

SAUDI CIVIL TRANSACTIONS LAW SUPPLEMENT

LEXIS MIDDLE EAST LAW ALERT

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FEATURE RISKY BUSINESS

Risk allocation in contracts

FEATURE IN HARM'S WAY

Tort liability

FEATURE RIGHT APPROACH TO REAL ESTATE

Property rights

ANALYSIS OF THE IMPACT OF THE SAUDI ARABIAN CIVIL TRANSACTIONS LAW



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THE PRACTICAL IMPACT OF THE SAUDI CIVIL TRANSACTIONS LAW

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A CLEARER WAY FORWARD

When Saudi Arabia Royal Decree No. M191/1444 (the Civil Transactions Law) was issued in June 2023, it generated unprecedented levels of interest. Perhaps not surprisingly, given the fact this law and its 721 provisions, cover subjects like contracts, rights and obligations which are key pillars in business and commerce. Other countries in the region have had laws covering these areas for many decades, but in the Kingdom, Saudi Arabia Royal Decree No. M191/1444 is the first law of this type. In the past, when disputes on these areas arose judges had to decide on them using their discretionary application of known Sharia principles. While these principles are well-established legal sources, there were often differences of opinion between different Sharia schools of thought on how these matters should be handled. This led to uncertainty on a whole range of important subjects. This new law comes into force on 16 December 2023 but applies retrospectively to events that occurred before it came into force, so has the potential to impact past agreements and transactions. When this law was first issued there was a rush among many in the profession to consider its general application. However, given the range of different subjects this law has the potential to impact, in this supplement we have asked specialists from across Z&Co. to think and write about the most important changes from their own perspectives. What is clear from these articles (which include contract risk, debt and guarantees, tort and real estate) is that Saudi Arabia Royal Decree No. M191/1444 has brought in a brave new world but also a new level of certainty on a whole host of areas where in the past the right approach was unclear. We hope Saudi businesses trying to get a fuller understanding of how this law impacts them in practice will find this supplement useful.

Claire Melvin
Editor, Lexis Middle East Law Alert

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RISKY BUSINESS

LOW

Jawahir Al-Subaie of Z&Co. considers the new Civil Transactions Law's pivotal provisions, including their implications on contract formation, termination, limitations and exclusions of liability, treatment of liquidated damages, force majeure clauses and other key aspects of risk allocation in contracts.

The Kingdom of Saudi Arabia has ushered in a new era in contract law with the enactment of the Civil Transactions Law which was promulgated by Saudi Arabia Royal Decree No. M191/1444 on 19 June 2023. Set to take effect in December, with retrospective application, the CTL represents the Kingdom's maiden foray into codified contract law.

CONTRACT FORMATION AND TERMINATION

Article 31 of Saudi Arabia Royal Decree No. M191/1444 preserves the traditional Sharia principles of contract formation, rooted in the notions of offer and acceptance, 'ijab and qabul', with the intention to create legal relations.

Article 94 of Saudi Arabia Royal Decree No. M191/1444 recognises the binding nature of contracts, emphasising that contractual parties are obliged to honour the mutually agreed-upon terms of the contract. Article 104 of Saudi Arabia Royal Decree No. M191/1444 specifies that in cases where the contract is clear and unambiguous, there is no scope for interpretation or modification, and the parties are legally bound by the explicit terms of the contract.

These principles closely parallel the well-established principles for contract formation and the binding effect of contracts found in both common law and civil law jurisdictions.

The CTL also offers nuanced insights into contract termination, such as the following.

- Termination by Mutual Consent (Article 105 of Saudi Arabia Royal Decree No. M191/1444) - Parties can mutually agree to rescind a contract, whether in whole or part, and such rescission is to be governed by the terms mutually agreed in the contract.

- Option to Withdraw (Article 106 of Saudi Arabia Royal Decree No. M191/1444) - Parties can agree



Jawahir Al-Subaie

Partner
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to include an option to withdraw from a contract. Although the CTL does not specify or restrict the type of contract in which such an option could be included, it is likely to be applicable to e-commerce contracts. In these cases, individuals often make purchases based on product photos and descriptions, which may not

- precisely match the actual goods received.
- Termination for Breach (Article 108 of Saudi Arabia Royal Decree No. M191/1444) - Parties can mutually agree to grant a right to terminate the contract for breach without requiring a court judgment for this purpose. However, it is important to note that such an agreement does not exempt either party from the duty to provide a termination

RISK

HIGH



notice, unless the contracting parties explicitly agree to waive this notification requirement.

- Termination due to Frustration (Article 110 of Saudi Arabia Royal Decree No. M191/1444) - Contracts may be terminated if they become unfeasible due to external factors beyond a party's control.

LIMITATIONS AND EXCLUSIONS OF LIABILITY

Limitations and exclusions of liability have traditionally been subject to the risk of being treated as unenforceable by KSA courts, as there were different Sharia views regarding whether or not such provisions could be upheld. Now, Article 173 of Saudi Arabia Royal Decree No. M191/1444 expressly confirms that provisions limiting or excluding liability arising from failure to perform – or a delay in performing – contractual obligations are enforceable, unless such a failure or delay is due to gross negligence or deceit.

Similar to many jurisdictions in the region, including the UAE, Qatar, Kuwait, Egypt and Jordan, the CTL expressly prohibits limiting or excluding liability arising from a 'harmful act', which is explained in the CTL to mean any fault that causes harm.

This is likely to be intended to capture breaches of non-contractual obligations, such as the duty to take due care while driving or handling machinery.

RELATED LEGISLATION

Article 178 of Saudi Arabia Royal Decree No. M191/1444

The contracting parties may determine in advance the amount of compensation by stipulating it in the contract or in a subsequent agreement; unless the object of the obligation is pecuniary, and the entitlement to compensation does not require serving a formal notice.

(Source: Lexis Middle East Law)

There may be room for argument as to whether an act or omission carried out in the course of performing a contract can be more properly considered a 'harmful act' for which liability cannot be waived, or a failure to perform contractual obligations, for which the limitations or exclusions of liability can apply.

LIQUIDATED DAMAGES

Liquidated damages have long been considered enforceable by KSA courts, unless the amount of liquidated damages (even if mutually agreed) is so far in excess of the damages that have been suffered by the non-breaching party that to enforce such an amount would be unjust.

The CTL maintains this position under Article 178 and 179 of Saudi Arabia Royal Decree No. M191/1444 but adds a more detailed framework to regulate the use of liquidated damages, which cannot be

RELATED LEGISLATION

Article 96 of Saudi Arabia Royal Decree No. M191/1444

If the contract is concluded by adhesion and contains abusive clauses, the court may amend them or exempt the compliant party therefrom as required by justice. Any agreement to the contrary shall be void.

(Source: Lexis Middle East Law)

contractually waived by the parties. The framework includes the following principles:

- If the party entitled to compensation can demonstrate that the damages caused exceed the agreed-upon liquidated damage amount as a result of the liable party's deceit or gross negligence, they have the right to seek a court order for an increase in the liquidated damage amount to match the actual harm incurred.
- Conversely, the liable party can seek a court order to reduce the liquidated damage amount if it

is evident that the agreed-upon amount is disproportionately high in comparison with the actual harm suffered.

- The liquidated damage amount will not be due if the liable party can establish that the party entitled to compensation has suffered no harm.

EXCEPTIONAL CIRCUMSTANCES AND FORCE MAJEURE

Article 97 of Saudi Arabia Royal Decree No. M191/1444 provides that if unforeseen exceptional circumstances of a general nature arise (e.g. a war or pandemic) which result in performance of the contract being more onerous and costly (resulting in substantial losses), then the party facing the increased burden can negotiate with its counterparty to adjust the terms of the contract to try to alleviate its losses.

The negotiation period does not mean that the parties are entitled to cease performing their obligations.

If the parties cannot reach agreement on adjusting the terms within a reasonable time, the party facing the burden can request the court to order this adjustment, taking into account the particular circumstances and weighing up the interests of each party. It is important to note that the CTL expressly states that the parties cannot contract out of this requirement. Article 110 of Saudi Arabia Royal Decree No. M191/1444 introduces a comprehensive framework for managing force majeure events. When a contract becomes impossible to perform due to uncontrollable factors, the obligations on both parties are cancelled and the contract is automatically annulled. However, if only specific obligations are rendered unfeasible, relief applies exclusively to those affected obligations. Interestingly, Article 125 and 174 of Saudi Arabia Royal Decree No. M191/1444 allow the parties to mutually agree that in the event of a force majeure occurrence, the obligor should bear responsibility for any associated losses.

Beyond exceptional and force majeure scenarios, under Article 114 of Saudi Arabia Royal Decree No. M191/1444, if one party to a contract fails to perform their obligations, the other party is entitled to also stop performing their own corresponding obligations, such as the delivery of goods or services in return for payment.

RENEGOTIATION OF STANDARD FORM CONTRACTS

In line with Sharia principles and found in both common law and civil law jurisdictions, Article 96 of Saudi Arabia Royal Decree No. M191/1444 acknowledges that in certain types of contracts, such as consumer contracts, one of the parties has little to no bargaining power and no ability to change the contractual terms. If these types of contracts contain unfair provisions, it may be possible for the party required to sign up to those terms to challenge these in court, and the court may amend those provisions to achieve a fairer outcome.

THE IMPACT OF THE CTL ON PRE-EXISTING CONTRACTS

The CTL's retrospective application broadens its jurisdiction to encompass contracts that were formed prior to the CTL coming into force, as well as contractual breaches that transpired before the CTL came into force, with the following exceptions.

- If a statutory provision or judicial principle pertaining to the event contradicts a provision of the CTL and a party relies on its application.
- If the relevant provision pertains to a statute of limitations period that started to run before the CTL came into force.

WHAT TO DO WITH EXISTING CONTRACTS?

Given the CTL's retrospective reach, a comprehensive review of existing contracts is prudent. Although the CTL does not mandate alterations to existing contracts, its provisions take precedence. Consequently, businesses should assess their compliance with the CTL, especially concerning concepts such as liquidated damages, and should re-evaluate previously unenforceable claims that may now be pursued under the CTL.

CHANGES IN APPROACH FOR NEW CONTRACTS

Drafting new contracts under the CTL necessitates a proactive approach to risk allocation. It is advisable to implement a CTL compliance checklist, encompassing mandatory provisions and permissible conditions set out in the CTL. This checklist should address areas including limitations of liability, unforeseen circumstances, and liability in force majeure events.

NEXT STEPS

Although no specific regulations which are directly linked to Saudi Arabia Royal Decree No. M191/1444 have been issued yet, Saudi Arabia's legal landscape has experienced considerable transformation as part of Vision 2030. While the CTL itself has yet to be tested in the KSA courts, the potential for discovering loopholes, errors, and omissions may emerge once it becomes officially enforced, and judicial application begins. Staying attuned to legal developments remains essential for effectively navigating the KSA's evolving contractual terrain.



RIGHT APPROACH TO REAL ESTATE

Sarah Gonem of Z&Co. explains how the new comprehensive legal framework on property rights will operate when the Civil Transactions Law comes into force.

The new Saudi Arabian Civil Transactions Law which was promulgated by Saudi Arabia Royal Decree No. M191/1444 and comes into force in December 2023 will bring with it a new comprehensive legal framework on property rights. This will cover a whole host of areas including property ownership; ownership in common, fixtures on land, usufructs, usage rights, easements; and leases.

However, one of the most significant changes it brings in is the confirmation that usufruct and

easement rights are real property rights. This means these rights can be transferable and potentially used as security for the purpose of raising finance. While there is still some way to go in terms of establishing the necessary land registry infrastructure to enable the registration of these rights, getting this legal framework in place is a major step towards this.

Another key change is that property-related dispute resolution is likely to be much clearer and less uncertain as a result of Saudi Arabia Royal Decree

No. M191/1444. Before this law was issued, there was very little in place to regulate property rights in Saudi Arabia. For example, there was no landlord and tenant legislation to determine rights and obligations in property leasing agreements, or any specific legislation determining the rights of property co-owners, neighbour disputes, or what would happen if one person built on another person's land.

This meant that judges would decide on property disputes using their discretionary application of known Sharia principles. While these principles are well-established legal sources, there can often be differences of opinion between the different Sharia schools of thought on these matters, which leads to uncertainty on how exactly a court might determine a particular issue.

However, a key point to note is that Saudi Arabia Royal Decree No. M191/1444 applies with retrospective effect, so it is important to consider how your existing real estate-related rights and agreements might be impacted by this new legislation. Therefore, all existing and new real-estate related agreements, including lease or usufruct agreements should be checked to see how they align with Saudi Arabia Royal Decree No. M191/1444.

It will also be important to re-evaluate any existing or potential property disputes in order to check if the risk profile has changed as a result of this new legal framework. In particular, it should be noted limitation periods will now apply. There will be a default maximum period of ten years to claim from when the right arose, and certain types of claim will have shorter limitation periods.

There are three areas of change of particular interest - how the law has changed on common ownership of property; how Saudi Arabia Royal Decree No. M191/1444 deals with structures built on other people's land; and the new legal framework on lease agreements.

COMMON OWNERSHIP OF PROPERTY

Saudi Arabia Royal Decree No. M191/1444 has revolutionised the legal framework on common ownership of property in Saudi Arabia, by putting in place clear rules on areas including how such property should be managed between co-owners, when division of the property into separate shares for each owner can occur; and pre-emption rights.

Management of common property is considered the joint right of the co-owners, but if one of those co-owners takes over management and the others do not object, that person is considered to be the representative of the others.

If the co-owners disagree on a management matter, then the decision of the majority (by ownership share) of the usual management will apply. However, if a majority cannot be identified, it will be open to the court - at the request of one of the co-owners - to appoint a manager for the property.

Major changes, such as improvements that go beyond usual management, can also be implemented with the approval of at least three quarters of the co-owners based on co-ownership shares.

When it comes to division, if any of the co-owners asks for their share to be divided from the common property, and the other co-owners refuse, the court can then order the requesting party's share be divided out, as long as the nature of the property makes this feasible and it will not detrimentally reduce the total property value. However, if any of these two circumstances apply, the court should instead order the property to be sold at auction.

There are ways the other co-owners can avoid an auction. If the requesting party is able to sell their share, but that share would have a lower value because it had been sold discretely than it would have had if the whole property was sold together- and the other co-owners want to avoid an auction they can do so by giving the requesting party the difference in these two amounts.

In addition, Saudi Arabia Royal Decree No. M191/1444 has given the right of pre-emption to a co-owner to acquire the share of the property sold by another co-owner at the price it was sold for plus expenses. However, if more than one of the co-owners has a pre-emption right, each one of them is entitled to their share of the pre-emption.

It is worth noting that a pre-emptor does not have the right of pre-emption unless they own their share in the property at the time the buyer purchased the seller's share. In addition, the right of pre-emption does not apply in certain circumstances, for example, if the share is transferred by means other than a sale (such as by a gift or inheritance); if the transfer is between direct family members (for example between spouses or between parents and children); or if the sale is by a legally regulated auction.

The right of pre-emption is also waived if the person with the right fails to inform the seller and buyer of their desire to exercise pre-emption within ten days; they do not file a pre-emption lawsuit within 30 days from the date of the notification sent to the seller and the buyer; or they otherwise waive their right of pre-emption, either expressly or implicitly.

FIXED STRUCTURES ON ANOTHER'S LAND

Where someone builds on another person's land, Saudi Arabia Royal Decree No. M191/1444 differentiates between whether the person building acted in good or bad faith. A bad faith situation is one where a person builds on another's land without permission, knowing that it is not their land. In these circumstances, the landowner has two options. They can either require the person who built the structure to remove it, and pay compensation as required; or they can keep the structure, and pay the lower of either the removal cost, or the increased value of the land as a result of the structure being on it.



RELATED LEGISLATION

Article 614 of Saudi Arabia Royal Decree No. M191/1444

If the wall is shared by two (or more), neither of them may make any change in it inconsistent with the purpose for which it was prepared without the permission of the other.

(Source: Lexis Middle East Law)

That said, the person who built the structure has the choice to remove it (rather than allow the landowner to keep it) as long the removal does not harm the land.

However, the position is different if the person who built the building did so in good faith. This may include if they genuinely believed they owned the land, or they believed they had permission to build on it.

In this case, the landowner cannot require the person who built the structure to remove it (although the person who built it can still choose to remove it, as long as this does not harm the land).

If the landowner wishes to keep the building, they can make a payment for it which is either the lower of all the material and labour costs for constructing it or the increased value of the land with the structure on it.

However, if the landowner is unable to pay these amounts and the person who built the structure refuses to remove it, the landowner can then ask the court to order the sale of the land to the person who built the structure in return for a fair price.

It should also be noted that if a tenant builds on a piece of leased land, and there is no agreement between the parties to the lease on what should

happen to the building when the lease expires, the same approach that applies when there has been construction on the land of another in bad faith applies.

Landowners may now want to put express provisions in leases to contract out of this default position which now applies following Saudi Arabia Royal Decree No. M191/1444, in order to allow transfer of the building ownership to them without additional cost.

A slightly different scenario arises when someone accidentally encroaches on neighbouring land when constructing on their own land.

In this case as long as it can be shown to have happened in good faith, the court can order that the part of the land which has been accidentally built on is sold to the neighbour who built the property at a fair rate.

LEASES

Saudi Arabia Royal Decree No. M191/1444 also now regulates lease agreements, and covers matters including how leases are established, how rent is calculated, the term, and the lessor and the lessee's obligations.

Lease agreements are defined as contracts that allow a lessee to make use of something non-depreciable, which can be a property, a right or benefit, for a specified period of time, in consideration for rent.

It should also be noted that Saudi Arabia Royal Decree No. M191/1444 states that if a lease term start date is not specified in the contract, it will be assumed to be the date of the contract.

In addition, if the lease period expires and both parties continue to apply it, it is assumed it has been renewed for a period equivalent to the rental payment period.

Saudi Arabia Royal Decree No. M191/1444 also provides for situations where the lease period expires, but there is an urgent need to extend it.

In this case, the lease is automatically extended for the period of urgent need, if the lessee pays the equivalent rent for this period, unless otherwise agreed.

In addition, helpfully, Saudi Arabia Royal Decree No. M191/1444 also provides flexibility on how rent can be determined - it can be a fixed amount, a specific amount plus a percentage of revenue or profits, or based on clear principles (for example, by reference to an index). While in terms of maintenance and repairs, lessors are responsible for repairs which are necessary to keep the property usable and the lessee is responsible for maintaining the property according to custom, unless otherwise agreed.

Finally, when the lease expires, the lessee must return the property in the same condition as they received it, except for acceptable wear and tear. If they do not hand over the property on the due date, the lessor will be entitled to equivalent rent plus compensation.



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Civil Transactions Law: Construction of buildings on another's land

1 Any buildings or plants on or under land are assumed to belong to the landowner, unless there is evidence to the contrary.

3 The person who built on someone else's land always has the right to remove the building at their cost, as long as this removal does not harm the land.

2 If a tenant* builds on the rented land / property and there is no agreement about what happens to the building at the end of the lease term, the landlord may:

Require the tenant to remove the building at the tenant's expense, and pay compensation if necessary; or

Keep the building by paying to the tenant either:



- the value equivalent to the cost of removal, or
- an amount equal to the increase in the value of the land due to the construction.

If the person who built on land belonging to another is not a tenant, and built in good faith, the landowner cannot force the builder to remove the building.

The landowner can keep the building by paying either:

- the value of the materials and the cost of construction or
- an amount equal to the increase in the value of the land due to the construction.

The landlord can also require the person who built the building to take ownership of the land with the building at fair compensation.

 Landowner
 Builder/tenant

* The same applies in cases where a person builds on someone's land without permission, knowing that the land belongs to someone else.



DEALING WITH DEBT AND DEBTORS

Martin Creek of Z&Co. explains how the new Civil Transactions Law will change the way resale of debt and guarantees are handled in Saudi Arabia.

The Civil Transactions Law which was promulgated by Saudi Arabia Royal Decree No. M191/1444 and will come into force on 16 December 2023 will have a significant impact on the way debt will be handled in the Kingdom. This new law covers a number of areas including the right to enforce against a debtor who has failed to pay by a due date, creditors' priority rights, including the unenforceability of certain debtor acts as against creditors; the consolidation of debts and consolidation among debtors; right to fulfil debts; designation of debts to be paid by debtors whose funds are insufficient to pay all debts; and debt offset.

However, in this context there are two particularly significant changes Saudi Arabia Royal Decree No. M191/1444 has brought in. These are the new framework for guarantee contracts (which are a very common form of credit support in financings for companies which are either established in Saudi Arabia or carry out projects there); and the confirmation of rights of creditors to sell debts to others.

GUARANTEES

Saudi Arabia Royal Decree No. M191/1444 applies with retrospective effect, except in certain limited circumstances where an existing statutory provision or judicial principle is relied upon by a party. Therefore, after it comes into force it is likely it will apply to all claims under guarantees, regardless of whether the relevant agreement was signed before or after this law's effective date. As a result, both guarantors and beneficiaries of guarantees should be carefully considering the terms of any guarantee granted in the past to check to see if their risk profile has changed as result of this new legislation.

In the past, financiers who were putting Saudi Arabian law guarantees in place tended to take a conservative approach to mitigate the risk of the guarantee being deemed unenforceable due to a breach of the Sharia requirement for certainty.

As a result, rather than uncapped 'all monies' guarantees which have no expiry date being required from KSA obligors, it has been usual for guarantees

RELATED LEGISLATION

Article 294 of Saudi Arabia Royal Decree No. M191/1444

The obligation of the debtor shall be extinguished if he proves the impossibility of its performance due to a cause beyond his control. The corresponding obligation, if any, shall also be extinguished.

(Source: Lexis Middle East Law)

governed by Saudi law to refer to a specific debt as being guaranteed and/or to have a financial cap on the guarantor's liability. There may also be a specific expiry date for the guarantee, which is linked to the corresponding date for the underlying financing.

It is likely this approach will continue even after Saudi Arabia Royal Decree No. M191/1444 comes into force.

Although Saudi Arabia Royal Decree No. M191/1444 now expressly confirms that guarantees can cover future and conditional debts, there is an express requirement for these guarantees to have a liability amount which is fixed and determined in advance.

In addition, if a guarantee for a future debt does not have a definite term, the guarantor may withdraw the guarantee if the creditor is notified of the withdrawal before the relevant debt matures, allowing for a reasonable period of time.

These provisions make it likely guarantees will still be drafted with the risk of unenforceability in mind due to uncertainty as Saudi Arabia Royal Decree No. M191/1444 does not remove this risk.

INDEMNITY PROVISIONS

Saudi Arabia Royal Decree No. M191/1444 defines a guarantee as a contract under which the guarantor agrees to meet a debtor's liability against a creditor if the debtor himself fails to satisfy the liability i.e., there is a secondary obligation.

However, guarantees based on international precedents (for example, the Loan Market Association (LMA) standard English law guarantee) often include both a guarantee and indemnity.

This structure is adopted so the indemnity, as a primary obligation of the guarantor, remains effective even if the underlying obligation which has been guaranteed becomes invalid.

It is likely when guarantees are taken in Saudi Arabia there will now be greater consideration by financiers of whether an indemnity provision of this type should be included in a Saudi Arabian-law governed agreement, in order to make the guarantor jointly liable with the primary debtor.

This is because Saudi Arabia Royal Decree No. M191/1444 now significantly restricts the ability to enforce against a guarantor who is not jointly liable with the debtor to the creditor.

RECOURSE AGAINST GUARANTORS

If a guarantor is not jointly liable with the relevant debtor to the creditor, then certain changes have

been introduced by Saudi Arabia Royal Decree No. M191/1444 on guarantees that could lead to discharge or termination of the guarantee or even potential liability for the creditor.

The first of these changes is that a creditor may only take recourse against a guarantor after first taking corresponding action against the debtor and dispossessing them of their funds. In addition, if the creditor has the benefit of security granted by the debtor, direct recourse against the debtor is not permitted before both enforcement of the security and recourse against the debtor and dispossession of their funds.

A claim may also now be filed by a guarantor to suspend enforcement proceedings against them until enforcement is first carried out against the debtor's funds and it then becomes evident that these funds are insufficient (and if such a claim is filed, the guarantor is obliged at their expense to direct the creditor to the debtor's funds, but not to funds that are disputed or located outside Saudi Arabia).

In addition, the creditor will now be liable to the guarantor if the debtor becomes insolvent after the guarantor has directed the creditor to the debtor's funds without the creditor taking necessary action in a timely manner.

If the debt becomes due and the creditor does not bring an action for the debt against the debtor, the guarantor may notify the creditor requiring them to take such action and if they fail to do so within 180 days from



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RELEVANT LAW

Article 287 of Saudi Arabia Royal Decree No. M191/1444

If the depositor has a debt owed by the depositor, or the borrower has a debt owed by the lender, the set-off shall not take place between the debt and the deposit or between the debt and the property lent, even if the debt is of the type of either of them, save by agreement of the parties.

(Source: Lexis Middle East Law)

“There are some alternative Sharia-compliant structures that can be used to try and achieve the same effect as a debt sale, but they introduce additional complexity into the structure if they are to be enforceable.

However, it is important to note that where there is a sale of a debt after Saudi Arabia Royal Decree No. M191/1444 comes into force there is no need for the debtor to consent to the transfer.

Although there is a requirement that they must be notified of the transfer.

In addition, in order for the transfer to be valid the seller must guarantee that the debt right exists at the time of sale, unless otherwise agreed, or unless the transfer was without consideration. However, the seller does not have to guarantee that the debtor is solvent, unless it has been otherwise agreed.

Saudi Arabia Royal Decree No. M191/1444 also provides that if there is a transfer of rights, such as a debt, all relevant guarantees of that debt will also transfer across, as long as the debtor has been duly notified of the sale, or unless the parties agreed otherwise.

There is no requirement to notify the guarantor or obtain their consent.

MINIMUM TERMS

In light of the changes brought in by Saudi Arabia Royal Decree No. M191/1444, it is recommended that parties to a debt sale should ensure that certain minimum terms are agreed upon in the transfer agreement.

As a minimum these terms should address debtor notification, whether the transferor (or another party) guarantees repayment of the debt, either at the time of sale or on the due date; and if the transferor guarantees the solvency of the debtor, either at the time of sale or on the due date.

While these changes brought in by Saudi Arabia Royal Decree No. M191/1444 may seem to be a game-changer for the secondary debt market, it remains to be seen how these provisions will be implemented in practice, particularly in the context of distressed debt and non-performing loans (NPLs).

In particular, as Saudi Arabia Cabinet Decision No. 264/1439 (the Saudi Bankruptcy Law) pre-dates Saudi Arabia Royal Decree No. M191/1444 by five years, there is no clear provision in the Bankruptcy Law detailing the impact of an approved creditor transferring their rights in the insolvency to a third party.

However, as the first such cases on this subject start to appear, we expect discussions with officeholders and the courts will be needed to achieve the registration of the purchaser as the new approved creditor.

Once this has been achieved, it may only be a matter of time before NPL trading becomes an every day practice in Saudi Arabia.

the date of the notice, the guarantor is released from the guarantee, even if the creditor has granted an extension of time to the debtor (unless with the guarantor's consent).

Finally, if the creditor loses relevant security due to their own fault or a liquidation procedure has been initiated against the debtor and the creditor does not submit a claim, the guarantor will not now be liable under the guarantee to the extent that the debt would have been satisfied from the security or insolvency proceeds.

As a result of these significant changes it may be preferable for financiers to structure their guarantees as a joint primary liability for the guarantor if commercially possible, in order to avoid the restrictions in enforcing against non-jointly liable guarantors.

SALE OF DEBT

Saudi Arabia Royal Decree No. M191/1444 also allows the buying and selling of debts (known as a transfer or assignment of rights) whereby a creditor assigns their rights in debts to third parties.

This is an important development because these transactions had previously been considered unenforceable under Saudi Arabian law.

The general Saudi court practice was to prohibit the sale of a receivable by the creditor to a third party based on a specific interpretation of Sharia dicta, despite there being contrasting views on this and Sharia scholars who had permitted these transactions.

IN HARM'S WAY

Dr Yazid Almasoud of Z&Co. explains how tort liability in Saudi Arabia will apply when the new Civil Transactions Law comes into force.



The first Part of the new Saudi Arabian Civil Transactions Law (which was promulgated by Saudi Arabia Royal Decree No. M191/1444 and comes into force on 16 December 2023) covers obligations.

These obligations come from five sources which are, contracts, unilateral acts, torts (wrongful acts or omissions that cause harm to another), unjust enrichment, and the law's statutory provisions.

Part 1, Chapter 3 recognises acts of harm caused by one person to another as one of the bases upon which an obligation can arise between individuals or entities where one person or entity (the tortfeasor) is responsible for the harmful act to an aggrieved person or entity.

The establishment of tort liability does not require a contract to exist between private individuals or entities, and unlike contract liability, tort-based liability cannot be excluded or limited.

Saudi Arabia Royal Decree No. M191/1444 states that tort liability can arise from either a personal act, the act of another (known as vicarious liability) or what is known as custodian's liability.

PERSONAL ACTS

The general rule in Saudi Arabia Royal Decree No. M191/1444 on tortious acts, is that a person (either a natural or legal person) is liable for compensation if they directly commit any wrong which causes harm, unless they can prove otherwise.

Saudi Arabia Royal Decree No. M191/1444 provides a clear framework for how compensation arising from such tortious acts should be assessed.

VICARIOUS LIABILITY

In line with modern civil law systems and judicial practice in Saudi Arabia, Saudi Arabia Royal Decree

RELEVANT LEGISLATION

Article 28 and 29 of Saudi Arabia Royal Decree No. M191/1444

Article 28

Whoever lawfully exercises his right shall not be liable for any damage arising therefrom.

Article 29

1- A right may not be abused.

2- The following cases shall constitute an abuse of a right:

a- If the use of the right is intended solely to cause harm to others.

b- If the benefit from its use is absolutely disproportionate to the harm suffered by others.

c- If it is used for other than its lawful purpose or for an unlawful purpose.

(Source: Lexis Middle East Law)

RELEVANT LEGISLATION

Article 35 of Saudi Arabia Royal Decree No. M191/1444

1- The offeror may retract his offer before the issuance of the acceptance; unless the offer has a specific duration.

2- If the offer does not have a specific duration, the offeror shall inform the offeree in case of retraction of his offer, otherwise the offeror shall compensate him for the incurred damage, excluding the loss of expected profits from the withdrawn contract.

(Source: Lexis Middle East Law)

No. M191/1444 has adopted the principle of vicarious liability.

This means a party will also be held liable for wrongs which have been committed by a third party over whom they are responsible and have control. A typical example where vicarious liability can occur is with an employment relationship.

This raises a question of whether Saudi Arabian cases will start developing along the lines of other jurisdictions, with analysis of the extent to which an employer can be liable for employees who commit wrongful acts while acting outside the scope of their employment.

WHEN DOES CUSTODIAN LIABILITY APPLY?

Under Saudi Arabia Royal Decree No. M191/1444, any person who has actual

control over an object (whether that control is exercised directly or through others) is considered to be a custodian of that object. The Civil Transactions Law has set out circumstances in which the custodian is liable for damage caused by an object under their control unless the custodian can prove otherwise.

These circumstances would include harm caused by animals, harm caused to third parties due to the collapse of all, or part of, a building and harm arising from objects which require special care whether as a result of their nature or as a result of a regulatory provision in order to prevent harm.

TORT LIABILITY AND CASES WHEN EXEMPTIONS APPLY

However, Saudi Arabia Royal Decree No. M191/1444 states a person who commits a tort will not be liable if they can establish the harm arose from a cause beyond their control, for example a 'force majeure event', or due to the fault of the aggrieved or third party. In addition, they will not be liable if the tort was as a result of self-defence, or defence of their honour or their property, to the extent necessary to prevent an attack against them. A person will also not be liable if the tort arose from a legitimate use of their right although this does not include wrongful uses which require compensation (see Article 28-29 of Saudi Arabia Royal Decree No. M191/1444). There is also an exemption if a person can establish that a tort arose from their act as a public official, as long as conditions in Article 126 of Saudi Arabia Royal Decree No. M191/1444 are met. In addition, a person is not liable if the tort arose from the act of a non-discerning person. This is a person under the age of seven or who is insane, subject to exceptional cases provided for by Article 122 and 129 of Saudi Arabia Royal Decree No. M191/1444.

APPORTIONMENT OF LIABILITY

It should also be noted under Saudi Arabia Royal Decree No. M191/1444 if an aggrieved person has contributed to the causation of, or aggravated, the harm through fault of their own, the aggrieved party will bear responsibility for the proportion of that harm to which they contributed.

Liability can also be shared and proportioned between multiple tortfeasors. In these cases the court assesses how the liability should be apportioned according to each tortfeasor's contribution to the harm, or it will be apportioned equally if this cannot be determined.

PRE-CONTRACTUAL HARM

There are two situations under Saudi Arabia Royal Decree No. M191/1444 which address tort liability arising before parties enter a contract.

The first is where a person negotiates, or terminates negotiations, in bad faith, and they are liable for any harm suffered as a result by the other party (see Article 41 of Saudi Arabia Royal Decree No. M191/1444).

The second is where an offer which does not specify a time for acceptance, is revoked without informing the offeree, the offeror must compensate the offeree for

any harm they have suffered as a result, see Article 35 of Saudi Arabia Royal Decree No. M191/1444.



Dr Yazid Almasoud

Partner,
Z&Co.

LIMITATION PERIODS

Saudi Arabia Royal Decree No. M191/1444 stipulates that tort claims will generally not be heard if three years have elapsed from the date on which the aggrieved party became aware of both the harm and the party responsible for it, or ten years have elapsed from the date of the occurrence of the harm if the aggrieved party was unaware of the harm or the responsible party.

Despite these limitation periods, a claim for compensation will not be precluded if the claim arose from a criminal offence and the criminal claim is not precluded from being heard.

DISCRETION AND CLARITY

Saudi Arabia Royal Decree No. M191/1444 does not specify the applicable provisions in cases where both the elements of tort and contractual liability are met.

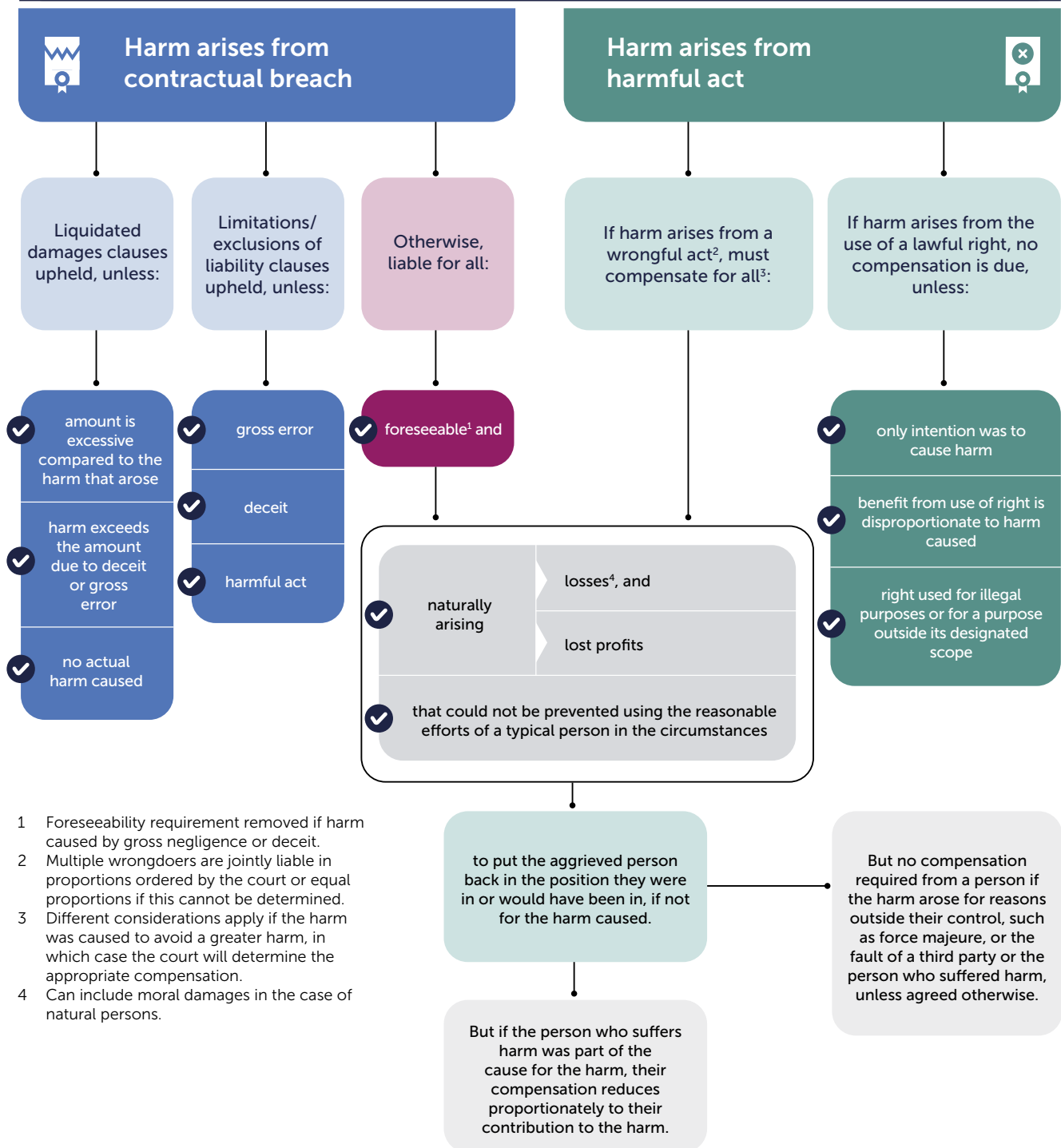
This leaves room for judicial discretion in the courts until judicial principles settle.

The fluidity of the provisions on fault which causes harm under the Saudi Arabia Royal Decree No. M191/1444, and the Sharia, means there is wide scope for the pursuit of remedy for tortious behaviour in Saudi Arabia.

Even with the codification of tort liability, there is still considerable scope for the courts in determining and apportioning liability. A detailed body of cases should develop on the key issues in Saudi Arabia Royal Decree No. M191/1444, and help to provide further clarity on this area.

The new Civil Transactions Law brings welcome clarity to compensation assessments













Compensation under the Civil Transactions Law



- 1 Foreseeability requirement removed if harm caused by gross negligence or deceit.
- 2 Multiple wrongdoers are jointly liable in proportions ordered by the court or equal proportions if this cannot be determined.
- 3 Different considerations apply if the harm was caused to avoid a greater harm, in which case the court will determine the appropriate compensation.
- 4 Can include moral damages in the case of natural persons.

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IN-HOUSE PROFILE

CHIEF LEGAL OFFICER – INFRASTRUCTURE



Building Blocks

Ibrahim Bakhurji, Chief Legal Officer of the National Infrastructure Fund explains how this fund is helping to develop infrastructure and financing solutions in Saudi Arabia.

YOUR BACKGROUND?

I am a Saudi national and a project finance lawyer by profession with over 16 years of experience. I specialise in the development and financing of large-scale infrastructure and energy projects in the utilities, renewables, and petrochemicals sectors. I studied Law at Leicester University, followed by the LPC at Nottingham Law School. I began my legal career with White & Case in London, then worked at Latham & Watkins and Shearman & Sterling in Abu Dhabi. In 2020, I returned to White & Case as a local partner in their Riyadh office. A year ago, I moved into an in-house role with the National Infrastructure Fund (NIF) of Saudi Arabia, and began what has been the most challenging, but also exciting and rewarding stage in my career to date.

YOUR ROLE?

As the Chief Legal & Compliance Officer at the National Infrastructure Fund (NIF), I oversee a talented and dynamic team, who ensure our legal frameworks align with the rapidly evolving infrastructure landscape in Saudi Arabia. My main role is to provide strategic legal and policy advice to the fund's executive management and other team leaders. My responsibilities range from transaction-specific negotiations to broader corporate and regulatory compliance matters.

Time spent in my early career drafting and reviewing finance documents and other contracts, (along with my previous work at Shearman & Sterling) has been particularly helpful with the work I do now, as has my more recent work with dedicated and talented colleagues at NIF which is shaping my approach and perspective in my current role.

NIF'S WORK

Our primary mission is to accelerate the delivery of strategic infrastructure projects in Saudi Arabia, and bring in the private sector and international investment, in line with Saudi Arabia's Vision 2030. NIF will invest in areas including social infrastructure, water, transportation, energy and health. Our main focus is on domestic projects, but with an emphasis on sustainability and green initiatives, we expect the ripple effects will have an impact well beyond Saudi Arabia's borders.



WHAT IS CURRENTLY IMPACTING YOUR WORK?

At present technology and AI are having a profound impact on our industry. At NIF, we have been looking at ways of integrating legal tech, digitization, and contract automation into our workflows, as a means of streamlining our processes. While this promises greater efficiency we also have to remain vigilant on the challenges, especially when it comes to data security and privacy.

The goal is to blend innovation with robust regulation. When it comes to integrating AI and contract automation it will be necessary to ensure this is done in alignment with our legal and regulatory environment, which includes the recently enacted Civil Transactions Law (CTL) (Saudi Arabia Royal Decree No. M191/1444). For example, in the context of interpretation of contract terms in dispute, the CTL prioritises the meaning and intention of the parties over text or form and allows pre-contractual correspondence or communications between contract parties to be considered when resolving any ambiguity. So in order for contract automation to be of value and provide an increased level of legal certainty, these interpretative principles will need to be taken into account. So, planning and adjusting for these legal developments will be important.

PAST PROJECTS

Infrastructure has a profound impact on day to day life, so I have been proud of the part I have played in all the infrastructure projects I have been involved. Most recently, this included, the NEOM Green Hydrogen

Project (a joint venture between ACWA Power, Air Products, and NEOM).

NEOM is a new planned city, located north of the Red Sea, in the north-western region of Saudi Arabia which is expected to be powered solely by renewable energy. The green ammonia produced at the NEOM facility will unlock the economic potential of renewable energy across the entire value chain.

This project will also integrate up to 4GW of solar and wind energy to produce carbon-free hydrogen in the form of green-ammonia as a cost-effective solution for transportation and industrial sectors globally.

Reaching financial close on this project was a major milestone for us, as it was the first transaction NIF was involved in.

Projects like this highlight the direct impact our work can have on millions of people and it is projects

like these that help make my work deeply rewarding.

THE CIVIL TRANSACTIONS

The CTL will certainly impact our contracts. It has retrospective effect and therefore has consequences for existing contracts, not just those entered into after the law came into effect. Existing contracts will have to be carefully reviewed in light of the new law to determine the impact and consequences on matters such as contractual obligations, risk allocation and even contract interpretation. Although the extent of the CTL's impact on infrastructure projects remains to be seen, this law is intended to help increase the level of transparency, predictability, efficiency and stability in the legal system, thereby making business and commercial transactions generally easier and more attractive to local and foreign investors.

PRACTITIONER PERSPECTIVE

Martin Creek of Z&Co. looks at how the Civil Transactions Law might impact infrastructure work in Saudi Arabia.



Martin Creek
Partner
Z&Co.

The Civil Transactions Law (CTL) (Saudi Arabia Royal Decree No. M191/1444) is likely to have an impact on infrastructure projects as they typically include a range of different types of contracts and transactions covering a wide range of relevant matters, such as transfers or rights to use land or other assets, as well as supply and offtake agreements. There was previously pressure from foreign counterparties to, where

possible, have these agreements governed by English law and subject to an offshore jurisdiction. However there now seems to be an increasing trend for agreements on Saudi infrastructure projects to be governed by Saudi law, and disputes to be subject to the jurisdiction of the Saudi Centre for Commercial Arbitration (SCCA). As result, the CTL is likely to be an important consideration when drafting and negotiating infrastructure project contracts. There are some areas of the CTL which will have a particularly big impact on this area. For example, typically infrastructure projects in Saudi Arabia include the granting of rights over land in form of leases, usufructs or easements. The CTL includes provisions that for the first time codify each of these types of land rights. There will also be changes on liquidated damages as the CTL has a helpful clarification on how these common contractual provisions will be enforced. Meanwhile on the calculation of damages for breach the previous uncertainty on limiting or excluding liability, the right to claim damages for lost profits and the enforceability of future promises have all been addressed in this law. There are also likely to be parent company financial and performance guarantees required from the various parties who are involved in infrastructure projects. The CTL also includes detailed provisions

on the obligations of guarantors and beneficiaries of guarantees.

In other jurisdictions a growing number of businesses in this sector are looking at contract automation and here the greater certainty afforded by the CTL in codifying Sharia principles might increase adoption of contract automation in Saudi Arabia, something which has not been as common as in other countries in the past. It is also hoped the CTL will address the issue of judges having wide discretion in applying Sharia (including concepts of fairness) and the impact of related different schools of thought when hearing cases. This level of discretion, combined with the fact that generally decisions of Saudi Arabian adjudicatory bodies are not considered to have established a binding precedent for later cases, has meant that there has been increased uncertainty on the interpretation of contractual provisions which has potentially been a factor in automated and standard contracts not being more widely used in Saudi Arabia before. The approach that the courts will take in interpreting the CTL will not be clear until after this law comes into force in December 2023 and they begin to issue judgments on the various provisions. Once a body of case law exists it will be clearer if there is now sufficient certainty for contract automation to be used more widely. Even still that process is likely to take a number of years and the traditional approach of contracts mainly being manually drafted, even if based on standard forms, is likely to continue for the foreseeable future.

The CTL is also likely to impact the numbers of international investors and private sector businesses working on infrastructure initiatives in Saudi Arabia. However, it is not the only CTL which is helping with this. The Bankruptcy Law (Saudi Arabia Cabinet Decision No. 264/1439), the Companies Law (Saudi Arabia Cabinet Decision No. 678/1443), Private Sector Participation Law and Moveable Property Security Law (Saudi Arabia Cabinet Decision No. 512/1441) are all playing a role in this.



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Settlement Contracts



Steps have been taken in Saudi Arabia to create a clearer regulatory framework on the enforceability of reconciliation contracts and settlement agreements. The Commercial Court Law (Saudi Arabia Cabinet Decision No. 511/1441) gave mandatory effect to contractually agreed conciliation and mediation provisions and required pre-claim mediation for certain disputes, including those which do not exceed SAR 1 million arising from commercial contracts or between commercial parties. Previously, parties had not always been held to their contractually agreed conciliation and mediation terms, and could simply proceed to file claims in court.

The Ministry of Justice has also rolled out the new Taradhi platform which enables virtual conciliation concluding with a binding settlement agreement. In addition, Saudi Arabia Ministerial Decision No. 5595/1440 approving the Reconciliation Rules and Procedures has also been issued.

Saudi Arabian Civil Transactions Law which was promulgated by Saudi Arabia Royal Decree No. M191/1444 has now also provided more details on how settlement and reconciliation can take place, and has created a clearer framework, in parallel with Saudi Arabia Ministerial Decision No. 5595/1440.

Under Article 391 of Saudi Arabia Royal Decree No. M191/1444 settlement agreements are drawn up when parties seek to resolve existing conflicts or prevent anticipated disputes. This involves mutual agreement at the point of reconciliation, and each party relinquishing some or all of their claims. Article 394 of Saudi Arabia Royal Decree No. M191/1444 requires the subject matter of the reconciliation to be eligible for compensation. A settlement can be between two individuals, who each claim a right against the other, with both retaining their rights (see Article 398 of Saudi Arabia Royal Decree No. M191/1444). However, parties must have the capacity to dispose of the relevant rights to make a settlement agreement and if the agreement involves waiving rights without compensation, those waiving the rights must have full legal capacity (see Article 391(1) and (2) of Saudi Arabia Royal Decree No. M191/1444). In limited circumstances settlement is not permitted, including if it relates to matters contrary to Sharia, in circumstances which violate Saudi Law or if the parties have no right to engage in a settlement, (see Article 2(2) of Saudi Arabia Ministerial Decision No. 5595/1440).

Settlement is not permitted if it causes evident harm to a legally authorised incapacitated minor (see Article 393 of Saudi Arabia Royal Decree No. M191/1444).

The effect of a settlement agreement under Saudi Arabia Royal Decree No. M191/1444 is limited to the settlement of disputes and confirmation of rights expressly referred to, without affecting other rights. Waiver expressions contained in the agreement are interpreted narrowly within the limits of the rights which are the subject of the dispute. Reconciliation does not establish

new rights for either party on the rights in question. There are also specific cases when reconciliation remains valid, e.g. if the specific right in question is unknown, if this ignorance does not prevent the surrender of the right, particularly if the nature, amount, and location of the right make it challenging to ascertain within a short time frame; if the rights are acknowledged, denied, or met with silence by the defendant; for a portion of the claims owed by either party against the other party; and if the claimed debt or a portion of it is postponed, without an increase, or it is brought forward and reduced.

Saudi Arabia Royal Decree No. M191/1444 does not specify a particular form for these contracts but Saudi Arabia Ministerial Decision No. 5595/1440 states the reconciliation officer is responsible for creating a document which outlines the parties agreed terms and conditions, including details such as the reconciliation date, reconciliation officer's name, parties' details, a summary of the dispute and parties' requests, and the settlement terms with all related conditions and implementation details. Reconciliation records must be signed by the reconciliation officer, and the parties or their legal representatives.

Revocation of these contracts is not provided for under Saudi Arabia Royal Decree No. M191/1444 but it is stated that reconciliation extinguishes the rights and claims waived by the parties and neither the parties nor their heirs have the right to retract their waivers. Saudi Arabia Royal Decree No. M191/1444 also states that once the reconciliation record becomes binding, neither party has the right to revoke it without the approval of all parties or because of a legal or Sharia requirement.



Contributor

Muneerah Alwahbi, Partner, Z&Co.

Meet the team

Martin Creek

Partner, Z&Co.

Martin is the Head of Z&Co.'s transactions practice and has been with the firm in Riyadh since 2013. He has considerable experience of advising clients in a wide range of matters including M&As, joint ventures, foreign investments, projects, bank financings and capital markets. Martin received his law degree from the University of Oxford.



Sarah Gonem

Partner, Z&Co.

Sarah's core practice area is in government advisory and commercial litigation. She is fully bilingual, and works closely with Z&Co.'s team of Sharia researchers and Arabic language drafters in drafting new regulatory instruments. Within the litigation team, she acts as an essential conduit between the local Sharia and judicial context and international best practice on commercial issues and disputes.



Dr Yazid AlMasoud

Partner, Z&Co.

Dr Yazid has a wealth of experience, having advised public and private sector entities over the past ten years. He has provided legal advice on a wide range of matters related to public policy and sector regulation, structuring, and governance, and has acted as the official government representative at various international forums.



Jawahir Al-Subaie

Partner, Z&Co.

Jawahir is a corporate and transactions specialist with over ten years' experience in private practice and in-house, advising on large-scale infrastructure projects, complex technology transactions, and strategic partnerships across the Middle East, Asia, Europe, and USA.



Muneerah AlWahbi

Partner, Z&Co.

Muneerah is a highly experienced Saudi-qualified lawyer with a background in litigation across all levels of the Saudi courts and judicial committees. Her expertise includes alternative dispute resolution and arbitration both under the SCCA rules and international bodies. She specialises in disputes in niche dispute areas, including taxation, bankruptcy, and capital markets.



Dani Itani

Counsel, Z&Co.

Dani is a Counsel in the Z&Co. Litigation and Dispute Resolution department. He has over 15 years of diverse experience across various sectors. He has a broad practice which includes, handling disputes across compliance, corporate, commercial law, regulatory, employment, contracts and taxation matters.



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