This country-specific Q&A provides an overview of construction laws and regulations applicable in Saudi Arabia.

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1. Is your jurisdiction a common law or civil law jurisdiction?

Shari’ah principles are the primary source of law in the Kingdom of Saudi Arabia ("KSA"). These are derived from the Holy Quran and the Sunnah. Although the legal system is not codified, Shari’ah principles are supplemented by legislation (including as enacted by the King, the Council of Ministers and the Consultative Assembly). Further, the principle of freedom of contract is respected and parties are bound by their contractual bargains (provided that it does not offend Shari’ah principles).

2. What are the key statutory/legislative obligations relevant to construction and engineering projects?

There is no specific legislation (such as a ‘construction law’) that applies directly to the drafting of the legal terms and conditions of a construction contract and, as such, the principle of freedom of contract largely prevails. However, other legislation is nevertheless applicable to the construction industry. This includes building regulations (which are comparable to those in other GCC and international jurisdictions) as well as legislation relating to health and safety and environmental issues.

3. Are there any specific requirements that parties should be aware of in relation to: (a) Health and safety; (b) Environmental; (c) Planning; (d) Employment; and (e) Anti-corruption and bribery.

(a) health and safety

The primary source of law regarding health and safety requirements in KSA is set out under Royal Decree No M/51/2005 ("Labour Law").

Labour Law imposes various obligations on both employers and employees, such as requiring adequate safety equipment and protections against hazards to be in place. In addition, Ministerial Decree No. 3337 of 1435/07/15 provides that during the summer season (15 June – 15 September) no work shall be performed between noon and 3pm.

Additional rules, procedures and restrictions have recently been implemented to combat the spread of COVID-19.

(b) environmental issues

Environmental issues are primarily governed by the General Environmental Law 2001 and the associated Implementing Regulation.

Prior to a construction project commencing, an environment accreditation permit needs to be obtained (which is required to address pollution).

(c) planning

Prior to commencing any construction project, all relevant documents (particularly designs) must be submitted to the municipality where the construction site is located for approval and to receive the appropriate permits.

(d) employment

Employment is KSA is governed under the Labour Law subject to amendments set out in Royal Decree number M/46 of 05/05/1436H, as supplemented by implementing regulations.

Among other things, companies with ten or more employees are required to implement internal regulations relating to such things as privileges, disciplinary penalties, company procedures and violations. The internal regulations must be sent to the Ministry of Labour for approval.

Labour Law applies to both Saudi nationals and expatriates. Pursuant to Article 33 of the Labour Law, all foreign workers must obtain a work permit from the
4. What permits/licences and other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?

Parties who intend to carry out projects in KSA require licences from the relevant authorities. Pursuant to Royal Decree No. (M/1) (dated 15/1/1421 H), foreign investors are required to obtain an Investment Licences from the Saudi Arabian General Investment Authority (SAGIA).

Prior to commencement of a project, details must be submitted to the municipality who will issue a permit for the carrying out of the works and any other necessary permits (provided that the relevant municipality is satisfied with the submission).

5. Is tort law or a law of extra contractual obligations recognised in your jurisdiction?

Tort law is recognised under the laws of KSA and it will be difficult to bring an action in tort if there is a contractual relationship between the parties. Actions in tort usually relate to death, personal injury or damage to property. Recovery of ‘economic loss’ is unusual under tort and is subject to stringent tests regarding directness and foreseeableability.

6. Who are the typical parties to a construction and engineering project?

Project participants in KSA typically mirror those in most other jurisdictions. Namely, the employer will ultimately engage a works contractor while the construction contract will usually be administered by a supervisor (as referred to an the engineer in most FIDIC contracts), appointed by the employer. Additionally, various design and other consultants (such as a cost consultant) will almost inevitably be engaged on the project. However, the identity of the party engaging the consultants will be determined by the procurement structure that has been deployed.

7. What are the most popular methods of procurement?

In our experience, construction-only procurement remains the most prevalent in the market and this is usually effected through an amended FIDIC form of contract (usually based on the 1987 4th Edition).

However, alternative forms of procurement are gaining popularity, particularly in the development sector (including in the form of design and build contracting as well as construction management contracting). Industrial facilities are predominately procured on a turnkey basis, often pursuant to an amended form of the FIDIC Silver Book.

While KSA has a long track record of implementing PPPs (particularly in the utilities sector), there is currently no specific PPP law in place. However, the Saudi National Centre for Privatisation published (in July 2018) a consultation draft of the Private Sector Participation Law, which is designed to regulate both PPPs as well as privatisations and dovetails with Vision 2030. Although well received, legislation has yet to be effected to implement the Private Sector Participation Law.

8. What are the most popular standard forms of contract? Do parties commonly amend these standard forms?

In the private sector the FIDIC based forms of contract remain the most common. In the event disputes are dealt with in the local courts, an Arabic version of the contract will be required. For this reason, bi-lingual contracts (albeit based on FIDIC forms) are frequently prepared.

Public procurement is governed under new Government Tenders and Procurement Law (“NGTPL”), as referred to below. The NGTPL requires that contracts are at least bi-lingual (with the Arabic language version prevailing in the case of any ambiguity) while government authorities are now only required to have their forms of contract approved by the Ministry of Finance if the contract in question involves the expenditure of the state budget.

Although this means that government entities have increased independence regarding their forms of contract, the majority of government contracts still remain in the form of standard contracts, as prepared by the Ministry of Finance However, we expect to see a more diverse range of contracts on the market over the coming years, which nevertheless comply with the NGTPL (see below).

Regardless of the form of contact that it used, it is implied that (i) parties must act in accordance with principles of good faith, (ii) the contractor shall be
compensated for unforeseen and/or materially different ground conditions (although employers sometimes seek to impose the risk of all site conditions upon the contractor) and (iii) a party shall be entitled to relief if an event of force majeure occurs.

9. Are there any restrictions or legislative regimes affecting procurement?

In terms of government procurement, the NGTPL was approved by Council of Ministers on 16 July 2019 and came into force on 1 December 2019 (replacing the previous Government Tenders and Procurement Law issued in 2006). The NGTPL, as supplemented by implementing regulations, is intended to facilitate the achievement of Vision 2030 and makes significant use of digitalisation.

The NGTPL applies to procurement by government entities (which is widely defined) and even extends to works undertaken outside of KSA by government entities. Other keys aspects of the NGTPL include the following:

- The provision of knowledge transfer from the private sector to the awarding government authority.
- Limited tenders can be conducted where the capex of the project is under SAR 500,000 (while direct purchases are permitted in exceptional circumstances or when it is in the public interest to do so).
- Provision has been made for two stage tendering.
- Bid bonds (of between 1% and 2% of the bid amount) are generally required. A successful bidder will be required to provide an on-demand performance bond provided that the value of the contract exceeds SAR 100,000.
- Electronic reverse tendering is possible, whereby bidders have the opportunity to submit more competitive bids prior to the closing date on an online platform.
- Unsuccessful bidders have a period of between 5 and 10 days to raise an objection and, during this period, the contract may not be awarded to the successful bidder. Grievances can potentially be escalated to a committee convened by the Minister of Finance.
- Contract documents are required to be in Arabic (with the Arabic text prevailing in respect of bi-lingual contracts).
- The successful bidder cannot assign its interests under the contract or enter into a subcontract without the approval of the awarding authority. Significantly, the awarding authority reserves the right to make direct payments to subcontractors.
- The contract price shall for a fixed amount and shall not be subject to escalation (although notable exceptions include escalations in the event of increased tariffs or taxes or in the event that the successful bidder encounters unforeseen financial difficulties).
- Variations are capped at +10% and -20%.
- Delay damages can be up to 20% of the contract price.
- Provided that the Minister of Finance has provided his approval, disputes may be determined by arbitration.

10. Do parties typically engage consultants? What forms are used?

The majority of projects in KSA are undertaken on a traditional basis, meaning that the Employer engages the professional team. The professional team typically includes an architect (including an ‘architect of record’), civil/structural engineer, MEP engineer and cost consultant.

It is normal practice for the architect or an engineering consultants to fulfil the role of contract administrator.

In our experience, the forms of appointment for the professional team vary considerably, although use of the FIDIC White Book (which can subject to varying degrees of amendment) is not uncommon.

Consultants engaged by government entities fall under the NGTPL.

11. Is subcontracting permitted?

In line with the principle of freedom of contract, subcontracting is permitted in KSA but this is typically subject to the employer’s prior consent.

We have noted that subcontracts have become increasingly elaborate and robust in KSA. For example, it is now not unusual for subcontracts to be strictly ‘back to back’ with the head contract (including in respect of the payment regime), while key subcontractors may also be required to provide collateral warranties in favour of third party beneficiaries (such as funders), thus creating a direct contractual link between the subcontractor and the beneficiary.
12. How are projects typically financed?

Financing methods include, Shari’ah-compliant finance, conventional finance, joint ventures and project finance.

Construction projects can be funded through conventional and Islamic finance structures. Local Saudi Banks will only provide funding to construction projects in compliance with Shari’ah but international banks will lend pursuant to conventional structures.

13. What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?

The provision of performance security is commonplace in the construction industry in KSA.

On-demand performance bonds are invariably required, typically in the sum of 10% of the contract price. Although the entire value of the performance bond can remain in place until the expiry of the defects liability period, it is not uncommon for the value of the performance bond to reduce by 50% upon take over, particularly if the employer is holding a retention.

Retentions are also prevalent in the market in respect of which it is not unusual for 10% of each interim payment to be retained and for half the retained amount to be released to the contractor upon the taking over of the works (with the balance being paid upon the expiry of the defects liability period).

It would be unusual for an employer to make an advance payment to a contractor without an advance payment guarantee being in place (the value of which typically decreases in direct proportion with the recovery of the advance payment). Following the introduction of NGTPL, the 5% limit in respect of advance payments (as set out under the previous procurement law) in respect of government projects has now been dispensed with, meaning that larger advance payments can now be advanced (provided that an advance payment guarantee has been provided).

Although parent company guarantees are not as usual as the forms of security referred to above, employers request them from time to time, particularly if they have concerns regarding the financial and technical capabilities of the entity to whom the contract has been awarded.

14. Is there any specific legislation relating to payment in the industry?

In accordance with the prevailing principle of freedom of contract, payments are subject to commercial negotiation and, in our experience, payment against the completion of milestones tends to be preferred by employers, particularly in government projects. However, it is possible that manifestly unfair payment terms could be set aside pursuant to Shari’ah principles (notwithstanding the prevailing principle of freedom of contract).

15. Are pay-when-paid clauses (i.e. clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

Pay-when-paid (or conditional) provisions in sub-contracts are commonplace in KSA and there is no legislation that prohibits or restricts their use. Accordingly, subcontractors need to carefully consider proposed payment structures and, if a conditional payment regime cannot be avoided, the subcontractor should seek to include various mitigants in the subcontract.

16. Do your contracts contain retention provisions and, if so, how do they operate?

As noted above, retentions are prevalent in the KSA construction market in respect of which it is not unusual for 10% of each interim payment to be retained and for half the retained amount to be released to the contractor upon takeover of the works with the balance being paid upon the expiry of the defects liability period. However, it is not unheard of for the entire retention (subject to any deductions) to be only released upon the expiry of the defects liability period. This position is more likely to be adopted if the employer has no other form of security in respect of the defects liability period.

17. Do contracts commonly contain delay liquidated damages provisions and are these upheld by the courts?

Most construction contracts in KSA require the contractor to pay delay damages in if the works are not completed on time due to the contractor’s culpable delay.

Typically subject to any agreed cap of 10% of the contract price, damages accrue on a daily or weekly
basis and are intended to compensate the employer for the loss suffered if the project is not completed by time. Delay damages regimes are typically upheld and respected by Courts, provided that they do not grossly exceed the losses actually suffered (but there are no questions regarding the enforceability of penalties under KSA law).

As an aside, it is notable that an increasing number of contracts now contain mechanisms that require the contractor to accelerate performance if the current rate of progress is insufficient for the works with the intention of ensuring that the works complete on time.

18. Are the parties able to exclude or limit liability?

Caps on liability frequently feature in construction related contracts in KSA and are generally respected. However, a Court is unlikely to uphold a clause that seeks to exclude (or limit) liability arising out of fraud, wilful misconduct, death, personal injury or damage to property.

Additionally, a damages claim is only likely to be enforced under KSA law provided that the loss suffered is direct and foreseeable and is not speculative (as can be the case in respect of loss of profit claims).

19. Are there any restrictions on termination? Can parties terminate for convenience? Force majeure?

Grounds for termination (and their consequences) are a matter for the parties to contractually agree and there is nothing at law that prevents the parties from agreeing to a termination for convenience clause.

In addition to termination for convenience, typical grounds for termination (which also feature in the NGTPL) include a failure by a defaulting party to remedy a breach within a reasonable cure period (i.e. 15 days), the assignment or the subcontracting of obligations without consent, insolvency or if the contract in question was secured through bribery.

Additionally, a party may petition the court to terminate a contract in the absence of a contractual basis for such termination and the court may consent to such request if it considers the reasons for termination to be valid (i.e. on the basis of fraud).

Under KSA law, force majeure becomes relevant when performance is rendered impossible. It is incumbent upon the party seeking relief to demonstrate that performance is impossible as a result of an event of force majeure and that it did not cause or contribute the occurrence of the event in question.

Force majeure interfaces with the Islamic principle of Gharar (which translates as hazardous or risky transaction). Under this principle, a party can argue that a contract should be set aside if continued performance has become unduly onerous or uncertain. However, the party seeking relief in this regard has a significant evidential burden to overcome in order to be permitted by a Court to rely on Gharar.

20. What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

Privity of contract is recognised in KSA. Accordingly, third party rights are conferred by requiring contractors and sub-contractors to enter into collateral warranties or direct agreements with third party beneficiaries (such as funders and purchasers), which may incorporate step-in rights. As a general observation, collateral warranties and direct agreements are less prevalent in KSA than in the case in other markets (although these instruments are increasing in popularity).

21. Do contracts typically contain strict provisions governing notices of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?

Contracts generally include strict provisions of notification of claims for additional time and money and an otherwise clear entitlement to relief may be lost if the contract states that a time-bar applies if notices are not submitted within the prescribed timeframe. However, it is important to note that there is no prescribed limitation period under KSA law.

Time bars are typically respected by courts in KSA, provided that they are consistent with Islamic principles. We are nevertheless aware of instances of time-bars being set aside on the basis that (i) in the circumstances it would be unfair for a party to lose its right to claim and (ii) pursuant to Shari’ah principles, a just claim should not be lost with the passage of time. Additionally, claims arising out of fraud, bad faith and the like will be not restricted or prejudiced by contractually agreed time-bars.
22. What insurances are the parties required to hold? And how long for?

SAGIA imposes insurance requirements for construction projects, such as requiring foreign entities engaging in construction projects to "obtain insurance against the company’s errors in implementation of the project".

In practice and as is the case in the international construction sector, it is typical for employers to require contractors and consultants to carry professional indemnity insurance to the extent that they have design responsibility or are providing professional services.

Other than in respect of specified ‘employer risk events’, a contractor is invariably required to insure the works until they have been taken over while contractors are also required to take out and maintain workers’ compensation insurance and public liability insurance.

23. How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?

Historically, the courts were the principal forum for dispute resolution (and courts tended to ignore even clearly drafted arbitration clauses). Since the introduction of the Arbitration Law of 2012 and the Enforcement Law of 2013 confidence in the use of arbitration in KSA has increased and, as noted above, the NGTPL provides for arbitration to be an option in government contracts.

There is no formal adjudication in KSA. However, we are aware of parties deploying dispute adjudication boards (particularly in the context of non-government related FIDIC based contracts) while some private parties are now taking tentative steps towards mediation (notwithstanding issues arising out of the absence of recognised ‘without prejudice’ rules in KSA).

24. How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?

Under the new Arbitration Law and Enforcement Law, arbitrations are enforceable in KSA (Article 49 of the Arbitration Law). However, am award may be set aside in certain circumstances including if:

- No arbitration agreement exists, the arbitration agreement is invalid or subject to invalidity, or the period provided for arbitration has expired.
- One of the parties to the arbitration agreement does not have the requisite capacity to enter into the agreement. It is therefore important to ensure that the signatories to contracts have the express ability to agree to disputes being resolved by arbitration.
- A party had difficulty filing its defence due to improper notice regarding the appointment of an arbitrator or arbitration procedures, or for other reasons beyond the party’s control.
- The award excludes the application of the rules to which the parties have agreed.
- The tribunal was formed or arbitrators were appointed contrary to the Arbitration Law or the agreement of the parties.
- The tribunal did not observe the necessary provisions regarding the arbitral award or relied on invalid arbitral procedures, which affected the content of the award.
- The award contradicts shari’ah principles or public policy.

25. Are there any limitation periods for commencing disputes in your jurisdiction?

The KSA courts will uphold the limitation period contractually agreed between the parties, provided that it is not contrary to good faith or offends shari’ah principles. However, there is no statutory provision regarding limitation periods in KSA (although a de facto limitation period of 10 years is frequently applied).

26. How common are multi-party disputes? How is liability apportioned between multiple defendants? Does your jurisdiction recognise net contribution clauses (which limit the liability of a defaulting party to a “fair and reasonable” proportion of the innocent party’s losses), and are these commonly used?

Multi party disputes do occur in KSA. Although there is no specific legislation on the matter, it is unlikely that a party would be deemed liable for an occurrence over which that party exercised no control (assuming that there is no contractual agreed provision to the contrary). A ‘net contribution clause’ would be enforceable to the extent that it constitutes a clearly drafted contractual term.
27. What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?

As in most GCC countries, payment issues remain a major challenge for contractors and in particular sub-contractors. Late payments can cause significant cash flow difficulties and can cause disputes.

As in a virtually all countries, the COVID-19 pandemic has affected KSA. However, the full extent of its impact has yet to be determined.

28. What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?

The implementation of Vision 2030 has resulted in a construction boom in KSA. Reports from Saudi Gazette has illustrated that there are over 5,200 construction projects currently being undertaken in KSA worth, covering various sector including infrastructure, power, commercial property, tourism and special economic zones.

29. How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?

One of the key enablers for Vision 2030 is technology. The use of innovations (such as Building Information Modelling (BIM) and blockchain) are expected to increase, thus improving efficiency in planning, designing, constructing and managing construction and engineering projects. The introduction of smart contracts via blockchain can become fundamental in the construction and engineering industry as it has the capacity to provide more efficiency and accountability between contracting parties.

Contributors

Euan Lloyd
Senior Counsel
e.lloyd@tamimi.com