

IS IT TIME KSA'S PRIVATE SECTOR WIDELY IMPLEMENTS ADJUDICATION TO RESOLVE CONSTRUCTION DISPUTES?



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The Construction industry is a major contributor to Saudi Arabia's economy and accounts for over 6% of the country's gross domestic product¹. The private sector plays a key role in the construction sector and in 2017, commissioned approximately half of the projects in the Kingdom (measured by value) and spent more than SAR 100 billion in construction activities².

The Kingdom's bold yet achievable Vision 2030 seeks to diversify the economy, including developing public service sectors such as health, education, infrastructure, recreation and tourism. These changes will provide huge opportunities to the private sector, particularly in the areas of leisure and hospitality. Economic analysts expect that the Saudi Arabia's construction market will register a compound annual growth rate of 6% over the next five years (save for any resultant growth impact due to COVID-19 outbreak)³.

In line with Vision 2030, an astonishing volume and variety of construction projects are either currently underway or are in the pipeline in Saudi Arabia. While Government sector contracts are typically governed by the Government Tenders and Procurement Law that, inter alia, provides the standardised contract forms and addresses the dispute resolution procedures⁴, there is no such standardisation in the private sector and consequently, the content and quality of construction contracts varies widely with the only requirements being the parties' consent and compliance with Sharia Law. As such, the parties are free to choose the conditions of the agreement between them.

“Companies operating in the private sector often lack the experience, knowledge of contract mechanisms and awareness of dispute resolution to resolve proactively or settle even the most straightforward and low value construction disputes.”

In the author's experience, companies operating in the private sector often lack the experience, knowledge of contract mechanisms and awareness of dispute resolution to resolve proactively or settle even the

- 1 Gross Domestic Product Charts, General Authority of Statistics, Saudi Arabia, 2017.
- 2 The Value of Projects achieved in 2017 by economic activity and project owner, General Authority of Statistics, Saudi Arabia, 2017.
- 3 <https://www.mordorintelligence.com/industry-reports/saudi-arabia-construction-market-growth-trends-and-forecast-2019-2024>.
- 4 <http://www.mondaq.com/saudiarabia/x/834856/Government+Contracts+Procurement+PPP/New+Government+Tender+And+Procurement+Law+In+Saudi+Arabia>.

most straightforward and low value construction disputes. To compound problems, disputes are generally left unresolved for long periods causing the disputes to grow, impacting the contractor's ability to perform (e.g. by negatively influencing the cash flows) and causing further delays to project completion. The repercussions of these disputes ultimately impact all project stakeholders.



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In the author's view, there is a need in Saudi Arabia's construction industry to find a more effective way of resolving disputes, ideally, much closer to the time they arise. There is no surprise that HKA's CRUX insight (HKA's analysis of over 700 projects), has identified contract management failure, poor drafting and administration of contracts and cashflow and payment issues in its top ten dominant drivers of construction disputes.

In the context of dispute resolution provisions, there appears to be a positive trend in Saudi Arabia to include arbitration in private construction contracts as a binding alternative to litigation. Arbitration has a statutory basis in Saudi Arabia and was first introduced in 1983.⁵ The Arbitration Law was replaced in 2012 and is currently regulated by the Arbitration Regulation issued under Royal Decree No. M/34.

As such, in Saudi Arabia's private sector, the dispute resolution options available to the parties in construction dispute tends to be negotiation, arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or litigation⁶. Whilst negotiation tends to be informal, arbitration and litigation dispute resolution measures are generally known to be lengthy and can be very expensive. Although the industry experts have highly praised the new Arbitration Law and have stated that it has changed the way in which disputes are resolved in Saudi Arabia, in the author's view, arbitration may not be suitable for all disputes. The author has personally been a party to an arbitration proceeding where the parties themselves did not see the fit due to the low value of the dispute.

⁵ Royal Decree No. M/46 dated 12/07/1403 AH.

⁶ <http://www.mondaq.com/saudi-arabia/x/727028/Inward+Foreign+Investment/QA+Legal+Considerations+for+Construction+in+Saudi+Arabia>.

“There is a need in Saudi Arabia’s construction industry to find a more effective way of resolving disputes, ideally, much closer to the time they arise.”

In author’s view, there is a gap in the Saudi Arabia’s private sector for resolving disputes between negotiation (unassisted and informal) and arbitration or litigation.

The Solution?

In an ideal world, an effective dispute resolution method is one that provides speedy justice, is user-friendly and cost effective, and provides a binding decision.

The introduction of adjudication would be one option to bridge the current dispute resolution “gap”. Adjudication is a speedy procedure that involves a practical approach to resolve disputes on an interim binding, but not necessarily final basis. The decision of the adjudicator is binding until the dispute is finally determined by agreement, arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by legal proceedings. It is timebound and is provided by a third-party adjudicator selected by the parties in dispute (or an independent body such as the Royal Institution of Chartered Surveyors). In author’s view, adjudication will be beneficial to the Saudi Arabia’s private sector as it will provide timely, well informed decision making and will facilitate the project execution.

By way of example, the UK construction industry (which is similar to Saudi Arabia’s construction industry in terms of the country’s economic output⁷) benefits from statutory adjudication, and the statistics indicate that adjudication is now widely used mechanism for low or medium value disputes and for “quick-fix” solutions. In the UK, it is observed that:

- Adjudication is popular for low or medium value disputes (less than 10% of the cases registered for adjudication were above GBP 500,000). Arbitration, for international and domestic cases combined⁸, is popular for high value disputes (more than 90% cases were of value GBP 500,000 or more, as reported by one of the major institutions⁹);
- The average total cost of adjudication is in the range of GBP 8,800¹⁰. As a comparison, for international and domestic cases combined, the average total cost of arbitration proceedings as reported by one of the major institutions is in the range of GBP 80,000 (i.e. adjudication is approximately one-tenth the cost)¹¹; and
- Dispute resolution through adjudication is quicker (84% cases resolved within 42 days¹²). The average arbitration length, for international and domestic cases combined, as reported by one of the major institutions is 16 months¹³.

7 Briefing Paper Number 01432, 16 December 2019, Construction industry: statistics and policy.

8 19 purely domestic arbitrations were recorded by one of the major institutions (i.e. accounting for 7% cases internationally for 2016). Facts and Figures, 2016: A Robust Caseload, The London Court of International Arbitration; p.9.

9 Adjudication Society Report (2017). Adjudicators Fees, Construction Dispute Resolution, p.2; ICC Dispute Resolution Bulletin 2018 Issue 2; ICC Dispute Resolution Bulletin (2018), ICC Practice and Procedure; p.62.

10 Adjudicators fees, Adjudicator’s Society Report, November 2017.

11 <https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx>.

12 Adjudication Society Report No.14 April 2016.

13 <https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx>.

It is worth noting that in many countries, including UK, Australia, New Zealand Singapore, Malaysia and Ireland, issues relating to timely payments down the payment chain and protracted dispute resolution processes became a national significance and governments intervened to mandate adjudication. There is possibly an argument for Saudi Arabia to introduce some form of statutory adjudication for the private sector (with the required infrastructure and the legal framework for its effective operation) to bridge the current gap between resolving disputes informally and the path of arbitration or litigation.

If adjudication was introduced for private sector construction contracts in Saudi Arabia, this would encourage the contracting parties to resolve or settle construction disputes proactively and quickly, allow parties in dispute to continue their commercial and contractual relationships and would mitigate the accumulation of relatively small and medium issues, the cumulative effect of which, if unresolved, can be catastrophic for all of the project stakeholders (clients, contractors, suppliers, lenders, etc). In doing so, the parties will increase project transparency, mitigate delays and disruptions to the project, foresee true project risks, improve financial performance and reduce the contractor's reliance on submission of a single chunky extension of time claim.

Adjudication follows a proactive approach to resolve disputes in the present. In the author's opinion, Saudi Arabia's private construction sector would benefit from the introduction of adjudication as it will bridge the current gap between resolving disputes informally and the path of arbitration or litigation.