi Arabia through negotiated agreements on cost sharing, contingency provisions or insurance arrangements.

For construction in the public sector, Article 68 of Saudi Arabia Cabinet Decision No 649/1440 on the Government Tenders and Procurement Law states that the prices of contracts and

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framework agreements may be only amended by increasing and decreasing in the following cases:

- change of prices of the materials or main services included in the tender provisions and designated under the Regulation;
- amendment of the customs tariff, fees or taxes; and
- in the case of unpredictable financial difficulties arising during the period of execution of the contract.

Article 69 of Saudi Arabia Cabinet Decision No 649/1440 on the Government Tenders and Procurement Law also adds that the government entity may only issue change orders by increases of no more than 10% of the contract value, and by decreases of no more than 20% of the value.

8. Contract Administration and Claims

8.1 Personnel

In construction contracts in Saudi Arabia, provisions regarding personnel typically outline the roles, responsibilities, qualifications and management of individuals involved in the project. Key personnel (such as project managers, engineers and supervisors) are identified, with specific qualifications and experience required. The contract defines their duties, reporting lines and authority, while also addressing the process for substitution or replacement, if necessary.

Training and development opportunities may be mandated to ensure ongoing competence. Performance evaluation mechanisms are established, along with requirements for compliance with laws, regulations and confidentiality agree-

ments. These provisions aim to ensure that the project is staffed appropriately, with competent individuals who fulfil their duties effectively and comply with legal and contractual requirements, ultimately contributing to the project's successful completion.

8.2 Subcontracting

In construction contracts in Saudi Arabia, subcontracting is a common practice that involves delegating certain portions of the work to third-party subcontractors. The general contractual possibilities and limitations of subcontracting in these contracts can vary depending on the specific terms negotiated between the parties. The following are some key points to consider.

Possibilities of Subcontracting

Flexibility

Construction contracts often allow for subcontracting to provide flexibility in project management and resource allocation.

Specialised expertise

Subcontracting allows the contractor to leverage the specialised expertise of subcontractors for specific aspects of the project.

Resource optimisation

Subcontracting can help optimise resources by allocating tasks to subcontractors who may have greater capacity or efficiency in certain areas.

Risk management

Subcontracting certain portions of the work can help manage risks associated with schedule delays, labour shortages or technical challenges.

Limitations of Subcontracting

Approval requirements

Some contracts may require the client's approval before subcontracting any portion of the work.

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Quality control

The main contractor remains ultimately responsible for the quality of the work, even if subcontracted. Therefore, there may be limitations on subcontracting to ensure quality control and compliance with contract specifications.

Liability

The main contractor typically retains liability for the subcontractors' work, so there may be limitations on subcontracting to minimise legal risks and liabilities.

Payment terms

Payment terms for subcontractors may be subject to the main contract's payment terms, with limitations on the main contractor's ability to modify or delay payments to subcontractors.

Performance bonds and guarantees

Some contracts may require subcontractors to provide performance bonds or guarantees, to ensure their performance and mitigate risks associated with subcontracting.

8.3 Intellectual Property

In construction contracts in Saudi Arabia, intellectual property (IP) provisions typically address ownership, licensing and use of IP rights related to the project. While the specific provisions may vary depending on the nature of the project and the parties involved, the following are some general contractual provisions regarding IP as commonly found in construction contracts in Saudi Arabia.

Ownership of IP

The contract should specify the ownership of IP rights created or developed during the course of the project. Typically, the contractor retains ownership of any pre-existing IP rights brought to the project, while the client or employer retains

ownership of any new IP rights created specifically for the project.

Licence Grants

The contract may include provisions granting the client or employer a licence to use any IP rights developed or delivered as part of the project. This licence may be exclusive or non-exclusive and/or limited or unlimited in scope, and may include sublicensing rights.

Confidentiality and Non-disclosure

Construction contracts often include provisions requiring the parties to maintain the confidentiality of proprietary information and IP related to the project. This helps protect sensitive information from unauthorised disclosure or use.

Indemnification

The contract may include provisions requiring one party to indemnify the other against any claims or liabilities arising from the infringement of third-party IP rights. This helps to allocate risk and to protect both parties from potential legal disputes related to IP infringement.

Warranties and Representations

The contractor may be required to warrant that the work performed under the contract does not infringe upon any third-party IP rights. Similarly, the client or employer may warrant that they have the necessary rights to use any IP provided to the contractor for the project.

9. Remedies and Damages

9.1 Remedies

Damage refers to harm, loss or injury caused to a person, property or entity. In the context of construction law, damage can occur in various forms, including:

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- physical damage to structures;
- financial loss;
- reputational damage; and
- personal injury.

In the event of damage in a construction project, parties may seek legal remedies to address the harm suffered. This may involve:

- filing insurance claims;
- pursuing litigation or arbitration; or
- engaging in alternative dispute resolution methods.

The specific legal framework and contractual provisions governing the construction project will determine the available options for seeking compensation or resolving disputes related to the damage. The NCTL stipulates that “the building guard shall be responsible for compensating the damage caused by the demolition of the building in whole or in part; unless it is proven that the damage was not caused by negligence in maintenance, age in construction or a defect in it”.

Previously, Saudi Arabia did not impose a ten-year commitment in this regard. As a result, consultants and contractors worked in the Kingdom without worrying about liability (except for government projects), and the parties’ agreement was the only basis for resolving construction and design issues arising from deficiencies identified after completion. However, *this is no longer the case*. The SBC requires a ten-year liability, and states the following:

“The supervising designer who supervises the implementation of the construction along with the contractor shall be jointly responsible for compensating the owner for ten years – from the date of issuance of the occupancy certificate

– for the total or partial demolition of the buildings they constructed or the facilities they built and for every hidden defect that threatens the durability and safety of the building.”

In the public sector, Article 71(3) of Saudi Arabia Cabinet Decision No 649/1440 on the Government Tenders and Procurement Law notes that, in all cases, the contractor will be jointly responsible with the subcontractor or sub-supplier for the execution of the contract according to the terms thereof.

9.2 Restricting Remedies

In Saudi Arabia, it is common practice for parties to contractually limit the remedies available to each other in various types of contracts, including construction contracts. These limitations on remedies serve to allocate risks, define the scope of liability and provide certainty to the parties involved. However, the extent to which remedies can be contractually limited may vary depending on the specific circumstances of each contract as well as the applicable laws and regulations in Saudi Arabia.

The following are some common ways in which the remedies available to parties can be contractually limited in Saudi Arabia.

Sole Remedy Clauses

Parties may include clauses in the contract stipulating that certain remedies are the sole and exclusive remedies available to them in the event of a breach or dispute. These clauses often limit the parties’ ability to seek additional remedies beyond those expressly provided for in the contract.

Limitation of Liability Clauses

Contracts may include clauses that limit the amount or types of damages that one party can

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recover from the other in the event of a breach. These clauses typically specify a maximum cap on liability or exclude certain types of damages altogether.

Time Limits for Claims

Contracts may impose time limits within which parties must assert their claims or initiate legal proceedings in the event of a breach. Failure to adhere to these time limits may result in the forfeiture of certain remedies or rights.

Exclusion of Consequential Damages

Parties may agree to exclude consequential or indirect damages, such as lost profits or business interruption, from the list of recoverable damages in the event of a breach.

Liquidated Damages Clauses

Contracts may include provisions specifying predetermined amounts of damages that one party must pay to the other in the event of a specific type of breach. These liquidated damages clauses can limit the parties' ability to seek additional damages beyond the agreed-upon amounts.

While parties in Saudi Arabia have the freedom to negotiate and include such limitations on remedies in their contracts, it is important to note that certain limitations are imposed by law. For example, contractual provisions that contravene Sharia principles or public policy may not be enforceable. Additionally, courts in Saudi Arabia may scrutinise the fairness and reasonableness of contractual limitations on remedies, particularly if they are deemed to be unconscionable or overly one-sided.

9.3 Sole Remedy Clauses

Contractual sole remedy clauses, which limit the parties' remedies to those expressly stated in

the contract, are commonly used in construction contracts worldwide, including in Saudi Arabia. These clauses serve to define the extent of liability and provide certainty to both parties regarding their rights and obligations in the event of a dispute.

In Saudi Arabia, enforcing contractual sole remedy clauses involves adhering to the principles of contract law and ensuring that the clause is clear, unambiguous and freely negotiated by both parties. The following are some key points on how these clauses can be enforced.

Clear and Unambiguous Language

The sole remedy clause should be drafted in clear and unambiguous terms, explicitly stating that the remedies provided in the contract are exclusive and that parties waive any additional rights they may have under applicable laws.

Mutual Agreement

Both parties must agree to the sole remedy clause and understand its implications at the time of contract formation. It is essential that no coercion or undue influence is exerted during the negotiation process.

Fairness and Reasonableness

Courts in Saudi Arabia, as in many jurisdictions, will scrutinise the fairness and reasonableness of sole remedy clauses. If a clause is found to be unconscionable or overly one-sided, it may not be enforceable.

Compliance With Sharia

Construction contracts in Saudi Arabia may need to comply with Sharia principles. Therefore, any sole remedy clause should not contradict Sharia or public policy.

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Documentation and Evidence

In the event of a dispute, parties seeking to enforce a sole remedy clause should be prepared to provide documentation proving that the clause was freely negotiated and clearly understood by both parties, and that it complies with applicable laws.

Judicial Interpretation

Ultimately, the enforceability of a sole remedy clause may be subject to judicial interpretation. Courts in Saudi Arabia will consider the specific circumstances of the case, including the language of the clause, the intentions of the parties and any relevant legal principles.

Overall, while contractual sole remedy clauses are commonly used in construction contracts in Saudi Arabia, their enforceability depends on various factors, including:

- clarity of language;
- mutual agreement;
- fairness;
- compliance with applicable laws; and
- judicial interpretation.

9.4 Excluded Damages

According to Article 173 of Saudi Arabia's Cabinet Decision No 820/1444, parties are permitted to limit liability, similar to practices in other civil law jurisdictions, except in cases involving fraud or gross error. Additionally, under the Saudi Civil Code, liability cannot be excluded for harmful acts (tort).

Parties engaging in construction contracts in the Middle East are likely familiar with a form of strict liability known as "decennial liability". While the UAE Civil Code (Federal Law No 5/1985) explicitly holds contractors and consultants accountable for decennial liability within a ten-year period

in the case of structural failures, Saudi Arabia's Civil Code does not address this directly. However, decennial liability remains a significant aspect in the country.

The Implementing Regulations of the Saudi Building Code Application Law, also referred to as the "Building Regulations", incorporate decennial liability in Article 29. This states:

"The Supervising designer overseeing the construction implementation and the contractor shall be jointly responsible for compensating the owner for ten years – from the issuance date of the occupancy certificate – for any total or partial demolition of the buildings they constructed or the facilities they built, as well as for any hidden defects jeopardising the building's durability and safety."

Therefore, contractors and consultants involved in construction projects in Saudi Arabia must recognise that structural failures in construction works are fully covered under the no-fault system of decennial liability.

In construction contracts in Saudi Arabia, various forms of damages may be excluded from liability, depending on the specific terms negotiated between the parties. Some common forms of damages that might be excluded from liability in these contracts include the following.

Consequential Damages

These are indirect or secondary damages that arise as a consequence of the breach of contract but are not directly caused by it. Examples include lost profits, business interruption or additional expenses incurred due to delays.

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Punitive Damages

Punitive damages are intended to punish the breaching party rather than compensate the non-breaching party for losses incurred. In many jurisdictions, including Saudi Arabia, punitive damages are not typically awarded in contractual disputes.

Incidental Damages

These are the costs incurred as a direct result of the breach of contract, such as expenses related to finding an alternative contractor or repairing defective work. While incidental damages are often recoverable, they may be limited or excluded depending on the terms of the contract.

Liquidated Damages

Liquidated damages are predetermined amounts specified in the contract that one party agrees to pay the other in the event of a specific type of breach, such as delays in completing the project. However, if these damages are deemed excessive or punitive, they may be unenforceable under Saudi Arabian law.

General Damages

General damages are those that naturally flow from the breach of contract and are foreseeable at the time the contract is formed. These may include the cost of rectifying defective work or completing unfinished work, as well as any resulting property damage.

9.5 Retention and Suspension Rights

In Saudi Arabia, retention and suspension rights can vary depending on the terms negotiated in individual contracts. While it is not common practice to completely exclude these rights from contracts, parties may include specific provisions that limit or regulate their application.

Retention rights, which involve withholding payment until certain conditions are met, are typically included in construction contracts to ensure that work is completed satisfactorily. Similarly, suspension rights allow parties to temporarily halt work under certain circumstances, such as non-payment or breach of contract by the other party.

However, the extent to which these rights are exercised and regulated can differ from one contract to another. It is important for parties to clearly outline these rights and their conditions in the contract, to avoid misunderstandings and disputes during the execution of the project. Additionally, any limitations or exclusions of these rights should be clearly stated in the contract to ensure compliance with applicable laws and regulations in Saudi Arabia.

9.6 Termination

If the contract is terminated due to the contractor(s) breaching the contract and the law for valid reasons, the contractor(s) will bear responsibility upon termination. They may not be entitled to any compensation for their failure to fulfil their obligations.

In the public sector, government contractors will not be entitled to damages if the contract is terminated.

In the absence of specific laws, rules or regulations governing construction contracts in the private sector, as well as contracts in general, parties will rely on the terms outlined in the agreement signed between them. If the agreement does not address dispute resolution, they will typically follow customary practices applicable to commercial transactions.

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The Civil Code of Saudi Arabia, under Cabinet Decision No 820/1444, encompasses various provisions regarding the termination of contracts. These include:

- termination by mutual consent (Article 105);
- termination through the exercise of an option (Article 106);
- termination for breach of obligations (Article 107); and
- termination due to impossibility of performance (Article 110).

Specifically tailored to construction contracts, Cabinet Decision No 820/1444 outlines termination possibilities for muqawala contracts in Articles 475–478. These scenarios include:

- termination upon completion of the works;
- termination by either party in the case of an emergency excuse related to contract performance (with compensation for resultant damages);
- termination if the contractor is unable to complete the work due to reasons beyond their control (with entitlement to payment for completed work and incurred expenses); and
- termination upon the death of the contractor if personal qualifications were a material consideration in the contract.

Therefore, parties involved in construction contracts should take into account these specialised provisions within the muqawala section of the Civil Code when navigating the termination of their agreements.

10. Dispute Resolution

10.1 Regular Dispute Resolution

Construction disputes in Saudi Arabia are typically resolved through local courts or arbitration. The jurisdiction depends on the parties' agreement or the provisions of the contract.

10.2 Alternative Dispute Resolution

Mediation and arbitration are commonly used methods for resolving construction disputes in Saudi Arabia. Parties often include arbitration clauses in their contracts, specifying the arbitration rules and procedures to be followed.

The Saudi Arabian Arbitration Law, enacted in 2012, provides a comprehensive legal framework for arbitration proceedings in the country. It incorporates internationally recognised principles of arbitration, such as the recognition and enforcement of arbitral awards.

Article 92 of Saudi Arabia Cabinet Decision No 649/1440 regarding the Government Tenders and Procurement Law allows government entities to settle disputes through arbitration, subject to approval from the Finance Minister. Meanwhile, Article 154 of the same decision stipulates that Saudi Arabian laws will govern such disputes, and arbitration procedures will not be recognised outside the Kingdom except in contracts involving foreign contractors.

In the private sector, parties have the liberty to opt for arbitration to resolve disputes, ensuring that the arbitration process complies with Sharia principles.

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