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The Impact of the Saudi Civil Transactions Law on Major Project Delivery

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How might the rights and remedies afforded to contractors and discretionary powers for dispute resolution bodies introduced by the latest legislative reforms impact upon the Kingdom's project delivery program?

Eight years on from the launch of Saudi Arabia's nation-building and socioeconomic reform program "*Vision2030*", the Kingdom finds itself as the centre of attention of the world's construction, private investment and corporate legal communities. The first phase of delivery of the Kingdom's Gigaprojects, the most spectacular of which, the USD$500 billion NEOM Project, seeks to bring 3 million people to the northwest of the Kingdom by 2030, successful bids to host the Asian Winter Games in 2029, Expo 2030 and the FIFA World Cup in 2034, coupled with broad legislative reform targeted at facilitating project delivery and efficient economic activity, have succeeded in attracting billions of dollars of investment to, and infrastructure development in, a market that had previously been hindered by high administrative barriers to entry and regulatory uncertainty.

It is evidently essential for the success of Vision2030 that its two fundamental strategies — major project delivery and legislative reform — are implemented interdependently and cohesively. In this context, the purpose of this note is to assess the potential impact of the Kingdom's latest and most ambitious legislative reform to date — the Civil Transactions Law, promulgated in Royal Decree No. M/191 dated 29/11/1444H (corresponding to 17/6/2023G) (the **Civil Transactions Law**) — on Saudi Arabia's construction industry, and in particular, to identify aspects of the Civil Transactions Law of which major project owners, sponsors and financiers (collectively, **Project Stakeholders**) and their legal advisers should be aware. Whilst the relative infancy of the Civil Transactions Law means that there is little relevant precedent on which to rely, assessment of the Civil Transactions Law suggests that the additional rights and remedies afforded to contractors, and the expanded ability of dispute resolution bodies to step into, or to terminate, construction contracts in specified circumstances should be considered by Project Stakeholders at all stages of the project and contractual lifecycles.

1. An Overview of the Civil Transactions Law

The Civil Transactions Law came into effect on 17 December 2023 and, following on from the new Companies Law, the Private Sector Participation Law, the Law on Real Estate Ownership and Investment by Non-Saudis, and regulatory reform enabling international professional services firms to operate in the Kingdom, is the latest and most far-reaching legislative reform introduced for the purposes of defining a clear legal framework for economic activity in the Kingdom.

The Civil Transactions Law applies to commercial transactions of every kind. Critically for the Kingdom's Project Stakeholders, the Civil Transactions Law applies retroactively to contracts executed prior to its promulgation as well as to prospective transactions and, in addition to its general provisions, contains tailored requirements that apply to particular industries, including, in Articles 461 to 478, to *Muqawala* (works and services) contracts. In these Articles, the Civil Transactions Law codifies key principles and mechanisms that will apply to construction contracts, including by enshrining new rights and remedies for contractors, and step-in rights for dispute resolution bodies, with the objective of preserving a sense of balance between contracting parties notwithstanding the occurrence of unforeseeable events, circumstances beyond either party's control, or inequalities in the parties' relative negotiating positions. Our experience acting for Project Stakeholders in the Kingdom suggests that such provisions have the potential to cut across contractual risk allocations typically seen in construction contracts for Gigaprojects and other Vision2030 projects, including those already in effect.

Further analysis of select Civil Transactions Law concepts and their potential impacts on construction contracts are set out in Sections 2 and 3 of this note. It will be essential for Project Stakeholders to be aware of and understand the potential impact of these provisions and, given the relative infancy of the Civil Transactions Law, monitor how these provisions are implemented and how dispute resolution bodies interpret these provisions in the Kingdom over time, particularly given that the Kingdom's legislative reform is expected to continue, and reforms that interface with the Civil Transactions Law, such as the expected promulgation of a new Commercial Transactions Law, will be relevant to its interpretation. It will also be essential to monitor collateral industry reforms relevant to major project delivery such as the launch of the Unified Contract for Complete Construction (UCC) by the Ministry of Justice in collaboration with the Saudi Contractor's Authority on March 5, 2024. At the date of this note, the scope of application of the UCC is unknown, however its potential to impact the project delivery landscape, either as a mandatory form or as an industry benchmark, is clear.

2. Key Concepts: Expanded Relief for Contractors and Discretion for Dispute Resolution Bodies

A. Remedies for Affected Parties and Discretions for Dispute Resolution Bodies to Step in or Terminate Contracts

The Civil Transactions Law codifies the general Shari'ah principle that neither party should bear liability for events or circumstances that are beyond their control or which render performance of its contractual obligations impossible and, in several ambiguously defined circumstances, provides specific rights and remedies to affected parties, including where:

1. unforeseeable extraordinary events make the fulfillment of a contractual obligation excessively onerous so as to threaten the obligor with heavy loss, in which case the obligor has the right to request renegotiation of the contract;
2. performance becomes impossible for a reason beyond the obligor's control, in which case the obligation and any corresponding obligation shall be extinguished, and the contract shall be automatically terminated or, in the case of partial or temporary impossibility, the relevant obligations are severed or suspended; and
3. an exigent matter that affects the obligor's performance of the contract, in which case the obligor may demand termination of the contract.

In addition to these provisions, which confer relief specifically upon the affected party, further discretion is conferred on the dispute resolution bodies to step into, or terminate, contracts in circumstances where:

1. the parties are unable or unwilling to renegotiate the contract following the occurrence of an unforeseeable extraordinary event that threatens the obligor with heavy loss, in which case the dispute resolution body may step in and reduce relevant obligations to a reasonable level;

2. the obligor contests the enforceability of a liquidated damages clause, in which case the dispute resolution body may reduce the amounts of liquidated damages payable if the obligor establishes that the contractually specified amount was excessive; and
3. unforeseeable general exceptional circumstances cause disruption to the balance of contractual obligations between the parties such that the basis upon which the contract was executed becomes no longer valid, in which case the dispute resolution body may order restoration of the contractual balance or termination of the contract.

B. Alignment with Typical Construction Contractual Risk Allocation

There are two elements to this that will be of concern to Project Stakeholders. The first is that, whilst the Civil Transactions Law uses different terms to define the circumstances in which relief arises, it does not define or clarify exactly what is meant by key terms such as 'extraordinary events', 'exceptional circumstances' and 'exigent matters'. In the absence of such definitions and any jurisprudential precedent as to how dispute resolution bodies will interpret these terms, it is difficult to qualify the extent of circumstances in which contractors may invoke these provisions to seek relief from their contractual obligations.

The second is that the overriding principle in accordance with which these provisions are introduced — the maintenance of balance between the parties and relief from responsibility for events beyond one's control — is inconsistent with the fact that construction contracts generally include a diametric allocation of risk between the parties pursuant to which the contractor's entitlements to time and cost relief are exhaustively defined, and no other circumstance or event will give rise to any alleviation of a contractor's obligations, whether or not foreseeable, and whether or not within the contractor's control.

Project Stakeholders therefore need to be aware of the cumulative effect of these factors. In drafting and negotiating construction contracts, it will be important to assess these provisions against the relief regime of the relevant contract, with a particular focus on how conceptually similar concepts such as the contract's force majeure and change in law regimes align with, or are cut across by, these provisions. Further, it will be essential to monitor how these provisions of the Civil Transactions Law are invoked by contractors and interpreted by dispute resolution bodies going forward. Some further insights into potential interpretation issues are set out in Section 3 below.

3. Key Concepts: Interpretation and Administration

A. Interpreting, and Contracting Around, the Civil Transactions Law

Whilst there are a number of provisions of the Civil Transactions Law that expressly state that any contractual provision that conflicts with the relevant article shall be deemed null and void, there is no general statement as to whether or not parties to a contract can agree to contract out of the application of the Civil Transactions Law. The closest applicable guidance comes in Article 1 which establishes that, with only limited exceptions, the Civil Transactions Law applies to all matters and transactions within its scope and, where none of its provisions can be applied, its General Rules of interpretation in Article 720, followed by the established principles of Shari'ah that are most consistent with the relevant principles of the Civil Transactions Law shall apply.

Implicit in this, and in our experience in the Kingdom, in the absence of an express right to contract around any specific article of the Civil Transactions Law, it does not appear possible to rely on the enforceability of any contractual provision that attempts to do so. Given this, it appears as though parties to construction contracts should not rely on the ability to resolve the misalignment of the contract's risk allocation with, and the ambiguities of terms within, the Civil Transactions Law with upfront drafting. Project Stakeholders should also be aware that, given the retroactive application of the Civil Transactions Law, any provisions in executed contracts that are inconsistent with the Civil Transactions Law will be unlikely to be enforceable to the extent of the inconsistency or otherwise circumvent the relevant provisions of the Civil Transactions Law.

B. Contract Administration under the Hijri Calendar

Project Stakeholders should also be aware that the Civil Transactions Law impacts upon contract implementation and administration as well as risk allocation. Notably, Article 2 mandates that time periods and limits provided in the Civil Transactions Law must be calculated in accordance with the Hijri calendar. In our experience, the majority of construction contracts for Gigaprojects and other Vision2030 projects, particularly those with international counterparties, rely on the Gregorian calendar, and Project Stakeholders must now be aware that, notwithstanding this, where contractual mechanisms are subject to the Civil Transactions Law, the relevant calculation must be made in accordance with the Hirji calendar. This is significant as time periods specified in the Hijiri calendar are typically shorter than the corresponding period calculated using the Gregorian calendar, and this may have adverse impacts on contract administration. Arguably the most relevant example is set out in Article 143, which provides that Project Stakeholders will be prevented from raising claims for compensation after the earlier of the date three years after they became aware of the relevant damage and the date 10 years after the date of the relevant damage, a limitation period that will expire earlier with a Hijiri calculation than with a Gregorian calculation.

4. Conclusions

Eight years on from the launch of Saudi Arabia's "*Vision2030*" nation-building and socioeconomic reform program, the Civil Transactions Law has codified key principles and mechanisms aimed at defining a clear legal framework for economic activity in the Kingdom and preserving an appropriate sense of balance between contracting parties. The Civil Transactions Law seeks to achieve these objectives in the context of construction contracts by introducing, amongst other things, new rights and remedies for contractors, and discretionary powers for dispute resolution bodies to step into, or terminate, construction contracts, a regulatory regime that sits at odds with the fact that construction contracts for major project developments generally include a diametric allocation of risk between the parties pursuant to which the contractor's entitlements to time and cost relief are exhaustively defined. Project Stakeholders and their legal advisers therefore need to be actively aware of the new regimes implemented by the Civil Transactions Law, particularly given that they apply retroactively to contracts already in force. Further, given the relative infancy of the Civil Transactions Law and the ambiguities inherent in its drafting, all affected parties will be best served by closely monitoring how contracting parties and dispute resolution bodies interpret and implement relevant requirements of the Civil Transactions Law going forward, particularly in the context of further legislative reform and collateral developments in the industry such as the launch of the UCC.

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