

INTERNATIONAL CONSTRUCTION CONTRACTS IN SAUDI ARABIA: DEMYSTIFYING SAUDI LAW AND SHARI'AH PRINCIPLES IN THE KINGDOM

DR ALI ALMIHDAR,

Barrister, Outer Temple Chambers, England and Wales and Saudi Arabia

AND

JOSEPH CHEDRAWE*

Partner, Covington & Burling LLP, Dubai

ABSTRACT

It has been said that the laws applicable to disputes arising in the Kingdom of Saudi Arabia are a black box – complicated, inaccessible, hidden, mysterious. For many years, Saudi Arabia has been home to some of the world's biggest and most important construction projects. Alongside these projects has come the inevitability of international arbitration over disputes arising from them. While the disputed issues may be generally described as typical in construction law – contractual notice, non-payment, scope variations, limitation of liability, and damages – the applicable law may be counter-intuitive to users who are less familiar with the laws of Saudi Arabia and the applicable Shari'ah principles. It, therefore, becomes important to demystify those laws and principles, particularly as applied to construction arbitration, with a view to enhanced clarity and predictability over construction contract disputes in the Kingdom.

INTRODUCTION

Disputes over construction projects represent a substantial proportion of international arbitration cases worldwide. When the law governing the dispute is familiar to the parties and the arbitral tribunal, the applicable legal principles may be considered as well established, with the main contest being over the disputed facts. When the law is less familiar to the parties

* The authors are grateful for English common law research undertaken by Patrick O'Grady, Associate, Covington & Burling LLP, Dubai.

and the arbitral tribunal, and perhaps even counter-intuitive, the legal principles and their application to the facts may be hotly contested, with independent legal experts appointed by each of the parties. Such appears to be the case when the applicable law is that of the Kingdom of Saudi Arabia, which has been described as a “black box” – meaning complicated, inaccessible, hidden, and mysterious. The objective of this article is to demystify Saudi law and Shari’ah principles, particularly as they are applied to modern construction disputes.

The article is set out in four parts. Section 1 will provide an overview of the laws of the Kingdom of Saudi Arabia and a summary of general principles of contractual interpretation. Section 2 will examine three foundational principles under Saudi law and the Shari’ah, including good faith, abuse of right, and unjust enrichment. Section 3 will analyse five commonly disputed issues in construction arbitration: contractual notice, scope variations, limitation of liability, damages and non-payment. Section 4 will offer brief concluding remarks.

1. LEGAL OVERVIEW AND PRINCIPLES OF INTERPRETATION

The two sections that follow provide an overview of the laws in the Kingdom of Saudi Arabia and their sources as well as a summary of the general principles applicable to the interpretation of contracts.

1.1 Overview of the Laws of the Kingdom of Saudi Arabia

Shari’ah principles (or Islamic law) is the basis of Saudi Law. The four main sources of the Shari’ah are: (1) the *Qur’an*, which is the central religious text in Islam, believed by Muslims to be the word of God as revealed through his Prophet Muhammad (Peace be upon him and all the Prophets); (2) the *Sunnah*, which are the recorded traditions (acts) and sayings (words) of the Prophet; (3) the *Ijma* (“consensus”), which is the agreement of the Islamic community and Muslim scholars on a particular matter; and (4) the *Qiyas* (“analogy”), which is the process of analogical reasoning generally applied when analysing the circumstances in light of the other three sources, to arrive at a solution that is most consistent with them.

Given that the *Qu’ran* and the *Sunnah* are believed to be divinely inspired, and further that the *Ijma* and *Qiyas* are derived from the two former, the Shari’ah is considered as divine legislation, and therefore takes precedence over all other laws in Saudi Arabia. Article 1 of the Basic Law of Saudi Arabia (or the Basic System of Governance) of 1992 (which serves as a constitution in Saudi Arabia) states: “*The Kingdom of Saudi Arabia*

*is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qu'ran, and the Sunnah (Traditions) of the Prophet ...*¹

There are several schools of Islamic jurisprudence, the four primary schools in Sunni Islam being:

1. Hanafi, which refers to the jurist the Imam Abu Hanifa Alnu'man who lived in Iraq, whose school of thought (the first of the four to come to existence), is mostly followed in East Asia, Morocco and Egypt, with the largest current number of adherents globally.
2. Maliki, which refers to the jurist Imam Malik bin Anas who lived in Al-Madinah, whose school of thought spread to North Africa and Sudan. Both Abu Hanifa and Malik were students of Ja'far Al Sadiq, an early scholar of Shi'a Islam.
3. Shafi', which refers to the jurist the Imam Al-Shafi'I, who was a student of Malik and applied his own understanding to juristic issues, which led to this new school of thought carrying his name and is mostly followed in Yemen, Iraq, Egypt, and Central and East Asia.
4. Hanbali, which is the latest school of thought to develop chronologically, refers to the jurist Ahmad bin Hanbal who was a student of Al-Shafi'I until his name became associated with this separate school of thought and whose followers are mostly in the Arab Peninsula and the Levant.

The one mostly followed in Saudi Arabia is the Hanbali school.² However, Saudi judges are not precluded from drawing on the principles of the other schools if they consider that that would produce a more just result in the case before them.³

In addition, Saudi laws can take the form of Royal Decrees, statutes, decisions of the Council of Ministers, ministerial decisions, and circulars issued by ministers empowered to do so, provided such laws are not inconsistent with the Shari'ah. For instance, Saudi Arabia has promulgated laws to provide a legal framework for modern transactions, such as the Saudi Arbitration Regulation, which was issued in April 2012 under Royal Decree No M/34 dated 24/5/1433H, and is broadly modelled on the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (as amended in 2006).⁴

¹ See also, Article 7 "Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunnah of the Prophet, which are the ultimate sources of reference for this Law and the other laws of the State". Article 48 "The courts shall apply to the cases before them the principles of the Islamic Shari'ah as derived from the Book (The Qur'an) and the Sunnah and the statutes promulgated by the Head of State which statutes must not be inconsistent with the Book and the Sunnah".

² Decision of the Commission of Judicial Supervision No 3 of 1374AH (Arabic), as reported on the website of the General Authority for Research and *Ifta*.

³ *Ibid*.

⁴ Royal Decree No M/34 dated 24/5/1433H (corresponding to 2012).

1.2 General Principles of Contractual Interpretation

Saudi Arabia has not codified the Shari'ah principles of contract into one document. As a result, judges and legal practitioners continue to rely on the classical books of Islamic *fiqh* (jurisprudence). Although there is a body of case law, Saudi Arabia does not have a system of judicial precedent. Judgments in past cases may serve as a guide, but it is not mandatory that subsequent judgments follow them.

(a) Freedom of Contract under the Shari'ah

Whilst parties to a contract have the freedom to agree the terms of their relationship, including matters like duration and termination or non-renewal, their terms must be within what the existing laws of Saudi Arabia allow. Any term outside such limits would not be enforceable. Leading Shari'ah scholar, Dr Mohammad Siraj, in his book, *The Theory of Contract and the Abuse of Right from an Islamic Jurisprudential Perspective*, says that the Maliki and Hanbali schools will "... look to the consequences in judging action. An action becomes illegal if it leads to what is prohibited by the Divine Legislator."⁵

Although there are divisions of opinion in Islamic *fiqh* (jurisprudence), the majority view is that parties have the freedom to enter into a contract by their mutual agreement, but do not have the freedom to decide the legal effects or consequences of that contract, unless those effects or consequences fall within, and do not violate, the Shari'ah.⁶ The objective of this principle is to prevent the risk of one party taking advantage of, or exploiting, its counterpart by abusing a dominant position or using fraudulent practices or forcing unwarranted risks.

Once the parties conclude a contract, which is consistent with the Shari'ah, its interpretation is a matter of giving the words and expressions in the contract their plain meanings, as used in similar circumstances. This general rule of interpretation was succinctly derived by Dr Sa'd Al-Thiaby from Judgment No 26/D/F/29 of 1421AH, as confirmed by the Judgment of the Court of Administrative Appeal No 68/T/1422AH, where he said: "*In interpreting a contract, the criterion to follow is the will of the two parties by reading the terms of the contract and identifying their apparent meaning in the light of the nature of the transaction.*"⁷ This general approach to contractual interpretation broadly mirrors that of common law jurisdictions, in which

⁵ Siraj, Dr M, *The Theory of Contract and the Abuse of Right from an Islamic Jurisprudential Perspective* (Arabic) (Translation), page 295.

⁶ Abu Zahra, M, *Property and The Theory of Contract in the Islamic Shari'ah*, (Arabic), pages 225–226: "*However, in the Islamic Shari'ah, the will only establishes the contract but the contractual stipulations and their effect are from the Divine Legislator ... The effect of a party's will is only to form the contract but not to give it its effects and consequences ...*" (Translation).

⁷ Dr Sa'd bin Sa'eed Al-Thiaby, "The Doctrine of Good Faith in Saudi Law and Comparative Laws", (Arabic).

the starting point is the natural and ordinary meaning of the words with consideration of certain other factors such as the documentary, factual and commercial context.⁸

Where the parties argue that the words of the contract do not reflect their collective intention or understanding, in ascertaining the parties' intentions, a Saudi judge may require evidence, including: the circumstances in which the contract was concluded; whether there is a proven course of conduct; the parties' communications; and customary business practices.

For example, if a dispute arises as to which document version represents the final and binding contract, the applicable principle is that the latest agreement is the only version to be considered. Furthermore, all prior understandings, whether written or oral, should not be taken into account, unless the parties agree. In Case No 688/2/S of 1435AH (appeal hearing dated 29/6/1435AH corresponding to 29/4/2014AD), the seller had agreed to sell a farm and its appurtenances to the buyer. The last document signed by the parties was called "Document of receipt and renewal of initial agreement", but the parties had never signed the final contract, which was in draft form. The seller attempted to back out of the sale, arguing that the draft contract needed to be signed. The buyer countered that the "Document of receipt and renewal of initial agreement" was binding. The court of appeal found in favour of the buyer, writing as follows:

"... and whereas the two parties have admitted that the agreement known as 'Document of receipt and renewal of initial agreement' is the last thing they agreed upon ... this agreement cancels other contracts or agreements. However, the respondent stopped the process of sale because the parties had not signed the draft contract that had been submitted to the court. And whereas the claimant argued that the mentioned draft contract contained matters which had not been agreed and therefore did not bind him and that he was bound by the document of receipt which was admitted by the respondent and which therefore cancelled all agreements and contracts drawn up by the parties ... the court therefore decides that the sale was valid and orders the parties to finalise the steps required to complete it ..."⁹

(b) Quranic Principles of Contract Interpretation

The three foundational principles of contractual interpretation from the Quran are as follows:¹⁰

1. Surah (chapter) 5, verse 1: "*O you who have attained to faith, Be true to your covenants ...*". The universal understanding of this command is

⁸ See, for example, *Arnold v Britton* (SC) [2015] UKSC 36; [2015] AC 1619; [2015] 2 WLR 1593; [2016] 1 All ER 1 for the position under English law as summarised by Lord Neuberger.

⁹ Case No 7185/2/q/of 1434H (court of first instance), Appeal Case No 688/2/S of 1435H (appeal hearing dated 29/6/1435H corresponding to 29/4/2014).

¹⁰ All translations of the Qur'anic texts in this article are taken from Mohammad Asad's translation entitled "The Message of the Quran", available at <http://www.muhammad-asad.com/Message-of-Quran.pdf> (last accessed 7 December 2022).

that people must perform their contractual obligations. However, sight must never be lost of the crucial requirement that such contractual obligations must be consistent with Shari'ah law.

2. Surah 2, verse 188: "*And devour not one another's possessions wrongfully, and neither employ legal artifices with a view to devouring sinfully, and knowingly, anything that by right belongs to others*". This verse is the primary authority for the prohibition of wrongfully taking the property of others. Its effect is wide ranging as it provides the fundamental test for ascertaining whether a transaction involving the transfer of property is valid or not.
3. Surah 4, verse 29: "*O YOU who have attained to faith! Do not devour one another's possessions wrongfully – not even by way of trade based on mutual agreement and do not destroy one another: for, behold, God is indeed a dispenser of grace unto you.*" The first principle is self-evident: parties must abide by their contractual obligations, which in turn must comply with the Shari'ah. The second and third principles, taken together, prohibit appropriating or "devouring" the property of others under any guise or pretext, whether such appropriation is achieved by a criminal act (like theft) or through an ostensibly non-criminal act such as a legal device with the features of a legitimate commercial transaction or a charitable arrangement. It is unanimously recognised in the Shari'ah that any gains or profit acquired through *riba* (the prohibited taking of interest or usury) or *gharar* (uncertainty in commercial dealing) constitute the wrongful devouring of another's property. In addition, where a party makes gains through, for example, unjust enrichment or the abuse of a right (both discussed in the next section), irrespective of whether the gains are contractual, those gains will be prohibited by the above principles, as well as by the Quranic commandment "... *do not devour one another's possessions wrongfully ...*".¹¹

Whilst the foundational principles of contractual interpretation are derived from the Qur'an and must be viewed through the lens of compliance with the Shari'ah, such principles do not in fact diverge significantly from general principles in common law jurisdictions: parties must comply with their contractual obligations to the extent that such obligations are permitted by law.

(c) Principles of Contract Interpretation from the Sunnah

The two traditions from the Sunnah most relevant to contract interpretation are as follows:

¹¹ Surah 4, verse 29.

1. *“He who innovates something in this matter of ours (i.e., Islam) that is not of it will have it rejected.”*¹²
2. *“... Any stipulation which is not in the Book of Allah, the Mighty and Sublime, is void even if there were one hundred stipulations. The Book of Allah is more valid and the stipulation of Allah is more binding.”*¹³

The importance of these two Prophetic traditions is clear: anything agreed between contracting parties, which is not fully consistent with the Shari’ah, is invalid and therefore unenforceable.

2. FOUNDATIONAL PRINCIPLES UNDER SAUDI LAW AND THE SHARI’AH

This section examines three of the foundational principles under Saudi Law and the Shari’ah: good faith, abuse of right, and unjust enrichment. Naturally, these are not the only Shari’ah principles applicable to construction contracts, and there are many others, including: the requirement to have contractual certainty, the need for consideration, and the overarching requirements of fairness, reasonableness and proportionality. The application of each of these to typical standard contract clauses in construction will be considered in Section 3.

The consequence of declaring a contractual clause invalid for violating these principles is that the clause may be struck or rendered invalid for illegality. The practical effect of the invalidity of a contractual clause may be managed through “severance”, whereby the rest of the contract remains enforceable (referred to in common law jurisdictions as the “blue pencil” rule).

2.1 Good Faith

(a) Good Faith under the Shari’ah

The Shari’ah recognises the duty to act in good faith as an overriding requirement in all forms of conduct, whether in a commercial context or otherwise. Good faith is ordained by several verses of the Qur’an, the three foremost of which are:

1. Surah 4, verse 100: *“And if anyone leaves his home, fleeing from evil unto God and His Apostle, and then death overtakes him – his reward is ready with God: for God is indeed much-forgiving, a dispenser of grace ...”*
2. Surah 16, verse 90: *“Behold, God enjoins justice, and the doing of good, and generosity towards fellowmen; and He forbids all that is shameful and*

¹² Reported by al-Bukhārī (2697) and Muslim (1718). The wording here is that of Muslim.

¹³ Reported by al-Bukhārī (456) and Muslim (1504). The wording here is that of Muslim.

all that runs counter to reason, as well as envy; He exhorts you so that you might bear in mind ...”

3. Surah 57, verse 25: *“Indeed, did We send forth Our apostles with all evidence of truth; and through them We bestowed revelation from on high, and a balance, so that men might behave with equity ...”*

The Sunnah also provide a basis for good faith in the tradition that reads: “Actions are but by intentions, and each person will have but that which he intended.”¹⁴ Many Muslim scholars have described the meaning and effect of this tradition, including the following three:¹⁵

1. Imam Ibn-Alatheer (of the Shafī School): *“This tradition is among the most comprehensive traditions laying down rules”*.
2. Imam Ibn-Rajab (of the Hanbali School): *“These are a few comprehensive words embodying two overriding principles which exclusively cover all acts”*.
3. Imam Ibn-Qayim Aljawziyah (of the Hanbali School): *“The intention is the soul and body of an act; an act would be rendered right if the intention is right, or wrong if the intention is wrong. In a few words, the Prophet prescribed the complete cure in which could be found the jewels of knowledge. In the first part of the tradition the Prophet clarified that no act can be judged except by judging the intention behind it and in the second part He clarified that the person performing the act could only claim what he had intended, and this includes all acts of worship, transactions, oaths, pledges, and all other contracts and actions”*.

From these Qur’anic verses and Prophetic traditions derives one of the most fundamental Shari’ah principles: that all acts are to be judged by the purpose for which they are taken. This means that the judgment and remedy for any act depends on its intended purpose; that is, if the intended purpose was legal, then the act would be legal, whereas if it was sinful or illegal, then the act would be illegal. This overriding principle is given primacy by many Muslim scholars, and was given pride of place in the *Majallat Al-Ahkam Al-Adliyah* (also known as The Mejelle) in 1877, which was the first meaningful attempt to codify a part of the Shari’ah and represented the civil code of the Ottoman Empire in the late 19th and early 20th century. Articles 2 and 3 are as follows:

1. Article 2: *“A matter is determined according to intention; that is to say, the effect to be given to any particular transaction must conform to the object of such transaction”*.¹⁶

¹⁴ Reported by al-Bukhārī (1) and Muslim (1907). The wording here is that of al-Bukhārī.

¹⁵ Alnadawi, Dr A, “The rules and regulations extracted from Tahrir by Imam Jamal al-Din al-Husayri, Explanation of the Great Compendium of Imam Muhammad ibn al-Hasan al-Shaibani (Ph.D.)”, (Arabic), 1991.

¹⁶ Rustum Baz, S, *The Explanation of The Mejelle* (Arabic), (Beirut Literary Press, 1923).

2. Article 3: “*In contracts effect is given to intention and meaning and not to words and phrases*”.¹⁷

These Qur’anic verses and Prophetic traditions demonstrate that good faith is firmly rooted in the Shari’ah and must be observed at all stages of a contract, from pre-contract negotiations to the conclusion of performance. Conversely, it is widely considered that English Law does not generally recognise an implied duty of good faith, although courts have developed “*piecemeal solutions in response to demonstrated problems of unfairness*”.¹⁸ For example, under English law the courts may recognise:

1. an implied duty of rationality, under which a party should exercise contractual discretion consistently with its contractual purpose in the absence of clear wording to the contrary (the so-called “Braganza” duty);¹⁹
2. an implied duty of good faith in relation to longer term “relational” contracts, pursuant to which parties should avoid “commercially unacceptable” conduct and acts that may undermine the bargain entered into or the substance of the contractual benefit; or
3. an express obligation to act in good faith.

This view of the English law position on good faith has been subject to recent scrutiny. In 2013, Mr Justice Leggatt (as he then was), in *obiter*, shed light on the direction of good faith under English law, with reference to other common law jurisdictions, including the US, Canada, Australia, and Scotland, which had increasingly recognised variations on the doctrine of good faith:²⁰

“In refusing however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide.

... I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.”

It may be then that the perceived gap between the Shari’ah and the common law on the matter of good faith is not so great after all and may continue to diminish.

(b) Good Faith in Saudi Legislation, Commentary, and Case Law

Good faith is not defined by Saudi legislation as a standalone concept that can be deployed in the resolution of disputes. However, since Saudi

¹⁷ *Ibid.*

¹⁸ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (CA) [1989] 1 QB 433 at 439.

¹⁹ *Braganza v BP Shipping Ltd* (SC) [2015] UKSC 17; [2015] 2 Lloyd’s Rep 240; [2015] 1 WLR 1661; [2015] 4 All ER 639.

²⁰ *Yam Seng Pte Ltd v International Trade Corporation Ltd* (QBD) [2013] EWHC 111 (QB); [2013] BLR 147; [2013] 1 Lloyd’s Rep 526; 146 Con LR 39, paragraphs 123–130 and 153.

law is based on Shari'ah principles, good faith is an overriding principle that envelops all forms of human conduct and certainly commercial transactions. Indeed, the term good faith appears in several civil and criminal statutes promulgated by the Saudi State.²¹

An article published in the Arabic legal journal, *The Shari'ah, the Law and Islamic Studies*, by Dr Sa'd bin Sa'eed Al-Thiaby, Dean of the Faculty of Shari'ah and Law at the University of Tabuk in Saudi Arabia, and titled "The Doctrine of Good Faith in Saudi Law and Comparative Laws" says, inter alia, that "... *Saudi Laws and the Saudi judiciary consider good faith a general principle to be applied to all transactions and actions ...*"²² The author then provides several illustrations from Saudi Law and judicial decisions:²³

“Firstly: Good Faith bars the enforcement of punishments in the Saudi Anti Money-Laundering Law ...

Secondly: Good Faith in the Saudi Commercial Negotiable Instruments Law ...

Thirdly: Good Faith in the Saudi Commercial Mortgage Law ...

Good Faith in Saudi judicial decisions:

It is settled in Saudi judicial decisions that the doctrine of Good Faith should be engaged as a general principle that covers all contracts, and the principle must be enforced in all successive stages of the contract from its negotiation to its formation to its interpretation and finally to its enforcement.

The following are examples of Saudi judicial decisions on this aspect of contract:

Firstly: the judgment of the 29th branch Circuit No 26/D/F/29 of 1421 AH which was confirmed by the judgment of the Court of Administrative Appeal No 68/T/1422 AH.

...

Principles laid down by the court in its judgment:

1. ...
2. In interpreting a contract, the criterion to follow is the will of the two parties by reading the terms of the contract and identifying their apparent meaning in the light of the nature of the transaction. The enforcement of the contract must be consistent with the requirement of Good Faith in transactions and the enforcement of contracts and the confidence that should exist between the contracting parties in accordance with the prevailing circumstances and the nature of the work.

...

²¹ For examples of civil legislation where the term “good faith” appears see, Article 8 of the Commercial Mortgage Law of 2018; Articles 29, 31, 32, 99, and 170 of the Companies Law of 2022 and Article 8 of the Commercial Papers Law of 1964. Examples from criminal legislation include: Articles 33 and 36 of the Combating Money Laundering Law of 2017 and Article 22 of the Criminal Law of Fraud Crimes of 2013.

²² Dr Sa'd bin Sa'eed Al-Thiaby, “The Doctrine of Good Faith in Saudi Law and Comparative Laws”, (Arabic).

²³ *Ibid.*

Secondly: Judgment No D/1/3 of 1413AH of the third Administrative Circuit of the BOG.

Basis and Principles upon which this judgment relies:

1. ...
2. Equity requires that a contractor with the Government must not be harmed by what the Government itself has ordained by way of an increase in customs duties, which fact would lead to an increase in the cost of the contract that the contractor had based his bid on. This is by reason of the prophetic tradition 'No harm should be inflicted and no harm should be suffered'. From this tradition was developed the Shari'ah principle that 'harm must be removed ...'

Hence it is clear that the court deployed the concept of Good Faith which is based on the Shari'ah principles: 'No harm should be inflicted and no harm should be suffered' and 'Harm must be removed'."

In circumstances where good faith may be difficult to define, jurists take the view that it may be identified by tracing any evidence of bad faith.²⁴ The principle of good faith can therefore also be referred to as the absence of forbidden bad faith.

The following cases from the Saudi courts are useful illustrations of the main principles described in the preceding paragraphs.

Case No 1193/1/q of the year 1425AH offers a useful illustration of the good faith principle. This case concerned a dispute over an administrative (public works) contract between a Government Ministry and a contractor. The contractor sued the Ministry for the return of amounts representing a delay penalty and the cost of the consulting engineer's extra time. The court found for the contractor and ordered the Ministry to pay back the amounts confiscated. The court reasoned that the delays were not caused by the contractor alone and that the Ministry had been at fault for being late in paying the contractor's dues and having made some of the payments in the form of Government bonds, which would take a very long time to encash. In addition, the court noted that, whereas the contract required that:

"... the owner must perform the terms of the contract in good faith and pay the contractor the instalments that fall due without delay and that if the owner defaulted in any term or failed to pay at the appointed times, the contractor was entitled to claim compensation for that ... Allah has ordained: 'O you who have attained to faith, Be true to your covenants ...' and the Prophet has declared that: 'Muslims should abide by the terms that they had agreed to ...' and amongst the most important of such terms is that the payments due to the contractor should be made in timely fashion ... further Article 29 of the Implementing Regulations of the Procurement Law made it obligatory upon the defendant to perform its contractual obligations. From the above it transpires that the defendant Ministry violated its legal and contractual obligations."

²⁴ Dr Sa'd bin Sa'eed Al-Thiaby, "The Doctrine of Good Faith in Saudi Law and Comparative Laws", (Arabic).

Case No 6504/1/q of the year 1429AH²⁵ involved a public works contract in which the court applied good faith principles and concluded that the owner had agreed to additional works and benefited from the contractor's performance of those works, thereby rendering it unnecessary to have written confirmation of the works. In passing judgment in favour of the contractor, the court commented as follows:

"The dispute between the parties is over the material consideration for additional works that the claimant had performed on instructions of the defendant ... and as long as the instructions to perform this work were issued by the defendant and it is demonstrated that the claimant has performed the work and the fact that the defendant has benefited from this work then the defendant is indebted to the claimant to whom it must pay the cost of the performance of the work ... and failing to pay the amount due on the basis that there is no written instruction when the circumstantial evidence, including the proven bills of quantities and the inclusion of the extra cost in the final invoice and the fact that the claimant had performed similar work in other projects for which the defendant Ministry had issued instructions ex post facto and paid for the extra work, all confirm that the instructions were issued during the performance of the work ... Reliance on the absence of written instructions at the time that the defendant had agreed to the works and benefited from them and the presence of precedent of instructions being issued ex post facto in past similar projects show the lack of good faith in dealings and contracting which should be observed according to the Shari'ah and legal principles in compliance with God's commandment: 'O you who have attained to faith, Be true to your covenants ...' and the teachings of the Prophet's (God peace and blessings be upon him): 'A believer's property cannot be taken unless it is given by a willing disposition' and the provision of Article 77 of the Government Procurement Law that: 'It is obligatory upon the contractor and the government authority to perform the contract in accordance with their terms and with good faith and the requirements of the proper functioning and interest of the public utility ...'"

It is clear that the doctrine of good faith permeates the Shari'ah, Saudi legislation, and Saudi case law, and represents a foundational principle in the Kingdom's legal landscape.

2.2 Abuse of Right

Abuse of right and good faith/forbidden bad faith are related doctrines and sometimes viewed as two sides of the same coin. The principle of abuse of right is well established in Saudi law. In an article in the Arabic Legal Journal, *The Shari'ah and the Law*, Dr Mohammad Ra'fat Othman observes: "*The Abuse of Right is forbidden in the Islamic Shari'ah. The basis of this is found in several places in the Qur'an and the Prophet's traditions*".²⁶ He then provides a detailed analysis of three scenarios or categories in which an abuse of rights may be identified:

²⁵ Case No 6504/1/q of the year 1429AH (corresponding to 2008).

²⁶ Ra'fat Othman, Dr M, "The Principle of Abuse of Rights under the Islamic Shari'ah and the Law", (Arabic).

1. where there is an absence of a legitimate interest in enforcing that right;
2. where the purpose of enforcing the right is to harm another party; or
3. where a party stands to make an unlawful gain by enforcing that right.

The first two scenarios are more subjective and require proof of the motives of the party alleged to have abused its right. The third scenario is more objective as the abuse of right may be presumed if a party makes an unlawful gain when enforcing a contractual right. For example, if one party has unlawfully reaped the fruits of its counterparty's efforts, this would fall within the third category as it would be categorised as an unlawful gain. So it would likely amount to an abuse of right for an employer to claim for liquidated damages for a delay that it has itself caused, in the absence of a contractual mechanism to address this type of scenario. This abuse of right category often overlaps with principles of unjust enrichment (discussed next).

As a final note, there is no stated principle of "estoppel", as known in common law countries, under the Shari'ah or in Saudi law. However, the operation of the principles of good faith, the prohibition of bad faith, and abuse of right would form a basis for, in effect, estopping a party to a contract from acts that would breach those principles. Therefore, although there is no standalone principle of estoppel, where a party is in breach of contract either directly by non-performance or indirectly through the operation of those principles, that party would effectively be estopped from realising gains that it might otherwise make.

2.3 Unjust Enrichment

One of the Prophet's traditions dictates: "*Do not perpetrate injustice, a believer's property cannot be taken unless it is given by a willing disposition*".²⁷ In other words, it is not permissible for the property of a person to be taken without their willing consent. For example, where it is clear that a party is not willing to give up its rightful entitlement to consideration (e.g., compensation), the counterparty's refusal to give that consideration would be an unlawful act.

In addition, under the Shari'ah, parties cannot agree to a stipulation that purports to make what is unlawful lawful. This is the effect of the principle enunciated by the Prophet's traditions cited in Section 1.2 above. The remedy for violating this principle in the terms of a contract is that the offending clause should be severed for illegality and the remainder of the

²⁷ Narrated by Abû Ḥumaid al-Sa'idi, Grade: Ṣaḥīḥ (authentic) according to al-Albanī, Source: Takhriḥ Mishkāt al-Maṣābīḥ, page 2875.

contract remains valid and effective to the extent that it can be performed, unaffected by the excision of the offending clause.

There is some difference of opinion between Muslim scholars about whether unjust enrichment is a general doctrine or principle under Shari'ah law. There is, however, agreement that a party who is unjustly "enriched" through a transaction with a party who is correspondingly "impoverished" must return whatever was unlawfully taken to its rightful owner, i.e., the impoverished party. In this respect, the following Qur'anic verse is apt: "*And devour not one another's possessions wrongfully ...*"²⁸ The Mejlle codifies the concept in Article 97, which states that: "*It is not permissible for any person to take the property of another person without a lawful reason*".²⁹ This principle is otherwise expressed by jurists through the maxim "*Al-Ghunm bel-Ghurm*" ("الغنم بالغرْم")³⁰ that "*gain must be met by consideration or compensation*" (our translation).

English law also recognises a principle of unjust enrichment, whereby the remedy of restitution seeks to return the enrichment to the claimant. Broadly speaking, a claimant seeking restitution must show that the defendant has been enriched, the enrichment is unjust, and the enrichment was at the expense of the claimant. The law of restitution is generally viewed as separate from the laws of contract and tort and can be distinguished from contractual and tortious damages, which focus on the damage suffered by the claimant rather than the enrichment of the defendant.

3. APPLICATION OF SAUDI LAW AND SHARI'AH PRINCIPLES TO COMMONLY DISPUTED ISSUES IN CONSTRUCTION ARBITRATION

It is fair to say that most international standard form construction contracts were not drafted with the Shari'ah or Saudi law in mind. The result is the potential for a clash between some standard construction contract clauses and Shari'ah principles or Saudi law when disputes arise. This is especially so where the contracting parties have expressly agreed that the applicable law to their contract is Saudi law. The authors analyse in the following sections five common standard construction contract clauses – contractual notification, scope variation, limitation of liability,

²⁸ Surah 2, verse 188.

²⁹ Rustum Baz, S, *The Explanation of The Mejlle*, (Arabic), (Beirut Literary Press, 1923).

³⁰ See, Alnadwi, Dr A, "Encyclopaedia of the Rules and Principles of Fiqh", (Arabic), who explains that this principle is derived from a Prophetic Tradition. The principle was also codified in The Mejlle, see, Rustum Baz, S, *The Explanation of The Mejlle*, (Arabic), (Beirut Literary Press, 1923).

damages, and non-payment – and the application of the Shari’ah to the likely scenarios that would give rise to a dispute under their terms.

3.1 Contractual Notification

It is commonplace for international construction contracts to include clauses that stipulate when and how parties must notify each other of any claims. Such clauses provide greater certainty as to when and how a notice is received, facilitate effective communication between the parties, and alert them to claims at an earlier stage so that they may take steps to evaluate and mitigate the claim. A typical clause might read as follows: “*The Contractor must give notice to the Engineer of any claims as soon as practicable and not later than 28 days after the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance.*” The question that arises is the extent to which the contractor’s claim may be time-barred if it does not meet the notification requirement. Indeed, some notice of claim clauses expressly add that the contractor will lose any entitlement to its claim if it does not give notice within the prescribed number of days. In common law jurisdictions, the starting point for a court or tribunal is to consider whether compliance with the clause is a condition precedent for a claim, with courts requiring express wording that a contractor will lose its right to claim additional time and/or cost if it does not comply with the provision.

To require that a claim be given within a certain number of days does not, in and of itself, violate Shari’ah principles and is unlikely to be viewed as unreasonable by a Saudi court, which would likely enforce the requirement to do so. However, for a contractor to lose its entire entitlement due to its failure to notify its claim within a certain number of days may, in certain circumstances, violate the Shari’ah for four reasons:

1. First, under principles of unjust enrichment, and specifically, the illegal devouring of the property of others, as described above in Section 2, the employer would have been unjustly enriched by having benefited from the contractor’s work without paying for it.
2. Secondly, in examining the intention of the contracting parties, as described above in Section 2, it would never be the understanding of the employer and the contractor that the latter would work without compensation.
3. Thirdly, Saudi courts will often take into account the general reasonableness and proportionality of a contractual clause. It could therefore be argued that the consequences of a failure to satisfy a mere formality, being the notification days, is neither reasonable nor proportionate as it would deprive the contractor of consideration for the relevant services and thus disturb the economic equilibrium agreed in the contract.

4. Fourthly, under the Shari'ah, rights are never forfeited by reason of the effluxion of time.³¹ In other words, a claimant's lawful entitlement cannot be eliminated simply because they did not make the claim within a certain period of time. This principle must be considered alongside the Commercial Courts Law, effective since 16 June 2020, which introduced a five-year time limit (with exceptions) on bringing commercial proceedings to court.³² It is noteworthy that the new legislation does not say that the right is lost after the expiry of this period; its effect is to make the dispute not justiciable.

In two related cases in 1992 and 1996, before two different circuits of the Saudi Board of Grievances, the contractor had submitted a number of claims to the employer, most of which the employer had rejected.³³ Under the contract, the contractor had to submit a written notice of dispute within 60 days of the rejection. The contractor had not done so and the employer asked the Saudi Board of Grievances to dismiss the claims. In both cases, the Board of Grievances rejected the employer's request for dismissal, and refused to enforce the time bar clause, on the grounds that such a clause violated public policy. As Jalili describes:

"The Board of Grievances held that matters relating to lawsuits, whether when or how they should be filed, or how they should be examined by the court, or how the judgments should be appealed, were not subjects that could be agreed upon in a private contract. Any such agreement would be null and void."

This is not to say that such a clause would never be enforceable, as it would depend entirely on the factual matrix of the particular case and factors such as: (a) whether the employer knew of the claim (notwithstanding the notice failure); (b) whether the employer prevented the formal notification of the claim through, for example, ongoing discussions with the contractor; and (c) any prejudice or harm caused to the employer as a result of not being notified on time.

3.2 Scope Variations

Nearly all construction contracts have provisions to deal with work that is "out of scope" – known as "extras" or "changes" or "variations". The most typical scenario sees an employer require the contractor to complete work that the contractor considers is not within the original scope of the contract,

³¹ See also: Jalili, M, "Time Bar Clauses in Saudi Arabian Contracts", [1996] ICLR 488, pages 490–492: "Attempts by Government employers to place additional hurdles in the way of the plaintiff in the form of contractual time bar clauses are deemed to be contrary to Saudi public policy and would not be enforced by the Board of Grievances".

³² Article 24 of the Commercial Courts Law of 2020.

³³ Cases described by Jalili, M in "Time Bar Clauses in Saudi Arabian Contracts", [1996] ICLR 488, pages 490–492.

such that it claims against the employer for the extra costs to complete the work. A less typical – but not unheard of – second scenario is where the employer removes scope from the contractor’s work, such that the latter claims for the amount it would have earned had the work been completed and for any costs associated with the “de-scoping”.

The first scenario is more straightforward and would give rise to principles of unjust enrichment, discussed above in Section 2, if the contractor can prove that the work was out of scope and cost more to complete. In common law jurisdictions, the court would have regard to the contractual mechanism for the instruction of variations to assess common issues such as the obligation on a contractor to comply with an instruction, the validity of any instruction, whether an instruction constitutes a variation, and the valuation of the variation.

The latter scenario is more complex, but a Saudi court guided by general principles of fairness under the Shari’ah is not likely to accept that a contract may be hollowed out of its subject matter by one party to the detriment of the other or so as to change the economic equilibrium of the contract. The authors’ view is that the permissibility of the de-scoping or not would depend on whether it is substantial or not. If it is substantial, then it would not be permissible. To provide guidance on the meaning of substantial in this context, it is noted that the Saudi Procurement Law permits de-scoping of up to 20 per cent.³⁴ In common law jurisdictions, an employer who omits work from the scope of work without a contractual right to do so would be in breach of contract.

The Shari’ah principle requiring certainty of subject matter in the contract would also potentially be violated by a substantial de-scoping, which would potentially introduce a degree of uncertainty. Under the Shari’ah, the doctrine of *gharar* (uncertainty) requires that the terms of a contract, and their application, be certain as otherwise they would be illegal and thus invalid. On this, Professor Noel J Coulson says:³⁵

“Traditional Shari’a authorities thus consistently emphasise that the essential certainty in contractual obligations is to be achieved by exact definition of rights and obligations of the parties ... It is, therefore, a fundamental purpose of the Shari’a to ensure that contracting parties accept their rights and obligations with full knowledge of the extent of their commitment. In short, it becomes part of the Islamic doctrine of illegality that a contract may be null and void on the ground of uncertainty.”

Nevertheless, in practice, Saudi courts recognise the need for changes to the content of the contract and its value, which they may permit in certain circumstances, provided that they may generally preserve the economic equilibrium of the contract as between the parties.

³⁴ Article 69 of the Government Tenders and Procurement Law of 1440 H (corresponding to 2019).

³⁵ Coulson, N.J, *Commercial Law in the Gulf States: The Islamic legal tradition* (1984), pages 44–45.

3.3 Limitation of Liability

Parties providing a service or goods under a commercial contract will often seek to limit their liability to avoid excessive and/or unforeseen exposure, protect their overall financial position, and mitigate against the risk that their losses may exceed the amounts they are to receive under the contract. A typical limitation of liability clause in a construction contract might read as follows:

“The Contractor’s total liability for all claims of any kind, whether as a result of breach of contract, delays, warranty, tort, negligence, strict liability or otherwise, for any loss or damage arising out of, connected with, or resulting from the Works, shall in no case exceed a sum equal to one hundred percent of the Contract Price. The foregoing limitation shall not apply to any liability arising from gross negligence, fraud or wilful misconduct of Contractor.”

Often considered alongside limitation of liability clauses are clauses that mutually release the parties of certain categories of damages and losses, such as the following example:

“Neither the Employer nor the Contractor shall be liable to the other for any consequential, indirect, punitive, or exemplary damages or any loss of income, loss of use, loss of opportunity or loss of profit.”

There is nothing about these types of limiting/exclusionary clauses, which would violate Shari’ah principles. Limiting aggregate liability and excluding heads of claim neither makes lawful what is unlawful, nor vice versa. A Saudi court would therefore recognise such clauses as enforceable under Saudi law. Similarly, in common law jurisdictions, courts recognise limitation and exclusion clauses, subject to statutory and public policy restrictions as certain liabilities (such as fraud or injury/death caused by negligence) cannot be limited, whilst others may only be limited by clear words and are subject to a reasonableness test.

3.4 Damages

Under Saudi law, to recover damages, there must be: (1) an obligation, deriving either from a contract or a tort; (2) the obligation must be breached by one party; (3) the other party must suffer a loss; and (4) there must be a causal link between the breach and the loss. The burden of proof is on the party claiming the loss. This is not dissimilar to common law principles, which also require a party to demonstrate that an obligation has been breached and it has suffered loss as a result of such breach. The baseline principle for compensation in common law jurisdictions is that damages for breach of contract should put the claimant in the same position as if the contract had been performed.

These requirements are viewed strictly under Saudi law because of the fundamental rule against *gharar* (uncertainty). Saudi courts consistently state that there can be no liability unless it is certain, actual, and verified, as opposed to merely hypothetical, possible, estimated, probable, or even expected. This requirement differs to the assessment of damages in common law jurisdictions, which may include both direct and indirect/consequential losses, depending on the wording of the contract and the particular circumstances of the claim.

The level of proof for damages to be acceptable is high, according to Saudi courts, who often cite the opinion of the Islamic Fiqh Council formed in 1981 under the auspices of the Organisation of Islamic Cooperation. In Case No 5237/2/q of 1428H, the claimant sought lost profits for the defendant's breach of a partnership agreement related to a card with international and local benefits and discounts. The court refused the claimant's lost profits claim by stating:³⁶

“Whereas the claimant is claiming lost profits and uncertain gain which may or may not materialise ... it is not permissible to pass judgment awarding uncertain gains or profits. In addition, the claimant's documents and evidence are not sufficient and strong to support his request for lost profits. Further, scholars and the Islamic Fiqh Council, Decision No (109 3/12), states: ‘Fifth: the harm that may be compensated for includes only the actual financial loss, real loss suffered by the victim and definite gain missed ...’”.

In Case No 52/2/q of 1405H, the claimant claimed against the defendant for lost profit due to the sale of fake video tapes. The court refused the claim on the basis that the claimant had not provided evidence of actual damage in lost profits, and Shari'ah principles only compensate for actual lost profits. Additionally, the court considered that the potential lost profit was non-existent at the time the damage took place, such that it had no value. In the court's words:³⁷

“Shari'ah principles prohibit awarding compensation other than for actual loss or harm that can be quantified in money. As for what is only expected no compensation can be awarded because it did not exist at the time when the harmful act happened and what did not exist cannot be quantified. And whereas the claimant did not submit evidence to show that actual harm had occurred, its claim is therefore rejected ...”

³⁶ Case No 5237/2/q of 1428H (at the court of first instance) and Appeal Decision No 1695/IS/7 of 1431H (corresponding to 2010).

³⁷ Case No 52/2/q of 1405H (corresponding to 1984).

The judicial prohibition against uncertain damages can be found in a number of other Saudi court decisions.³⁸ So, where the contractor believes it will realise profits, but the facts are such that although profits are possible, they remain unproven and may therefore not be realised due to factors other than the employer's actions, lost profits would not be awarded. In contrast, where the contractor's profits would likely have been realised, and it was only the wrongful act of the other party that caused the profits not to be realised, lost profits would be awarded as they are considered to be direct losses. In summary, where profit is already included as part of a construction contract's price, a claim for unpaid amounts would likely not be deemed uncertain and would be recoverable.

3.5 Non-Payment

It is not unheard of for employers to withhold payments owing to contractors on the basis of various allegations, for example, where an employer claims that the work is defective or incomplete. The starting point of a Saudi court for any such analysis would be the contractual payment obligation; in other words, if the contractor has completed the work related to that payment under the contract, the employer must pay it. A court in a common law jurisdiction would take a similar approach.

In addition, a failure to pay could give rise to considerations of unjust enrichment, as an employer could be unjustly enriched if it received the fruits of the contractor's labour, without making payment. By the same token, any payment made to the contractor for which the contractor did not give any consideration in the form of services or goods could also give rise to considerations of unjust enrichment: enrichment of the contractor and impoverishment of the employer. Therefore, if the employer can prove the contractor had not given consideration (e.g.,

³⁸ See also: Case No 2/5054/q of 1426H, Decision No 63/d/a/10 of 1429H, (date of hearing 2/4/1429H corresponding to 2008): "It is settled law in the Board of Grievances not to award compensation for merely possible harm, since compensation must be for actual damage verified to have occurred. Lost profit is of the type of possible damage."; Case No 5605/1/q of 1428H, Decision No 51 of 1430H (at Court of first instance) and No 250 of 1331H in the Appeal Court which confirmed the earlier judgment on 20/10/1431H (corresponding to 2010): "... Over and above that, the compensation that the claimant seeks for lost profit is based on mere conjecture (*takhmin*) and expectation (*tawaqqu*). It is therefore not defined (*mundabit*) and cannot be defined precisely. Further, it leads to ignorance (*jahala*) and uncertainty (*gharar*) which are prohibited in by the Shari'ah. It is settled law in the Board of Grievances that when the harm is merely possible (*muhtamal*) not to award compensation for lost profit or the 'hoped for benefit' which, if ordered, would be touched by the Shari'ah prohibitions referred to. Property must not be awarded in compensation for possible harm that has not been proved ..."; and Decision 103, Board of Grievances, Commercial Court – 1435 (page 862) (Commercial Circuit No 1, Jeddah 1434 (corresponding to 2012)) in which the employer claimed against the contractor for payment of amounts further to a penalty clause and for compensation for loss of profit. The court awarded the penalty amount (albeit capped at half the contract price) and rejected the claim for lost profits.

services or goods), the employer would be entitled to recover any payments for that incomplete work.

4. CONCLUSION

The three foundational principles of good faith, abuse of right, and unjust enrichment under the Shari'ah provide a meaningful starting point for many of the issues that arise out of international construction contracts governed by Saudi law. To the extent that any of these three principles lead to the potential for a deviation from the contract, that potential must be balanced against the baseline principles of contractual interpretation applied under the Shari'ah and Saudi law. These include the principles that the words of the contract are to be given their ordinary meaning and that parties must abide by their contractual obligations, provided they do not contravene the Shari'ah. There is also the need to consider common and practical industry practices in ascertaining the parties' intention.

While some of the principles of the Shari'ah and their application may seem counter-intuitive to users more familiar with common law or Western civil law jurisdictions, it is important to park any prejudices when analysing issues of commonly disputed matters in construction arbitration through the lens of the Shari'ah and Saudi law, particularly where the application of the Shari'ah may lead to the same result as would be achieved by applying parallel common law principles. While the authors have attempted to demystify the Shari'ah and Saudi law, as they apply to construction disputes, there will be those who still consider that Saudi legal principles continue to reside in a black box. The respectful contrary view is that the Shari'ah and Saudi law are rich, transparent, accessible, and provide a meaningful opportunity for discourse as they are applied in new and important contexts involving international contracts.