

Managing risk in contracts under the new Civil Transactions Law

The new Civil Transactions Law (CTL) provides welcome confirmation that parties can contractually agree to limitations and exclusions of liability, as well as liquidated damages clauses, allowing greater certainty in the allocation of risk between parties at the commencement of the contractual relationship.



Liquidated damages clauses

Liquidated damages clauses have long been considered enforceable by KSA courts, unless the amount agreed is so far in excess of the damages that have been suffered by the non-breaching party that to enforce the amount would be unjust.

This position has been reflected in the CTL, but with a more detailed framework to regulate the use of liquidated damages clauses, which cannot be contractually waived by the parties:

1

The liquidated damages amount will not be due if the liable party can show that the party to be compensated has suffered no harm.

2

The liable party can seek a court order to reduce the liquidated damages amount if it is clear that the amount is excessive to the harm suffered.

3

The party to be compensated can seek a court order to increase the liquidated damages amount to equal the actual harm caused, if the harm caused exceeded the liquidated damages amount as a result of the liable party's deceit or gross negligence.



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 Shariah views regarding whether or not such provisions could be upheld. Now, the CTL expressly confirms that provisions limiting or excluding liability arising from failure to perform – or a delay in performing – contractual obligations, are enforceable.

However, the CTL also expressly prohibits the use of contractual clauses that seek to limit or exclude liability arising from:

1

gross negligence or deceit – a position that is often reflected by contractual drafting in any event; and

2

a harmful act, which is explained in the law to mean any fault that causes harm. This legal restriction reflects a similar position in many jurisdictions in the region, including the UAE, Qatar, Kuwait, Egypt and Jordan, which have each expressly legislated to prohibit such limitations or exclusions of liability applying.

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. Therefore, appropriate insurance cover remains an essential arm in a contracting party's risk-allocation toolkit.

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