

KSA risks in enforcing future conditions

A mere promise or a binding obligation?

Commercial agreements often include obligations that a party is required to commit to fulfilling at a future time. Illustrative examples include:

- > An obligation on a party to take a lease of a building once constructed.
- > A put option requiring other shareholders to purchase an investor's shares at a specified future time.
- > An agreement to establish a joint venture company once certain agreed targets have been fulfilled.

The risk, under *Shari'ah*, that all such agreements have in common is whether the party making these commitments can be held to the agreement at that future time.

Three out of the four main *Shari'ah* schools of thought (including the Hanbali school, which is the school of thought primarily followed by the Saudi judiciary) consider such terms as merely non-binding 'promises' rather than binding obligations, and therefore unenforceable in court.

Under the fourth school of thought, being the Maliki school, such promises can be binding in certain circumstances, primarily where the beneficiary of the promise has acted in reliance on it. Whilst we have seen Saudi judges

accommodating this view, it remains at the discretion of the individual judge subject to his particular *Shari'ah* mindset, creating significant uncertainty for the contracting parties.

Additionally, for the future promise to be considered binding, it would need to have sufficient clarity in detail, so that the enforceability of the promise is not undermined by the uncertainty of the terms being agreed.

The risks of enforceability challenges are reduced to minimal if the dispute at hand is to be heard before the Committee for Banking Disputes or the Committee for Resolution of Securities Disputes, as both take a much more commercial view than the *Shari'ah* judges in the courts.

However, if the commercial agreement is unrelated to banking or securities matters, a safer approach to minimise the risk that the future obligation is deemed unenforceable by the Saudi courts is as follows:

1. Include detailed conditions for the future obligation

The future obligation should be sufficiently detailed and clear, to minimise the risk that it is deemed unenforceable due to uncertainty.

It should also be clear that the future obligation is a fundamental term of the contract, and that the benefiting party is entering into the contract in reliance on such term.

2. Include an arbitration provision in the agreement

The Arbitration Law requires that Saudi courts decline to hear a dispute if the subject-matter of the dispute is governed by a valid and binding arbitration agreement, as long as the defendant raises the arbitration agreement as its first defence to a claim.¹

3. Provide for an accommodating governing law

a. Arbitration in KSA

If the preferred approach is to arbitrate in Saudi Arabia, it is unlikely that a governing law other than Saudi law would be accepted. However, the agreement should expressly provide that the parties adopt the Maliki school of thought in relation to the enforceability of the future obligation. We consider such an approach likely to be accepted by arbitrators, who take a more commercial approach to the enforcement of terms compared to court judges.

b. Arbitration outside of KSA

Alternatively, if arbitration will take place outside of KSA, then the law of any jurisdiction can be chosen that would accept future obligations as binding. As Saudi Arabia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**), then the location for the arbitration should be a jurisdiction that is also party to the New York Convention, to enable the final award to be enforced in Saudi Arabia against the breaching party's in-country assets.

¹ Pursuant to article 11 of the Arbitration Law, issued by Royal Decree M/34, 2012

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