

Court compensation

Are claims for loss of future profits a lost cause?

In negotiating contract terms, parties need to be aware of the potential compensation that could be awarded by the courts in the event of a claim for breach of contract, so that appropriate provision to allocate risk can be made at the early stages.

For contracts subject to KSA court jurisdiction, the key takeaway from court judgments is that compensation awards are typically very conservative, with only very clearly-evidenced, direct costs being typically awarded as compensation. Anticipated losses, such as loss of future profits, are rarely awarded.

Administrative judges in the Board of Grievances, who deal with claims against government entities, are slightly less conservative in their assessment of compensation, but the same general restrictive approach applies.

The typical view of the courts is to decline to award compensation for loss of anticipated profits on the basis that the claimant cannot prove without doubt that such profits would have actually arisen. The exception to this is if the claimant can evidence that all the 'grounds of the profits have been established', a principle supported by *Shari'ah*, which means that, but for the breach of contract, the profits would certainly have been made.

Whilst this potential argument exists, successful claims for lost profits remain relatively rare, both in the Board of Grievances (i.e. for claims against Government entities) and the Commercial Courts, with judges typically holding that the evidence is not sufficient to show that all the grounds for the profits have been established.

Parties taking the bulk of the financial risk in reliance on the contract terms would be advised to include provisions expressly agreeing the remedies in the event of a breach of contract, such as by way of liquidated damages clauses.

Whilst the *Shari'ah* enforceability of liquidated damages provisions can be questioned, the typical view of the courts is to enforce the term as it has been agreed by the parties, unless the level of damages is wholly disproportionate to the actual loss.

This creates a higher level of certainty to protect the investing party which cannot be achieved by relying on the court's discretion alone.

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